

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUN - 5 2012

**Appeal From Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge** S.C. Supreme Court

TIMOTHY DION ROGERS,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX

DIANA HOLT, ESQ.
P.O. Box 6454
Columbia, South Carolina 29260
ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
Post Office Box 1525
Orangeburg, SC 29116-1525
(803) 533-6252

ATTORNEYS FOR PETITIONER

INDEX

INDEX	i
Transcript of Record - January 25 th and 27 th , 1994	1
Record on Appeal - The Honorable Luke N. Brown, Jr.	27
Notice of Intention to Appeal - March 3, 1994	1377
Final Brief of Appellant - July 26, 1995	1380
Final Brief of Respondent - July 7, 1995	1410
South Carolina Supreme Court Opinion No.: 24366 filed January 22, 1996	1478
Remittitur - February 7, 1996	1484
Record on Appeal - The Honorable Charles William Whetstone, Jr.	1485
Notice of Appeal - December 6, 1996	2625
Final Brief of Appellant - June 17, 1998	2633
Final Brief of Respondent - June 17, 1998	2649
South Carolina Supreme Court Affirmed Opinion No.: 25032 filed December 6, 1999	2668
Petition for Rehearing - December 20, 1999	2674
South Carolina Supreme Court Order granting Petition for Rehearing dated January 24, 2000	2677
South Carolina Supreme Court Affirmed Opinion No.: 25032 filed January 24, 2000	2678
Petition for Stay of Execution - February 7, 2000	2684
Remittitur - February 9, 2000	2687

Application for Post-Conviction Relief [2000-CP-18-575] - June 12, 2000	2688
Return to Application for Post-Conviction Relief [2000-CP-18-575] - July 13, 2000	2693
First Amended Application for Post-Conviction Relief - August 27, 2004	2704
Post-Conviction Relief Transcript of Record	2719
Second Amended Application for Post-Conviction Relief - March 31, 2005	3947
Post-Conviction Relief Hearing Transcript - March 25, 2005	3966
Post-Conviction Relief Hearing Transcript - Cont. - August 23, 2005	3985
Applicant's proposed Order - June 11, 2007	4068
Respondent's proposed Order - May 11, 2007	4209
Third Amended Application for Post-Conviction Relief dated May 31, 2007	4412
Motion to Strike Third Amended Application for Post-Conviction Relief - June 7, 2007 ...	4436
Order granting applicant to amend Third Application for Post-Conviction Relief dated September 22, 2008	4461
Revised Third Amended Application for Post-Conviction Relief - September 29, 2008	4464
Return to Motion to Amend Third Amended Application for Post-Conviction Relief dated October 15, 2008	4492
Order granting Applicant's Motion to Amend - June 19, 2009	4513
Respondent's proposed Order - Grounds 9 (G-H) - July 20, 2009	4523
Applicant's proposed Order - Grounds 9(G-H) - July 24, 2009	4541
South Carolina Supreme Court Order - June 17, 2010	4556
Order Granting New Sentencing, etc. - September 2, 2010	4558
Applicant's Motion to Alter or Amend - September 13, 2010	4732
Respondent's Motion to Alter or Amend - September 13, 2010	4750

Transcript of Hearing on Rule 59(e), SCRC motions - October 8, 2010 4818
Amended Order Granting New Sentencing, etc. - December 10, 2010 4858
Notice of Appeal dated January 7, 2011 5009

1 punishment. That's it.

2 I'm asking you not to do that, because, as the state
3 has said, if you decide the case is bad enough, what is
4 bad enough? There's no proof before you about any other
5 kind of murders or anything of that sort. This isn't a
6 comparison kind of case, there's no evidence of that.

7 What they're saying is, is this is a bad case. Be it
8 the death of anybody is a bad case, the death of a child
9 is a bad case. But is this a bad enough case to impose
10 the death penalty? Given the nature of what happened?

11 A telephone call, but for, you know, maybe having
12 another cold one, they wouldn't have gotten down there to
13 use the telephone while Mr. B [REDACTED] was there. But for,
14 that log truck having to have its tire changed, they never
15 would've met up.

16 But for, a lot of other circumstances. And I'm not
17 going to stand up here and suggest to you that this is an
18 exercise of some sort of existential philosophy or
19 something. But the simple fact is, is this is not a
20 planned situation where someone went out to rob someone or
21 hurt somebody or what have you.

22 But for a lot of things and a lot of circumstances
23 this whole thing wouldn't have happened. And there's a
24 little girl who would now be substantially older, be in
25 high school. Freshman, 8th grade, 9th grade.

1 But for those circumstances this man would not be in
2 pain, this woman would not be in pain, this grandmother
3 and grandfather would not be in pain. This family over
4 here would not be in pain. But for all those things.

5 Now, your verdict is not going to cancel any of that
6 pain. You're not going to decide based on prejudice.
7 You're not going to decide based on sympathy. You're
8 going to decide whether or not this case is a bad enough
9 case, whatever that means, to impose the death penalty.
10 That's it.

11 I respectfully submit to you that given the nature of
12 what happened this is not one of those bad enough cases.

13 We're asking you to find for life without parole, not
14 as a reward, because it's pure punishment. To live the
15 rest of your life, he's 28 years old, 28 years old. If he
16 lives to be 70 it means he's going to spend the next what
17 42 years? I'm a lawyer not an accountant, so please bear
18 with me. Next 42 years cleaning toilets, trimming grass
19 and seeing the world go by when he does get to see
20 television. Won't even be able to put the train whistle
21 out of his mind, he'll be able to see what he's missing.
22 Please consider our request.

23 Whatever your verdict is, once you sign it, you don't
24 owe anybody any explanations. You don't, you know, and
25 nobody can fault you for it.

1 I've been practicing law since September 13th, 1967.

2 And the simple fact of the matter is, is the hardest job
3 in this whole country is probably being a juror.

4 But nobody can fault you as long as you make a
5 decision that you can live with. Nobody. And nobody's
6 suggesting you would be faulted.

7 Whatever your decision, I want to thank you for your
8 attention, this hasn't been a long case. And we
9 haven't -- neither the state or the defense or anybody
10 else has -- has tried to tie up your time for days and
11 days and days on end.

12 Simple fact is, however, that this is a very important
13 case, it's a matter of life and death. It's respectfully
14 submitted to you that you're not going to compound -- you
15 should not compound one death with another death.

16 MR. BAILEY: Your Honor, I would object to that
17 comment, to equate the jury's verdict with the murder. I
18 think that's highly inappropriate.

19 MR. RUNYON: I'm not suggesting it's equated to the
20 murder, Your Honor.

21 THE COURT: Objection's overruled, go ahead, please.

22 MR. RUNYON: I want to thank you for your attention.
23 As I said, I've been practicing law since
24 September 13th, 1967, and I don't think a jury or juror's
25 ever held anything against a litigant because of anything

1 I've said or done. But if I've said or done something
2 that's offended you, I apologize for it. If you really
3 feel strongly about it, call me up after it's all over and
4 get me down the road.

5 That's why they call it practicing law because we're
6 still trying and we're still learning and we're still
7 trying to get it right. Which might be a humorous thought
8 if you stop and think about it, until you stop and think
9 about it, your family doctor's still practicing medicine.

10 I'm not going to stand up here any longer. I keep
11 talking and talking and talking. I'm going to sit down
12 now. His Honor is going to give you the law and give you
13 your choices. We respectfully request that you not only
14 seriously consider the penalty of life without parole, but
15 impose that sentence as a just sentence under all these
16 circumstances. Thank you.

17 THE COURT: Okay, ladies and gentlemen, we'll take a
18 ten minute break at this point before I give you the
19 charge on the law. Please step into the jury room and do
20 not talk about the case yet. Please step into the jury
21 room.

22 (WHEREUPON, the following takes place out of the
23 presence of the jury.)

24 THE COURT: Okay, we'll be at ease for ten minutes.
25 Mr. Runyon, since you raised a charge on credibility or

1 believability, are you requesting that, I do not have it
2 included in the charge?

3 MR. RUNYON: Your Honor, we -- we have omitted to
4 request to charge. Obviously they have to judge the
5 witnesses and I would ask the Court to instruct the jury
6 as to credibility and believability.

7 THE COURT: Any objection, Solicitor?

8 MR. BAILEY: Could I have a second to kind of mull
9 that over?

10 THE COURT: Yes, sir, you can tell me when I come back
11 in. Thank you. We'll be at ease for ten minutes.

12 (Brief recess was taken.)

13 THE COURT: State ready?

14 MR. BAILEY: State's ready, Your Honor.

15 THE COURT: The defendant ready?

16 MR. RUNYON: We're ready, Your Honor.

17 THE COURT: Okay, Solicitor, be glad to hear you on
18 the request to charge as to credibility of witnesses.

19 MR. BAILEY: Your Honor, I have no objection to it.

20 THE COURT: Bring the jury in.

21 (WHEREUPON, the following takes place in the presence
22 of the jury.)

23 THE COURT: Ladies and gentlemen, it now becomes your
24 duty to determine the sentence this Court should impose
25 upon the defendant, Timothy D. Rogers. There are two

1 possible verdicts that you are to consider in the case.
2 One is the death penalty. The other is life imprisonment.

3 Should you the jury sentence the defendant to a life
4 sentence his sentence shall be for life without the
5 possibility of parole. In short, if sentenced to life he
6 will never be eligible for parole.

7 In order to explain to you these two sentences or
8 rather the order that I explain these two sentences to you
9 is in no way a recommendation by this Court as to which
10 sentence you should choose to recommend. It is simply
11 that one must be stated first.

12 Also remember that although I use the term recommend,
13 the defendant will actually be sentenced to whatever is
14 recommended by you, the jury.

15 Now, ladies and gentlemen, for clarifications
16 purposes, I want to explain to you a few things before I
17 get into the actual charge on this case.

18 First of all, I want to talk to you about the
19 credibility of witnesses. You are the sole judges of the
20 credibility, that is, the believability, of the witnesses
21 who testified.

22 In passing upon their credibility you can take into
23 consideration many things, some of which are as follows:
24 the demeanor or the manner of testifying of a witness, was
25 the witness forthright or hesitant, whether the witness

1 had reason to be biased or prejudiced, whether a
2 witnesses' testimony was contradicted on the one hand or
3 supported and corroborated on the other, what was the
4 witnesses' opportunity for observation and knowledge of
5 the matters about which that witness testified?

6 You may believe a small portion of a witnesses'
7 testimony and disregard the larger or the other way
8 around. You may believe one witness against many or many
9 against one. You may believe all, some or none of what a
10 particular witness says. All of these things you will
11 consider, bearing in mind that you are the sole judges of
12 the credibility, that is, the believability of the
13 witnesses who testified.

14 Further, I want to define for you the term murder. In
15 order to define that I need to define a few other terms
16 before I reach that point. Motive is defined as that
17 which leads or tempts the mind to indulge in a criminal
18 act. It is the cause or reason that induces a person to
19 commit a criminal act. Although motive is not an
20 essential element of the crime of murder and need not be
21 shown, the presence or absence of a motive may be
22 considered in determining criminal intent. And criminal
23 intent is an essential element of the crime of murder.

24 Criminal intent means an intention in the defendant's
25 mind at the time of the commission of an act to violate

1 the criminal law by the commission of that act. In other
2 words, criminal intent means the intention to commit a
3 crime at the time that act is committed.

4 Murder is the unlawful killing of any person with
5 malice aforethought, either express or implied. In order
6 to convict of murder the state must not only prove the
7 killing of the deceased by the defendant, but that it was
8 done with malice aforethought. And such proof must be
9 beyond a reasonable doubt.

10 I tell you that while the law does not require that
11 malice shall exist for any particular length of time
12 before the commission of the act in question, it must be
13 aforethought.

14 Malice is defined in the law of homicide as a term of
15 art, that is, a technical term importing wickedness and
16 excluding just cause or excuse. It is something which
17 springs from wickedness, from depravity, from a depraved
18 spirit, from a heart devoid of social duty and fatally
19 bent on mischief.

20 The words express or implied malice do not mean
21 different kinds of malice, but merely the manner in which
22 the only kind of malice known to the law may be shown to
23 exist. That is, either by direct evidence or by
24 inference.

25 Malice may be expressed as where previous threats of

1 vengeance or lying in wait or other circumstances show
2 directly that an intent to kill was really entertained.

3 Malice may be implied as where, though, no expressed
4 intent to kill is proved by direct evidence, it is
5 indirectly, but necessarily implied or inferred from facts
6 and circumstances which are proven. Malice is implied or
7 inferred from the willful, deliberate and intentional
8 doing of an unlawful act without just cause or excuse.

9 If a person using a deadly weapon deliberately and
10 intentionally and without just cause or excuse takes the
11 life of another malice may be inferred. If facts are
12 proven beyond a reasonable doubt, sufficient to raise an
13 inference of malice to your satisfaction, this inference
14 would be simply an evidentiary fact to be taken into
15 consideration by you, the jury, along with the other
16 evidence in the case and given to it such weight as you
17 determine that it should have.

18 In any event, such an implication or inference in no
19 way lessens the burden upon the state to prove malice
20 beyond a reasonable doubt.

21 In other words, the inference of malice from the use
22 of a deadly weapon is simply an evidentiary fact to be
23 considered by you along with all the other evidence in
24 this case and given such weight as you determine that it
25 should have.

1 Now again keep in mind, ladies and gentlemen, that in
2 giving you that charge I'm defining for you the term
3 murder. This defendant has already been convicted of
4 murder on that charge as all of you know by now.

5 In order for you to decide which sentence to recommend
6 you must first determine whether a statutory aggravating
7 circumstance exists beyond a reasonable doubt.

8 Now what is a statutory aggravating circumstance? It
9 is a fact, an incident, a detail or an occurrence which
10 the General Assembly, that is the legislature, has
11 declared by statute would make worse. That is, aggravate
12 the offense of murder when the two occur together.

13 In other words, it is something which increases the
14 enormity or adds to the injurious consequences of the
15 offense.

16 Now, ladies and gentlemen, these three pages here are
17 a document labeled statutory instructions. Upon this
18 sheet of paper are written the words statutory
19 instructions. You will have this paper, that is, these
20 three pages in the jury room with you during your
21 deliberations. I want to read part of this to you now,
22 there'll be paragraphs one, two and three.

23 And I quote from the statutory instructions. In
24 determining whether the defendant, Timothy D. Rogers, be
25 sentenced to death, you will first determine whether the

1 state has proven the existence of one or more of the
2 following statutory aggravating circumstances beyond a
3 reasonable doubt.

4 Number one, the offender, by his act of murder,
5 knowingly created a great risk of death to more than one
6 person in a public place, by means of a weapon or device
7 which normally would be hazardous to lives of more than
8 one person.

9 The second aggravating circumstance. The murder of a
10 child 11 years of age or under.

11 If you do not unanimously find the existence of one or
12 more of the alleged statutory aggravating circumstances
13 listed above then you shall so indicate in part A of the
14 sentencing verdict form which is entitled jury's verdict
15 on proof of aggravating circumstances.

16 And here is that form, you probably can't see it from
17 back there, but that is line A of that form, you'll have
18 that with you in the jury room also.

19 At this point you will cease your deliberations and
20 complete the verdict form, recommendation of sentence,
21 life imprisonment. The foreman shall sign both forms.
22 You will then indicate to the bailiffs that you have
23 reached a decision and you will return to the courtroom
24 with your verdict.

25 If, however, you unanimously find that the -- find the

1 existence of one or more of the alleged statutory
2 aggravating circumstances listed above, then you shall so
3 indicate on part B of the sentencing verdict form entitled
4 jury's verdict on proof of aggravating circumstances.

5 That is the B part of the form I just showed you.

6 This finding, if made by you, must be signed by every
7 member of the jury. If you unanimously find the existence
8 of one or more of the alleged statutory aggravating
9 circumstances and designate this finding on part B of the
10 jury's verdict on proof of aggravating circumstances, then
11 you must continue your deliberations in order to determine
12 whether you shall recommend that the defendant, Timothy D.
13 Rogers, be sentenced to life in prison or the death
14 penalty. That's paragraphs one, two and three of the
15 statutory instructions.

16 Let me emphasize to you that these are the only
17 circumstances you may consider as aggravating
18 circumstances. Should you find -- and again it must be
19 unanimous, that is, all of you agree. Should you find
20 that the state has proven beyond a reasonable doubt the
21 existence of one or more of the circumstances listed on
22 this sheet of paper, then you would be authorized, which
23 is to say, permitted, to consider recommending to this
24 Court that the defendant be sentenced to death.

25 Now what is a reasonable doubt in the law? A

1 reasonable doubt is a doubt that would cause a reasonable
2 person to hesitate to act.

3 Please pay particular attention to this. You are
4 never required to recommend the death penalty. Even if
5 you find that a statutory aggravating circumstance existed
6 at the time of the -- at the time the offense occurred,
7 you could still recommend a life sentence.

8 Now, ladies and gentlemen, the state has presented to
9 you, for your information, facts concerning the
10 defendant's alleged prior crimes. You must remember that
11 these previous or earlier convictions are not and may not
12 be used as proof of statutory aggravating circumstances.
13 They cannot be used for that purpose.

14 The previous allegations of crimes may only be
15 considered by you in reference to the character of the
16 defendant and for no other purpose. The defendant is on
17 trial for his life and it is important that you have for
18 your consideration all pertinent information about him.
19 This evidence may be considered by you and given what
20 weight, whatever weight, rather, if any, that you feel
21 that it is entitled to.

22 I emphasize to you again that alleged offenses may not
23 be used by you as evidence of the aggravating
24 circumstances which the state relies on.

25 You may, if you choose, consider this as evidence of

1 the defendant's characteristics as they bear logical
2 reference to the crime for which he is being charged.

3 I instruct you further that should you find that the
4 state has not proven that such a circumstance existed,
5 that is, an aggravating circumstance, you find that you
6 have some reasonable doubt as to the existence of such
7 circumstance, then you would not be authorized to
8 recommend the death penalty and your recommendation must
9 be for life in prison.

10 Now, should you find that the state has not proven the
11 aggravating circumstance or circumstances, either one of
12 them, beyond a reasonable doubt, then you would mark
13 section A of the form entitled jury's verdict on proof of
14 aggravating circumstances, and I've already shown that to
15 you.

16 This section reads, we the jury in the above entitled
17 case find no statutory aggravating circumstance or
18 circumstances. That's paragraph A of that form. The
19 foreman would then sign below that line.

20 However, should you find beyond a reasonable doubt one
21 or more of the aggravating circumstances existed at the
22 time of the murder, you would write such circumstance or
23 circumstances in paragraph B, and there are lines there
24 for you to do that, on that same form. And all 12 of you
25 would then have to sign the bottom of the form.

1 As I previously instructed you, if you find the
2 existence beyond a reasonable doubt of a statutory
3 aggravating circumstance, then you are permitted, but not
4 required, to recommend the death penalty.

5 There are three conditions which you should consider
6 in reaching your decision. First, whether any evidence
7 has been introduced as to the existence of a statutory
8 mitigating circumstance.

9 Whether there has been introduced any evidence as to
10 the existence of any other mitigating circumstances.

11 And third, whether, for any reason you can think of,
12 or for no reason at all, the defendant should be sentenced
13 to life imprisonment.

14 Now what is a statutory mitigating circumstance? It
15 is a fact, an incident, a detail or an occurrence which
16 the General Assembly has declared by statute would reduce
17 the severity of the offense of murder.

18 In other words, it is a circumstance recognized by
19 statute as one, which in fairness and mercy, may be
20 considered as extenuating or as reducing the degree of
21 moral culpability for the commission of the act of murder.

22 A mitigating circumstance is neither justification nor
23 excuse for the murder. It simply lessens the degree of
24 the defendant's actions, that is, it tends to lessen the
25 severity of the punishment.

1 Now, what statutory mitigating circumstances should
2 you consider in this case? I'll refer again to the
3 statutory instructions that I read you three paragraphs
4 out of already. And immediately starting below that third
5 paragraph you'll find the mitigating circumstances.

6 In determining whether to recommend -- this is
7 paragraph four of that form. In determining whether to
8 recommend that the defendant, Timothy D. Rogers, be
9 sentenced to life imprisonment or to death you may
10 consider any of the statutory aggravating circumstances
11 found by you to exist beyond a reasonable doubt.

12 You may also consider any of the following statutory
13 mitigating circumstances. They are as follows: the
14 murder was committed while the defendant was under the
15 influence of mental and emotional disturbance; the
16 capacity of the defendant to appreciate the criminality of
17 his conduct or to conform his conduct to the requirements
18 of the law was substantially impaired; the age or
19 mentality of the defendant at the time of the crime.

20 Paragraph five continues, when you have determined the
21 sentence to be imposed upon the defendant, indicate your
22 verdict by completing the appropriate sentencing verdict
23 form. Recommendation of sentence, life imprisonment or
24 recommendation of sentence death penalty. Each member of
25 the jury shall indicate his or her agreement with the

1 verdict by signing as indicated.

2 Now, the phrase any other mitigating circumstances
3 referred to those -- references to those circumstances or
4 mitigating factors which are not specifically provided for
5 by statute. But which are claimed to serve the same
6 purpose, that is, to reduce the degree of the punishment
7 the defendant should receive. You need not find the
8 existence of a mitigating circumstance beyond a reasonable
9 doubt.

10 In reaching your decision as to which sentence to
11 recommend, you will consider the aggravating and the
12 mitigating circumstances. While an aggravating
13 circumstance must be found before you can even consider
14 recommending the death penalty, such a finding is made --
15 excuse me, once such a finding is made beyond a reasonable
16 doubt you may recommend the death sentence even though you
17 find the existence of a statutory mitigating circumstance.

18 In other words, the existence of an alleged statutory
19 mitigating circumstance does not keep you from imposing
20 the death penalty.

21 The third element which you may consider, if you
22 conclude that a statutory aggravating circumstance exists
23 is whether the defendant should be sentenced to life in
24 prison for any reason or for no reason at all. This is
25 what has been traditionally referred to as a

1 recommendation of mercy. Should such be your decision you
2 would so indicate by returning to the Court the
3 recommendation of sentence life imprisonment form which
4 will be signed by the foreman.

5 In other words, you may choose to recommend life
6 imprisonment if you find a statutory or nonstatutory
7 mitigating circumstance. Or you may choose to recommend a
8 life -- a sentence of life imprisonment as an act of
9 mercy. In any instance, should you choose to recommend
10 life imprisonment your decision must be unanimous.

11 Now, ladies and gentlemen, by -- I'll explain this
12 form to you now. By this recommendation of sentence form,
13 which I hold in my hand, you the jury may recommend that
14 this Court sentence the defendant to death. And the Court
15 will do so. Please observe that there are 12 lines on the
16 bottom of this form. This is where, should you decide to
17 recommend the death penalty, each one of you would sign
18 your name.

19 It is the law of this state, ladies and gentlemen,
20 that a recommendation for the imposition of the death
21 penalty be a unanimous recommendation. And that each and
22 every juror sign his or her name to the recommendation.

23 I'll read the form for you now. It says in the first
24 paragraph, we the jury in the above case find beyond a
25 reasonable doubt the existence of the following statutory

1 aggravating circumstance or circumstances, and you are
2 required to write those in the space provided if that is
3 your choice. Under that it says, we recommend to the
4 Court that the defendant, Timothy D. Rogers, be sentenced
5 to death. And then there is a place for each of you to
6 sign.

7 Now, this form, ladies and gentlemen, can recommend to
8 this Court that the defendant be sentenced to life
9 imprisonment. I'll read this form to you. It says, we
10 the jury recommend to the Court that the defendant be
11 sentenced to life imprisonment. And that needs to be
12 signed by the foreman if that is your choice.

13 Now, ladies and gentlemen, I'll summarize at this
14 point. You will have in the jury room, during your
15 deliberations, the following forms, the statutory
16 instructions, that is, the first three page document I
17 read to you. The form entitled jury's verdict on proof of
18 aggravating circumstances. That's the one that has the A
19 and the B sections on it. Recommendation of sentence,
20 death penalty form, I just showed that one to you. And
21 recommendation of sentence, life imprisonment, form.

22 The statutory instructions state the only aggravating
23 circumstances which you shall consider in this case.
24 Should you fail to find beyond a reasonable doubt that one
25 or more of these circumstances existed at the time the

1 murder was committed, then you would go no further and
2 your verdict must be for life imprisonment.

3 Should you find beyond a reasonable doubt the
4 existence of an aggravating circumstance, you would then
5 be authorized to consider recommending the death penalty.

6 In your deliberations you will consider any statutory
7 or nonstatutory mitigating circumstance or circumstances
8 which are supported by the evidence as you find them. You
9 will consider both the aggravating circumstances that you
10 found together with the mitigating circumstances. You
11 will then decide whether you will recommend the death
12 penalty or life imprisonment.

13 You will also consider any other factors in mitigation
14 of the offense. And you can recommend a sentence of life
15 imprisonment for no reason at all.

16 If you decide to recommend the death penalty you will
17 complete the proper form. You must write out the
18 aggravating circumstance or circumstances that you found
19 and all 12 of you must sign that recommendation.

20 Should you decide to recommend life imprisonment you
21 will complete the proper form for that recommendation.

22 Whatever your recommendation is, it must be
23 unanimous. All 12 of you have to agree.

24 Now, in considering whether to recommend the defendant
25 be sentenced to life in prison or to the death penalty, I

1 charge you, ladies and gentlemen, that as jurors, you must
2 decide the issues involved in this proceeding without bias
3 and without prejudice to any party.

4 In considering whether to recommend that the defendant
5 be sentenced to death or to life imprisonment, I charge
6 you that you are not to allow any passion, prejudice or
7 any other arbitrary factor to influence your decision or
8 your judgment. As jurors you must decide the issues
9 involved in this proceeding without bias and without
10 prejudice to any party. You cannot allow yourselves to be
11 governed by mere sympathy, by prejudice, by passion or by
12 public opinion.

13 Both the state and the defendant have the right to
14 expect that each of you will carefully and impartially
15 consider all the evidence in the case and that you will
16 follow the law as I've given it to you in determining your
17 recommendation.

18 Now at this time, ladies and gentlemen, I'm required
19 by law to ask the 12 jurors on the jury to step into the
20 jury room. The alternates will be taken to a separate
21 room at this time.

22 You are not allowed to begin your deliberations yet.
23 I need to talk to the lawyers to see if they have any
24 additions or corrections to what I have told you. If they
25 do not, you begin your deliberations when we send in all

1 of these forms I've talked to you about and the exhibits
2 that came in during the course of the trial.

3 Now, Mr. Helwig, you preside as the foreman in the
4 jury room. You be sure that everyone has the opportunity
5 to be heard. It is also your job, as foreman, to fill out
6 these forms that I have explained to you. If you need me
7 to explain or to recharge any of this, you may ask about
8 that and I'll be happy to recharge any or all of it. Or
9 if you need further explanation or have questions about
10 the forms, I'll be happy to answer those for you.

11 I cannot answer questions of fact, you're the fact
12 finders and those are up to you.

13 But, please, any question that you have, send it out
14 in a written form. If I can answer it I'll answer it, if
15 I can't answer it I'll tell you that also. So all those
16 come through you, Mr. Helwig.

17 For now, please step into the jury room and don't talk
18 about the case until you receive these papers. Thank you.

19 (WHEREUPON, at 4:35 p.m., the jury retired to the jury
20 room.)

21 THE COURT: Any additions or corrections from the
22 state?

23 MR. BAILEY: Not from the state, Your Honor.

24 THE COURT: From the defendant?

25 MR. RUNYON: None from the defense, Your Honor.

1 THE COURT: Okay. Here are the forms if you'd like to
2 look them over one more time. And you probably need to
3 review your exhibits.

4 MR. BELL: Your Honor, can the record reflect that we
5 have two 26's?

6 THE COURT: Any objection?

7 MR. RUNYON: No, Your Honor.

8 THE COURT: Any objection to having the bailiff
9 deliver the articles and telling them to begin their
10 deliberations?

11 MR. BAILEY: None from the state, Your Honor.

12 MR. RUNYON: None from the defense, Your Honor.

13 THE COURT: You may tell them to begin their
14 deliberations. If they request to see the tape then we'll
15 have to make arrangements to send in one of the monitors,
16 Mr. Bell, can you arrange that?

17 MR. BELL: Yes. Or you can bring them back out here
18 and view it here.

19 THE COURT: All right, please don't go too far in case
20 we have any questions.

21 (WHEREUPON, at 4:40 p.m., the jury was instructed to
22 begin their deliberations.)

23 (Recess was taken.)

24 THE COURT: Okay, we have two questions from the
25 jury. The first one is, may we have television, VCR to

1 view State's Exhibit 20, the television video? So we'll
2 bring them back in here and do that per our conversation
3 before we adjourned just a few minutes ago.

4 The second question is as follows, to help us decide
5 the validity of aggravating circumstance one, may we have
6 examples of cases where that circumstance has been
7 applied? Specifically, in other cases has the use of a
8 handgun been considered to fit that category?

9 Any position from the state on that? My -- the
10 Court's position is that we've already explained that to
11 them, it's a factual question for them to decide.

12 MR. BAILEY: Your Honor, I agree, I don't think you
13 could answer that without a charge on the facts.

14 MR. RUNYON: I agree, Your Honor, you can't answer
15 that without a charge on the facts. It's up to them to
16 decide. And, I don't see how we can help them.

17 THE COURT: Very well, we'll tell them that and then
18 we'll show them the video. Is it set up to roll?

19 (Pause.)

20 THE COURT: Okay, bring the jury in, please.

21 (WHEREUPON, at 5:22 p.m., the jury returned to open
22 court to have their questions answered.)

23 THE COURT: All right, ladies and gentlemen, I have
24 your two questions. The first question is whether you can
25 hear the -- whether you can have a television and VCR so

1 you can play this tape. We'll play it for you in here
2 because it's impracticable to put all this stuff in the
3 jury room. So we'll play it for you here and you can see
4 it as many times as you want to.

5 In regard to your other question, for me to answer
6 that would be a comment on the facts, which I cannot do.
7 The facts are entirely up to you. You've heard the
8 evidence and testimony, you've also heard the law, that is
9 the decision for you to make, so I cannot answer that
10 question.

11 You may play the tape.

12 (WHEREUPON, the jury viewed State's 20.)

13 THE COURT: Okay, you may return to the jury room and
14 continue your deliberations. Thank you.

15 (WHEREUPON, at 5:25 p.m., the jury retired to the jury
16 room to continue deliberations.)

17 THE COURT: Any objection from the state?

18 MR. BAILEY: None from the state, Your Honor.

19 THE COURT: From the defendant?

20 MR. RUNYON: No additions or exceptions, Your Honor.

21 THE COURT: Okay, this note is a Court's Exhibit.
22 We'll be at ease until we hear back from the jury. Thank
23 you.

24 (Note from jury re: TV and examples marked as
25 Court's 3.)

1 (Recess was taken.)

2 THE COURT: Okay, we have again two questions from the
3 jury. This time the questions are as follows, if the
4 death sentence is given will there be appeals? The second
5 question is, is it automatic or based on point of law
6 regarding the trial?

7 Those are not questions that the jury should be
8 concerned with, their concern is to decide between a life
9 sentence and the death penalty.

10 What says the state?

11 MR. BAILEY: Your Honor, could I see the -- see the
12 note?

13 THE COURT: Yes, sir, you may. You're welcomed to see
14 it also, Mr. Runyon.

15 MR. RUNYON: I already -- I already know what my
16 position on that, Judge, is. I think it---

17 MR. BAILEY: Your Honor, I think I'd agree with the
18 Court, that it's not their concern, they just should be
19 told you can't answer them.

20 MR. RUNYON: I agree, Your Honor.

21 THE COURT: Mr. Runyon.

22 MR. RUNYON: I agree, Your Honor, I think they should
23 be told that that is not to enter into the deliberations,
24 that that's not their concern. And, I think we're both in
25 agreement on that.

1 THE COURT: All right. Bring the jury in, please,
2 sir.

3 (WHEREUPON, at 6:05 p.m., the jury returned to open
4 court to have their questions answered.)

5 THE COURT: Okay, ladies and gentlemen, I have the two
6 questions that you have sent out on this note. I will
7 tell you at this time that I cannot answer those
8 questions. That is not a concern of yours. Your decision
9 is to decide between a life sentence and the death
10 penalty. You may return to the jury room and continue
11 your deliberations.

12 (WHEREUPON, at 6:07 p.m., the jury retired to the jury
13 room to continue deliberations.)

14 THE COURT: Any additions or corrections or objections
15 from the state?

16 MR. BAILEY: No, sir.

17 THE COURT: From the defendant?

18 MR. RUNYON: None from defense, Your Honor.

19 THE COURT: Okay, the note is a Court's Exhibit. All
20 right, we are at ease again.

21 (Note from jury re: death penalty marked as
22 Court's 4.)

23 (Recess was taken.)

24 THE COURT: Okay, I understand we have a verdict in
25 the case. I want to be sure everybody understands there

1 will be no reaction to the verdict, whatever it might be.
2 If you can't control yourself you need to leave. If we
3 have any reaction to the verdict whatsoever, I assure you
4 you will be a guest of the county for a while. So if you
5 can't behave now is your opportunity to leave. There will
6 be no more warnings.

7 Okay, bring the jury in, please.

8 Any objections if I have the alternates sitting over
9 here since their duties are through?

10 MR. RUNYON: Without objection, Your Honor.

11 MR. BAILEY: Without objection.

12 (WHEREUPON, at 6:38 p.m., the jury returned to open
13 court to report its verdict.)

14 THE COURT: Mr. Foreman, have you reached a verdict?

15 MR. FOREMAN: We have.

16 THE COURT: Would you pass it up, please, Madam
17 Bailiff? Would you give it to me?

18 (Court reviewed verdict.)

19 THE COURT: Case of The State of South Carolina versus
20 Timothy D. Rogers, Indictment No. 93-GS-18-101, jury's
21 verdict on proof of aggravating circumstances, we the jury
22 in the above entitled case find beyond a reasonable doubt
23 the following statutory aggravating circumstances; the
24 murder of a child 11 years of age or younger. It is
25 signed by each of the jurors, Juror Helwig, Pigate -- some

1 of them I can't read. But all 12 lines are filled in.
2 Howard, O'Neal, Baldwin, Williams, Owens, Miller, Bates,
3 White, Bowen and Parham. Is that all 12? Okay.

4 Recommendation of sentence. We the jury in the above
5 entitled case find beyond a reasonable doubt the existence
6 of the following statutory aggravating circumstance; the
7 murder of a child 11 years of age or younger. We
8 recommend to the Court that the defendant, Timothy D.
9 Rogers, be sentenced to death. Signed by all 12 jurors,
10 Helwig, Miller, Pigate, Bowen, Parham, White, Bates,
11 Howard, O'Neal, Baldwin, Williams and Owens.

12 Is this your verdict, so say you all.

13 (WHEREUPON, no juror responded in the negative.)

14 THE COURT: Is there a request to poll the jury?

15 MR. RUNYON: Request to poll, Your Honor.

16 THE COURT: Would you poll the jury please, Madam
17 Clerk? When each of your names is called, if you would,
18 please stand and answer the two questions that'll be asked
19 of you.

20 (WHEREUPON, the jury was duly polled, all jurors
21 affirmed the verdict.)

22 THE COURT: Okay, all of the jurors have responded
23 that that was their verdict and it is still their verdict.

24 Ladies and gentlemen of the jury panel, I will tell
25 you at this time that after your service in this trial has

1 concluded, which it has now concluded, you have the right
2 to either refuse to discuss the verdict you have rendered
3 or to discuss the verdict to the extent each of you may
4 desire to discuss it. That means you can talk about it or
5 you don't have to talk about it.

6 If you choose to discuss the verdict, you are free to
7 terminate any such discussion at any point. If the person
8 with whom you are speaking continues to pursue a
9 discussion of the verdict after you have communicated a
10 desire to terminate the discussion, or if a person
11 continues to harass you after you have refused to discuss
12 the verdict, you are to report that to any of the
13 following persons, the Sheriff of Dorchester County,
14 Sheriff Southerland, the Clerk of Court, Ms. McKissick or
15 to me, and I assure you we can cure that problem for you.

16 To put that in other words, ladies and gentlemen, you
17 have done what you are supposed to do, that is, you have
18 made the choice and you have rendered a verdict. Nobody
19 is to bother you about your service on this case.

20 You can talk to anybody you want to once I release you
21 from jury service. But you don't have to talk to anybody.
22 If you don't want to talk and anybody bothers you, please
23 let us know and we'll take care of the problem for you.
24 Does everybody understand?

25 I'll ask each of you to strictly abide by these

1 instructions. You've done your duty as jurors, please be
2 assured nobody's to bother you and we're going to see to
3 it that nobody bothers you.

4 So, if you receive any contact that is unwarranted or
5 improper or you feel uncomfortable receiving, let us know
6 that right away, please. Thank you.

7 Now, ladies and gentlemen, I have a form here I need
8 to give each of you before you leave. If you would please
9 step back into the jury room I'll come back in there and
10 speak to you and deliver these forms to you. Thank you.

11 The two alternates, you may join the rest of the panel
12 at this point too, if you'd like.

13 (WHEREUPON, the jury retired to the jury room.)

14 THE COURT: Okay, I'll give the attorneys a few
15 minutes to collect your thoughts and then I'm come back in
16 and hear any motions that you might have. And I'll
17 deliver these forms to the jurors while you're collecting
18 your thoughts. I'll be back in just a minute. Everybody
19 is to remain in their seat and not move until I get back.
20 And order will remain in the courtroom, we still will have
21 no reaction.

22 (Recess was taken.)

23 THE COURT: Okay, for the record, then, I will note
24 that I have served this required form on each of the
25 jurors in the jury room, hand delivered one to each of

1 them and each of the alternates. And further instructed
2 them that if they had any problems with anyone about
3 talking about this verdict or if anybody bothered them at
4 all about their service they're to let me know that or the
5 other officials who are noted on here so that we can
6 handle that problem for them. And this will be made a
7 Court's Exhibit and made part of the record.

8 Are there any motions?

9 (Letter given to jurors marked as Court's 5.)

10 MR. RUNYON: Yes, Your Honor. Your Honor, we would
11 move -- make a motion in arrest of judgment, alternatively
12 for a new trial as to sentence, on the grounds that the --
13 the statutory aggravating circumstance, the death of a
14 child under 11 years of age, is an arbitrary
15 classification, has no rational legislative basis and,
16 therefore, the defendant should be -- the case should not
17 have been submitted to the jury for sentencing.

18 Secondly, and alternatively, we would ask the Court to
19 set aside the jury's verdict and enter a verdict of -- a
20 sentence of life without parole, on the same grounds as I
21 just stated as it relates to the arbitrary classification
22 of the aggravating circumstance, which is the only
23 aggravating circumstance the jury found.

24 In addition to that, Your Honor, we would move, as
25 further grounds for that motion, we've -- we asked the

1 jury or we asked for the jury instruction as it relates to
2 charging the statute, so that the jury would know that
3 they didn't have to find -- they didn't all have to
4 unanimously agree to terminate this litigation.

5 And, while we don't agree -- we don't -- we didn't
6 disagree with the charge, because the charge the Court
7 gave the jury in totality was -- was, of course, the
8 charge that's given in South Carolina.

9 But, had the jury -- it's our position that had the
10 jury been told that -- and they obviously had some
11 questions that the -- that it was not necessary for them
12 to reach a unanimous verdict as it related to life without
13 parole, that that most probably would've resulted in the
14 defendant receiving life without parole sentence.

15 Those are the basic reasons that we've moved -- our
16 grounds for our motion in arrest of judgment,
17 alternatively for a new trial. And to impose a life
18 without parole sentence.

19 THE COURT: Okay. Those motions are denied on the
20 same basis as they have been denied before.

21 In regard to the jury's verdict, there were sufficient
22 facts available to support their finding. The jury
23 verdict -- the jury was polled, the finding was unanimous,
24 all of them signed the form.

25 The statutory provision in regard to the age of the

1 child is not arbitrary, it is very straightforward and it
2 is constitutional, I will not reverse the jury's verdict
3 based on that.

4 I specifically find that they -- the jury's verdict
5 was not a result of any passion or prejudice or any other
6 arbitrary factor. That the jury properly, thoughtfully
7 and thoroughly considered its options. That they asked
8 several very incisive and insightful questions that we
9 dealt with. And they properly went about doing their duty
10 as jurors in the case.

11 The facts are there sufficient to substantiate their
12 findings and I'm not going to set aside the verdict.
13 There are -- there is no basis at this point to set it
14 aside, the statute's proper, the jury's verdict is within
15 bounds and I will not set aside the verdict, the motions
16 are denied.

17 Anything further from the defendant?

18 MR. RUNYON: Nothing from the defendant at this point
19 in time.

20 THE COURT: Anything further from the state?

21 MR. BAILEY: Nothing from the state, Your Honor.

22 THE COURT: Okay, bring your client around, please,
23 sir. Okay, Mr. Runyon or Mr. Leiendecker, is there
24 anything else you'd like to tell me?

25 MR. RUNYON: Your Honor, obviously the -- the hands of

1 everyone are tied at this point in time. We'd once again
2 request the Court to be merciful. But having made our
3 record we stand before the Court for the imposition of
4 sentence.

5 THE COURT: Mr. Leiendecker, anything you'd like to
6 say?

7 MR. LEIENDECKER: No, sir.

8 THE COURT: Mr. Rogers, anything you'd like to say?

9 THE DEFENDANT: No, sir.

10 THE COURT: As to the indictment and sentence for
11 murder, I find as an affirmative fact that the death
12 penalty was warranted under the evidence of this case and
13 was not a result of prejudice, passion or any other
14 arbitrary factor.

15 Therefore, it is the sentence of this Court that the
16 defendant, Timothy D. Rogers, be returned to the
17 Department of Correction to be kept there in close and
18 safe confinement until the 6th day of February, 1997,
19 between the hours of six o'clock a.m. and six o'clock
20 p.m., when you shall suffer death by electrocution or by
21 lethal injection. That is the order and sentence of the
22 Court. Thank you.

23 MR. RUNYON: Thank you very much, Your Honor.

24 THE COURT: Court is adjourned until nine o'clock
25 Monday morning.

1 **END OF VOLUME IV OF REQUESTED TRANSCRIPT OF RECORD**
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA)

2)

CERTIFICATE OF REPORTER

3 COUNTY OF BERKELEY)

4 I, the undersigned, Karen Mullins, Official Court
 5 Reporter for the Ninth Judicial Circuit of the State of
 6 South Carolina, do hereby certify that the foregoing is a
 7 true, accurate and complete Transcript of Record of all
 8 the proceedings had an evidence introduced in the trial of
 9 the captioned case, relative to appeal, in the General
 10 Sessions Court for Dorchester County, South Carolina, on
 11 the 5th day of December, 1996.

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

14

15

16

17

June 20, 1997

18

Karen Mullins

19

Circuit Court Reporter

20

21

22

23

24

25

STATE OF SOUTH CAROLINA		COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER		FIRST JUDICIAL CIRCUIT
		CASE NO. 93-GS-18-101
STATE OF SOUTH CAROLINA)	
)	
versus)	TRANSCRIPT OF RECORD
)	(DEATH PENALTY NOTICE)
TIMOTHY D. ROGERS,)	DATE:
)	FEBRUARY 8, 1996
DEFENDANT)	

BEFORE:

HONORABLE A. VICTOR RAWL, PRESIDING JUDGE

APPEARANCES:

WALTER BAILEY, ESQUIRE

SOLICITOR

FOR THE STATE

WILLIAM L. RUNYON, JR., ESQUIRE

MARK ALAN LEIENDECKER, ESQUIRE

ATTORNEYS AT LAW

FOR THE DEFENDANT

HARRY A. WALKER (MRS.)

COURT REPORTER, FIRST JUDICIAL CIRCUIT

POST OFFICE BOX 127

ROWESVILLE, SOUTH CAROLINA 29133

I N D E X

NO EXHIBITS SUBMITTED AT THIS HEARING.

1 DATE:

2 FEBRUARY 8, 1996

3 THE COURT: SOLICITOR BAILEY.

4 SOLICITOR BAILEY: YOUR HONOR, I
5 CALL THE COURT'S ATTENTION TO INDICTMENT 93-GS-18-101,
6 THE STATE VERSUS TIMOTHY D. ROGERS. MR. ROGERS IS
7 PRESENT, REPRESENTED BY MR. LEIENDECKER AND MR. RUNYON,
8 WHO WERE PREVIOUSLY COURT APPOINTED IN THE FIRST TRIAL.
9 AND WE'RE HERE, YOUR HONOR, AT THIS POINT TO RE-SERVE
10 MR. ROGERS WITH THE STATE'S NOTICE OF INTENT TO SEEK THE
11 DEATH PENALTY, A CERTIFIED COPY OF THE INDICTMENT, THE
12 STATE'S EVIDENCE IN AGGRAVATION, AND THE STATE'S
13 DISCOVERY.

14 THE COURT: MY UNDERSTANDING IS,
15 THIS CASE WAS TRIED TO FRUITION, AND THE DEATH PENALTY
16 WAS GRANTED AT THE FIRST TRIAL, AND THE SUPREME COURT'S
17 REVERSED IT, IS THAT CORRECT?

18 MR. RUNYON: THE PENALTY PORTION,
19 YES, YOUR HONOR.

20 THE COURT: ALRIGHT. THEY REMANDED
21 BACK THE PENALTY PORTION ONLY, NOT THE GUILT PHASE?

22 MR. RUNYON: THAT'S CORRECT, YOUR
23 HONOR. HE STILL -- HE STANDS CONVICTED OF MURDER, YOUR
24 HONOR.

25 THE COURT: YES, SIR. I WAS NOT

1 SURE EXACTLY WHAT THE -- I REMEMBER IT WAS REVERSED, BUT
2 I WASN'T SURE IF IT WAS FULLY REVERSED, OR JUST THE
3 DEATH PENALTY PHASE.

4 ALRIGHT, SIR, Y'ALL ARE OFFICIALLY
5 RE-SERVED. I DON'T THINK I NEED TO SAY A THING.

6 SOLICITOR BAILEY: YOUR HONOR, FOR
7 THE RECORD, I'LL HAND MR. RUNYON, TOO, THE CERTIFIED
8 COPIES OF THE DOCUMENTS I JUST MENTIONED.

9 THE COURT: THANK YOU, MR. BAILEY.

10 SOLICITOR BAILEY: AND I WILL NOTIFY
11 COURT ADMINISTRATION, HE HAS BEEN RE-SERVED, SO THEY CAN
12 SET A TERM AND EITHER REAPPOINT PRESENT COUNSEL OR
13 APPOINT NEW COUNSEL FOR HIM.

14 THE COURT: YES, SIR. AND MY
15 UNDERSTANDING ALSO IS THAT THE STANDARD PROCESS NOW WITH
16 THE SUPREME COURT IS, THEY'RE GOING TO ASSIGN A TRIAL
17 JUDGE FOR THAT CASE FROM THE BEGINNING, SO THAT ALL
18 MOTIONS AND MATTERS INVOLVING THE PENALTY PHASE WILL
19 MOST LIKELY BE HANDLED BY THE SAME JUDGE THROUGHOUT, AS
20 OPPOSED TO OUR NORMAL WAY OF HANDLING CASES.

21 SOLICITOR BAILEY: THAT'S MY
22 UNDERSTANDING, YOUR HONOR.

23 THE COURT: ANYTHING YOU NEED FROM
24 ME, MR. RUNYON?

25 MR. RUNYON: NO, YOUR HONOR, IT -

1 - WE, I -- MR. LEIENDECKER AND MYSELF JUST NEED TO HAVE
2 A QUESTION OF REPRESENTATION CLARIFIED. WE WERE
3 ORIGINALLY APPOINTED, AND WE FEEL WE'RE ON THE CASE
4 UNTIL TOLD OTHERWISE, AND ---

5 THE COURT: MOST LIKELY. AT THIS
6 POINT IN TIME YOU ARE APPOINTED UNTIL FURTHER NOTICE BY
7 THE SUPREME COURT. I CAN DO THAT, JUST TO MAKE CERTAIN
8 THAT MR. ROGERS'S REPRESENTATION IS CONTINUOUS, UNTIL
9 SUCH TIME AS THE DECISIONS ARE MADE.

10 MR. RUNYON: ALRIGHT, THANK YOU VERY
11 MUCH, YOUR HONOR.

12 THE COURT: THANK YOU, GENTLEMEN.

13 SOLICITOR BAILEY: THANK YOU, YOUR
14 HONOR.

15 MR. LEIENDECKER: THANK YOU.

16 THE COURT: GOOD LUCK TO YOU.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

CERTIFICATE

I, THE UNDERSIGNED, MRS. HARRY A. WALKER, OF ROWESVILLE, SOUTH CAROLINA, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE EIGHTH DAY OF FEBRUARY, 1996.

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

DATE: JANUARY 20, 1998



(MRS.) HARRY A. WALKER

1 STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
2 COUNTY OF DORCHESTER)

3
4 The State of South Carolina,)
5 Plaintiff,)
6 -VS-)
7 Timothy Rogers,)
8 Defendant.)

TRANSCRIPT OF RECORD

9 November 20, 1996
10 Moncks Corner, South Carolina

11 B E F O R E:

12 HONORABLE CHARLES W. WHETSTONE, JR., Judge.

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

14 WALTER M. BAILEY, JR., Esquire
15 Office of the Solicitor
16 Dorchester County Courthouse
17 St. George, South Carolina
18 Attorney for the State

19 WILLIAM L. RUNYON, JR., Esquire
20 1 Carriage Lane, Building B, Suite 203
21 Charleston, South Carolina
22 Attorney for the Defendant

23 MARK LEIENDECKER, Esquire
24 Office of the Public Defender
25 Dorchester County Courthouse
St. George, South Carolina
Attorney for the Defendant

BETTYE S. GUM
OFFICIAL REPORTER

1 THE COURT: Okay, this is a hearing in the
2 case of the State versus Timothy Rogers. The purpose
3 of the hearing is to deal with the jury excuses that
4 we have already and also to take up any motions that
5 are pending on behalf of the State or on behalf of the
6 Defendant.

7 Solicitor Bailey is present. Mr. Runyon and
8 Mr. Leiendecker, and Mr. Rogers are all present and
9 ready to proceed.

10 Would you like to do the Clerk matters first
11 or would you like to go with the motions first?

12 MR. BAILEY: Your Honor, Mr. Runyon has got a
13 continuance motion so it might be a good idea to take
14 that up first.

15 THE COURT: Okay. Well, we'll do the motions
16 first, then. That's fine.

17 Go ahead, Mr. Runyon.

18 MR. RUNYON: Your Honor, we have two brief
19 motions and they are brief motions on the face of
20 this. One is a housekeeping matter and that's to
21 ascertain Mr. Rogers' clothing size and then have him
22 receive appropriate clothing for the trial, which I'll
23 address later.

24 At the present time, Your Honor, Mr.
25 Leiendecker has just returned from Ohio. He has a

1 serious illness in a member of his immediate family.
2 His grandfather is terminally ill and out of an
3 abundance of caution, since he will have to make
4 probably another trip there due to his grandfather's
5 illness between now and the time of the trial and the
6 possibility is that his grandfather may, of course,
7 pass away, we would ask that the matter be -- that
8 this case be continued for cause.

9 The Statute gives this man the right to two
10 lawyers, and I'm not suggesting that Mr. Leiendecker
11 would -- has ever shirked his duties in this case or
12 any other case, but certainly the -- the time
13 commitment that needs to be made, particularly at this
14 stage of the game -- at this stage of the trial --
15 it's not a game obviously, but at this stage of the
16 trial in the next two weeks, we've got to devote our
17 full attention to this matter and two heads are always
18 better than one, particularly when one of those heads
19 is just mine, because I'm not the smartest guy in the
20 world, and so as a practical matter, we would ask that
21 the Court consider continuing the matter because of
22 the press of personal business of Mr. Leiendecker.

23 Obviously if the Court doesn't see fit to do
24 that, we've been preparing for trial and we'll
25 continue to prepare for trial, but -- and I -- I would

1 let Mr. Leiendecker address his personal situation.

2 THE COURT: Mr. Leiendecker, I'll be glad to
3 hear from you, sir.

4 MR. LEIENDECKER: Thank you, Your Honor. May
5 it please the Court.

6 THE COURT: Yes, sir.

7 MR. LEIENDECKER: Mr. Runyon and I discussed
8 this just this week. I returned Monday from Ohio, had
9 -- to make a long story short, Your Honor, my
10 grandfather -- and I think Mr. Bailey's office was
11 aware of this before, at least some of his under-
12 deputies, was diagnosed in August with the terminal
13 lung cancer. I -- this last weekend was the first
14 opportunity I've had because of the press of business
15 to go to visit Ohio, he and my grandmother both. We
16 got there and on -- upon my arrival on Thursday
17 afternoon, he immediately went into the hospital.
18 I've been in contact with family since then. He's got
19 a developing pneumonia condition that they are not
20 able to lick. The doctor is concerned enough to move
21 him to a care facility from there.

22 I -- I don't know the status, Your Honor. I
23 mean, I'm not a doctor. I really don't. When I --
24 when I was talking about it with Bill and when he was
25 unable to get a hold of me at the end of last week

1 because I had hurried home, he suggested that maybe
2 out of an abundance of caution we needed to make this
3 motion really on Mr. Rogers' behalf more than on Mr.
4 Leiendecker's behalf because I've been somewhat
5 diverted.

6 I will be going back this weekend. I'm taking
7 a late bus back on Thursday night. I'll be there
8 Friday, Saturday; then I'll be driving back. My in-
9 laws are moving furniture down with my sister-in-law
10 this next weekend, so to try to save some money and
11 other things like that, I'll be doing that. Short of
12 that, Your Honor, I don't really have any other
13 immediate plans to return to Ohio. That could all
14 change if the condition continues to worsen. I also
15 don't have any idea whether if things get better we
16 won't be facing this same situation a month or two
17 down the road. I just would tell the Court that it
18 seems exigent and involved right now and I will, of
19 course, do whatever the Court requires, including if
20 that means continuing to prepare doing the things that
21 I can do while I'm traveling back and forth to help
22 Mr. Runyon in preparation of this case.

23 THE COURT: Mr. Bailey?

24 MR. BAILEY: Your Honor, I have the utmost
25 sympathy with Mr. Leiendecker's situation. I was

1 aware of it and I realize from Mr. Runyon last week, I
2 believe, that they would be moving for a continuance.

3 If this was a private civil matter, I wouldn't
4 hesitate to consent to a continuance, but under the
5 circumstances and unique circumstances of this case, I
6 would on behalf of the State strongly oppose a
7 continuance in this case. We're looking at a trial
8 coming up in two weeks. As Mr. Leiendecker said, he's
9 got no crystal ball; he doesn't know what the
10 situation may be and if the case is continued, we
11 could be back in this same boat in a month or two
12 months or three months.

13 We've got three hundred jurors summoned on
14 this case. The jury research has been done, rap
15 sheets have been run on them; there's been a lot of
16 work in the case up until this point. All the State's
17 witnesses, some of whom are from out of state, have
18 been subpoenaed in this case. It's too late at this
19 point in time to salvage that first week of Court if
20 this case is continued because the defendants have
21 been advised to come during the second week in case we
22 finish this during the first week.

23 We just had the case assignments for the next
24 six months to come out. I got my copy yesterday, so
25 the Court is set for the next six months. It would be

MOTIONS

1 extremely difficult to reschedule this thing during
2 that time period without a whole lot -- a major effort
3 to reschedule that.

4 Your Honor, a further point is, of course, Mr.
5 Leiendecker is the Senior Public Defender in
6 Dorchester County. He's been under a thirty day Order
7 of Protection. If the case is continued, he'll get
8 another thirty day Order of Protection. That puts us
9 really in our normal cases at being able to move about
10 half of our regular -- as far as moving -- moving
11 Court.

12 Most importantly, Your Honor, the victims want
13 some closure in this thing. This killing took place
14 back in 1992. They've been through a trial. They've
15 been through an appeal. They want closure. Mr.
16 Burdette is present in Court. He has -- he's in
17 counseling still. He's got psychological problems.
18 He needs to get this thing behind him.

19 Mr. Rogers needs to get it behind him. He is
20 under a conviction of murder and no sentence. He's
21 out there in limbo somewhere and he's been that way
22 for about a year now.

23 As far as the period of time necessary to get
24 ready on this thing, this is a re-trial. The same
25 attorneys were involved in the initial trial. It was

MOTIONS

1 a very short trial, very simple trial. Mr.
2 Leiendecker and Mr. Runyon have been involved with
3 this case for over three years now. The Rogers' case
4 was reversed in January 1996. They volunteered to be
5 reassigned on it and so they've known for almost a
6 year now this case was coming up and it was actually
7 set for December 2nd back in March and I notified them
8 by letter in March, so that's what, some nine months
9 they've had to get ready for this case.

10 I would ask Your Honor to contrast this
11 situation with State versus Jerry Clemmons, which was
12 a death penalty case where both lawyers were appointed
13 about two months prior to trial and they said that
14 wasn't sufficient time to get ready. The Trial Judge
15 in that case denied a continuance motion and our
16 Supreme Court upheld it and, of course, it is
17 discretionary with you.

18 Your Honor, I think that we'd be in a
19 different situation if Mr. Runyon had that problem
20 since he is lead counsel. Mr. Leiendecker is second
21 chair on this case. In the first trial, Mr. Runyon
22 did the bulk of the work. He handled all of the in-
23 court work. He took all of the witnesses. He did all
24 of the cross examination, all direct examination and
25 he made the opening and closing statements.

MOTIONS

1 Your Honor, I think this type situation is --
2 these kind of things happen. I think that's why we
3 have two lawyers appointed in death penalty cases.
4 That's why they get a thirty day period of time in
5 which they're relieved from all other Court
6 appearances, and Your Honor, I just think for all
7 those reasons, the State is prepared to go forward and
8 the case needs to be heard, and again, I'm -- I'm
9 extremely sympathetic with Mr. Leiendecker's
10 situation. I've lost my grandparents and those things
11 happen, but I think the case needs to move on, Your
12 Honor.

13 THE COURT: Mr. Runyon?

14 MR. RUNYON: Just for the record, Your Honor,
15 I can't disagree with what the Solicitor has indicated
16 about how the prior trial went and I'm not gonna
17 suggest to you that -- that I can sit here and tell
18 you that there is -- that there is any prime factor in
19 this case that Mr. Leiendecker is working on that
20 would hinder the continuation of trial preparation or
21 the trial in this case. I made this motion out of an
22 abundance of caution because I think in all candor as
23 an officer of the Court, I think when this situation
24 first appeared on the horizon last week, I talked to
25 Mr. Bailey about it and I think that -- I think we'd

1 be very remiss if we didn't bring it to the Court's
2 attention now versus maybe next week when I call and
3 say, "Judge, we've had this problem in Ohio. Mr.
4 Leiendecker may be not available to try the case."
5 Then you're gonna say, "Why didn't you tell me
6 earlier?" and I -- I think that part of this is just
7 putting the Court on notice of what -- of a growing
8 problem that may exist, and I don't want to walk in,
9 you know, Wednesday of next week or call the Court and
10 say, "Well, Mr. Leiendecker has had to rush off to
11 Ohio because of a problem and won't be -- won't be
12 able to be back."

13 I think we've got that kind of exigent problem
14 and, of course, it's not a question of whether or not
15 I take all the witnesses. I mean, we definitely can't
16 try this case without two lawyers. He's entitled to
17 that, ---

18 THE COURT: That is correct.

19 MR. RUNYON: --- and so I think as an off- --
20 as officers of the Court, we -- we just want to -- we
21 want to be in communication with the Court as much as
22 possible so we -- and give the Solicitor as much
23 notice, too.

24 I well understand that we've got file boxes
25 full of stuff and we've read it and, I mean, probably

1 memorized it in our -- probably dreamed about it from
2 time to time. We know exactly what's happening, and
3 I'm not suggesting that there's any particular
4 problem, any identifiable problem with preparation,
5 but I do think that out of an abundance of caution, we
6 raised it and brought it to the attention of the
7 Court.

8 THE COURT: Thank you.

9 Mr. Leiendecker, anything further?

10 MR. LEIENDECKER: No, sir, Your Honor.

11 THE COURT: Mr. Rogers, anything you'd like to
12 say on the subject?

13 MR. ROGERS: No, sir.

14 THE COURT: Okay.

15 I'm inclined not to continue the case at this
16 point. However, Mr. Leiendecker, I want you to be
17 sure that you understand that if anything happens that
18 takes you away from this trial, I'm open to hear it
19 and to continue the case. Given the circumstance and
20 the situation as it appears right now, I'd be inclined
21 to go forward, but I'm understand- -- I want you to
22 understand that all of us understand that's a very
23 fluid situation and I'm not saying the case absolutely
24 won't be continued. If need be, we'll make
25 arrangements and continue the case at any point that

1 you need to go to Ohio. Do you understand?

2 MR. LEIENDECKER: Yes, sir, Your Honor.

3 THE COURT: So we're very sympathetic to that
4 situation and if you need to go, the case will just
5 have to be continued, so, you know, all you have to do
6 is call and let me know, and Solicitor, I'm sure you
7 understand that, too.

8 MR. BAILEY: Yes, sir, Your Honor.

9 THE COURT: I don't think we can absolutely
10 say one way or the other at this time that the case
11 won't be continued, but for now, given what you have
12 told me today, the case is not continued, but if the
13 situation changes, it will be and I would not hesitate
14 at all to continue the case if need be, so all you
15 need to do is keep me posted in regard to that.

16 I'd also ask you at this time that if a
17 circumstance comes up that you think warrants
18 continuing the case or that you need to keep me
19 abreast of what's going on, I'd like to have the
20 agreement of the attorneys and Mr. Rogers at this time
21 that a call can be made, a conference call, with at
22 least one of your lawyers, Mr. Rogers, on the phone
23 with the Solicitor and me without us having to have a
24 formal hearing in regard to a continuance, and
25 including Mr. Rogers, the reason being my preference

MOTIONS

1 is to not do anything in a case such as this without
2 everybody present and in Court on the record.

3 Given the potential in this circumstance of
4 the need for Mr. Leiendecker to leave South Carolina
5 and go to Ohio on short notice, what I'd like to know
6 from you, Mr. Rogers, is whether you would authorize
7 your attorneys to have a conference call with me once
8 that need arises without us having to come in here and
9 have a formal hearing on it. Do you object to us
10 doing that by telephone without you being on the phone
11 or without you being present?

12 MR. ROGERS: No, sir.

13 THE COURT: You don't object, and you
14 understand what I'm asking? I don't think I asked the
15 question too good, but you understand what I mean?

16 MR. ROGERS: Yes, sir.

17 THE COURT: All right.

18 Any objection to that, Solicitor?

19 MR. BAILEY: No, sir.

20 THE COURT: Any objection ---

21 MR. RUNYON: None, Your Honor.

22 THE COURT: --- Mr. Runyon, or Mr.

23 Leiendecker?

24 MR. LEIENDECKER: No, sir.

25 THE COURT: And Mr. Rogers has not objected,

1 is that correct, Mr. Rogers?

2 MR. ROGERS: Yes, sir, that's correct.

3 THE COURT: You authorize them to call me with
4 a conference call with at least one of your attorneys
5 on the phone to deal with this situation if the need
6 arises?

7 MR. ROGERS: Yes, sir.

8 THE COURT: All right, sir, thank you.

9 The case is not continued.

10 Any other motions from the Defense at this
11 time?

12 MR. RUNYON: Your Honor, we've made a motion
13 which -- and I'm trying to -- quite frankly, I'm
14 trying to avoid -- Mr. Rogers needs to have
15 appropriate clothing. There was clothing purchased
16 last time which may, in fact, -- I think it's been
17 brought over. I'm not suggesting that clothing is not
18 appropriate. What I'm suggesting is -- is that we --
19 it probably doesn't fit him and he's at the -- he's at
20 the institution where we can have someone measure him
21 if we can make arrangements through the South Carolina
22 Department of Corrections to measure him, and if the
23 measurements prove true to be -- not fit the clothing
24 we currently have ---

25 THE COURT: Where is the other clothing?

MOTIONS

1 MR. RUNYON: The other clothing is in the
2 custody of the -- of the Clerk, Your Honor.

3 THE CLERK: I brought it.

4 THE COURT: You've got them?

5 THE CLERK: Yes, sir.

6 THE COURT: Let him try them on while he's
7 here to see if they still fit.

8 MR. RUNYON: All right, sir. We'll try it on.

9 THE COURT: If they don't fit, I'll authorize
10 the clothing measurements to be made and authorize
11 you, Mr. Runyon, to take the appropriate action to
12 purchase him some clothes, given -- you and Mr.
13 Leierendecker given the appropriate restrictions in
14 regard to being prudent with your expenditure of
15 funds.

16 MR. RUNYON: Well, we -- our actual motion is
17 to approve an expenditure not to exceed Seven Hundred
18 Dollars, Your Honor.

19 THE COURT: Excuse me?

20 MR. RUNYON: Not to exceed Seven Hundred
21 Dollars. We'd ask the Court to put a cap on it ---

22 THE COURT: I think that cap is probably more
23 than twice as much you need to buy him a suit and some
24 shirts.

25 MR. RUNYON: All right. We'll take Three

MOTIONS

1 Hundred and Fifty or Four Hundred Dollars, Judge.

2 That's no problem.

3 THE COURT: Well, ---

4 MR. RUNYON: We'd just ask the Court to put
5 a -- give us a ---

6 THE COURT: I won't put a limit on you. I'll
7 just tell you to be prudent ---

8 MR. RUNYON: All right, Judge.

9 THE COURT: --- and fiscally responsible.

10 MR. RUNYON: Well, we bought ---

11 THE COURT: I mean, you don't need to buy him
12 a Four Hundred Dollar suit. There are other ways to
13 get clothes that you don't have to go out to Saks
14 Fifth Avenue and buy him clothes.

15 MR. RUNYON: Yes, sir. Thank you very much,
16 Your Honor. Saks wouldn't give us credit, Judge.

17 THE COURT: Sir?

18 MR. RUNYON: Saks wouldn't give us credit.

19 THE COURT: All right, sir. They wouldn't
20 give me credit either, I doubt.

21 All right, next motion.

22 MR. BAILEY: Your Honor, I think that's all
23 the Defense has.

24 The State has ---

25 THE COURT: Okay. Anything from the State?

MOTIONS

1 MR. BAILEY: --- some motions, Your Honor.

2 I'm not sure if you have copies of these from
3 the Clerk's file ---

4 THE COURT: I do and they're on my desk in
5 Chambers. Let me go get them.

6 THE CLERK: I'll get them for you.

7 THE COURT: They're on the way. Go ahead,
8 please, sir.

9 MR. BAILEY: Your Honor, the first motion --
10 these are not numbered. There are about five of them.
11 I'm gonna withdraw some of these motions.

12 The first one that I've got in chronological
13 order, I believe, is a motion in limine to prohibit
14 the Defense attorneys soliciting testimony from any
15 witnesses concerning what verdict the jury should
16 reach and that, Your Honor, is based on State versus
17 Matthews, which our Supreme Court said was
18 inappropriate to ask a family member of the Defendant
19 what sentence should this person get, life in prison
20 or the death penalty, and in the first trial, Mr. --
21 Mr. Rogers' mother, Mrs. Applicant's Mother, was asked -- and I'm
22 referring to Page 1150 of the transcript; "Now, Mrs.
23 Applicant's Mother, what are you asking -- what would you ask
24 this Court and this jury to do with your son in this
25 case?" and then she gave a response including "Spare

1 his life." Question, "Even if that life was spent in
2 prison?" Answer, "Even if it was spent in prison,"
3 and, you know, referring to State versus Matthews, I
4 think this is an inappropriate question. I would ask
5 the Court to grant a motion in limine to prohibit that
6 type of testimony.

7 THE COURT: What you say, Mr. Runyon?

8 MR. RUNYON: Your Honor, we understand the
9 case law. The simple fact was we -- the question I
10 don't think was objected to either at that point in
11 time. We -- we understand what the law is and we, of
12 course, are not gonna ask them to specifically tell
13 the jury what to do. We're gonna try to adhere to the
14 legal principles. We've got no problem with staying
15 the bounds as -- of what the case law says. I don't
16 think we asked them to -- I don't think that question
17 necessarily asked -- the follow-up question may have -
18 - may have asked something, but the initial question
19 was -- was "What are you asking of the Court?" and --
20 and she just made a simple plea for her son's life.

21 THE COURT: Which I think is clearly
22 appropriate.

23 MR. RUNYON: Which is clearly appropriate.

24 THE COURT: As long as you keep your questions
25 in bounds, I think that's a proper questioning to ask

MOTIONS

1 a family member to say and to ask that the life be
2 spared, but to ask them what the verdict should be I
3 think is an inappropriate question. I don't -- I'm
4 not inclined to grant your motion, Solicitor. I'll
5 just instruct Mr. Runyon to abide by the case law and
6 frame his question -- he and Mr. Leiendecker to frame
7 their questions appropriately.

8 MR. BAILEY: Your Honor, the next motion is a
9 motion to prohibit Mr. Runyon from asking witnesses
10 that knew Mr. Burdette on cross examination about his
11 prior -- alleged prior loss of temper. I'm gonna
12 withdraw that.

13 THE COURT: All right, that's withdrawn.

14 MR. BAILEY: The next one is a motion to
15 prohibit the Defense from instructing the jury in any
16 way that Mr. Rogers is parole ineligible, as I was
17 considering at that time not broaching the issue of
18 future dangerousness. I want to withdraw that one
19 also.

20 THE COURT: Withdrawn.

21 MR. BAILEY: The next motion, Your Honor, is
22 to prohibit the Defense in their closing argument from
23 getting into Biblical references in support of a life
24 sentence. In the first trial, Mr. Runyon made
25 reference to his uncle who was a Baptist preacher and

1 what he might have thought of the death penalty. He
2 refers to the death penalty as an agnostic statement,
3 and I think if we get into, you know, like quoting the
4 Old Testament, an eye for an eye and they go turn the
5 other cheek, we're gonna be getting into arbitrary
6 factors and getting away from the circumstances of the
7 crime characteristics of the Defendant which is the
8 thrust of the penalty phase.

9 THE COURT: Mr. Runyon, Mr. Leiendecker?

10 MR. RUNYON: Judge, maybe -- maybe making
11 reference to what my -- because he didn't testify, but
12 I think from the viewpoint of the general tenor of the
13 motion which is to avoid any kind of reference to -- I
14 think the basic motion is Biblical references, I mean,
15 we've got to argue for this man's life and I certainly
16 am not suggesting that we can get up there and just go
17 totally far afield, but I think that we -- we -- you
18 know, the people on the jury are gonna be asked when
19 they come up, they're gonna be asked about their
20 religious convictions of against -- for or against the
21 death penalty, things of that sort, so we're gonna
22 know whether or not that jury which is impaneled has
23 any background, for example, in religion, any
24 religion, and I think that the concept of religious
25 beliefs kind of permeates our society and permeates

1 the juror's background, so making reference to -- and
2 I'm not sure what he means by Biblical references, but
3 making references to any kind of Biblical argument, if
4 you keep us from doing that, I mean, we're supposed to
5 just stand up there and say, "Don't kill him because
6 he's not a bad -- really not a bad fellow." I mean,
7 we're arguing for this man's life.

8 This trial, as the Court well knows, is -- is
9 even more pointed than before because we're not
10 talking about guilt here. We're just talking about
11 trying this case from the viewpoint of the jury
12 considering what to do with it and as the Solicitor
13 has said, the record is very complete in many
14 respects. We know what the evidence is gonna be. Not
15 a whole lot is gonna change. It might change a little
16 bit from last time in the viewpoint of some Defense
17 witnesses and people who may be able to come in and
18 say how he's been conducting himself in prison, things
19 of that sort, but as a practical matter, we -- we've
20 got to be able to argue for this man's life, and I
21 think that to unduly restrict us, to say, "Well, you
22 can't -- you can't make any reference to the Bible,"
23 something of that sort I think is -- I think is too
24 much restriction.

25 THE COURT: I don't know that there's anything

MOTIONS

1 that prohibits that either. I'm not inclined to sort
2 of limit either side, so the motion is denied.

3 MR. BAILEY: Your Honor, the next motion is a
4 motion to prohibit the Defense from trying to educate
5 the jury on the legal effect of a hung jury, and I've
6 cited five or six South Carolina cases which I think
7 are direct on point. The reason I did that was
8 because that argument was attempted to be made in
9 closing argument in the first trial, and Mr. Runyon,
10 when I objected, responded "In all candor, I was
11 trying to get as close as I could. No question about
12 that," and Judge Brown said, "You got too close."

13 I discussed this with Mr. Runyon and I think
14 he concurs that that is an inappropriate thing for the
15 jury to be told about.

16 MR. RUNYON: Judge, and I -- and I, of course,
17 am not arguing with my friend here, but I --
18 specifically what I was trying to do, and I think the
19 record would reflect it, and this is why this case is
20 back, I made a motion under the then pending case of
21 State V. Simmons, which was in the United States
22 Supreme Court, South Carolina V. Simmons, as it
23 relates to the effect of his being facing life without
24 parole based on his record. That's what I was trying
25 to do at that point in time. I was trying to get as

MOTIONS

1 close as I can to let the jury know and, of course, he
2 objected and Judge Brown said, "You can't do that,"
3 and, of course, one reason why -- and quite frankly,
4 Your Honor, quite frankly, the Appellate decision in
5 this case addressed that particular instance of
6 argument because the State tried to rely upon that and
7 say, "Well, he argued that to the jury and they knew
8 that if he was convicted, it would be life without
9 parole," and the Supreme Court said, "No, he didn't
10 get a chance to argue that," so what I was really
11 arguing at that point in time, I think, is pretty
12 clear, was I was, in fact, trying to get as close to
13 the line to tell them "If he's convicted, it's life
14 without parole" as I could. I mean, that's what I was
15 trying to do.

16 Now, insofar as the motion, however, by
17 educating the jury when it comes to the effect of a
18 hung jury, I think the Court is gonna instruct the
19 jury and we'll be able to make fair comment on your
20 instructions that -- that their verdict of death must
21 be unanimous, and I think we could argue about the
22 fact that -- and present to them, "You must all
23 agree" ---

24 THE COURT: That's right, but I don't think
25 you can tell them that if they don't agree, that a

MOTIONS

1 hung jury means a life sentence. That's out of
2 bounds.

3 MR. RUNYON: That's not -- and I'm not
4 suggesting I can do that, Judge, ---

5 THE COURT: Right.

6 MR. RUNYON: --- and there's no question about
7 that. All I'm saying is ---

8 THE COURT: Okay, so this motion -- this
9 motion then is granted.

10 MR. RUNYON: That motion is granted. That's
11 no question.

12 THE COURT: Right. Any objection from the
13 State or the Defendant in this particular case -- I
14 think given the circumstances and Mr. Rogers' prior
15 record, that he is ineligible for parole. I mean, he
16 gets a life sentence. I think it's appropriate in
17 this instance to tell the jury that that is the
18 circumstance in this particular case.

19 MR. BAILEY: I agree, Your Honor.

20 THE COURT: Life means life in this case.

21 MR. RUNYON: That's correct, Your Honor, and
22 we would be requesting that at the appropriate time.

23 THE COURT: He is ineligible for parole.

24 MR. RUNYON: That's correct.

25 THE COURT: All right. Go ahead, Solicitor.

MOTIONS

1 MR. BAILEY: Your Honor, the next one was a
2 motion in limine to prohibit the Defendant from
3 comparing what happened to him with what happened to
4 Daxton Patterson. Daxton Patterson is the person who
5 was with Mr. Rogers when this incident started. We
6 have no indication that this was any kind of a co-
7 conspiracy, the hand of one, hand of all type
8 situation. It's a confrontation that Patterson
9 started and Rogers jumped into it, and I think
10 Patterson was probably as surprised as anybody else
11 when Rogers started shooting.

12 He was charged. Those charges were dropped,
13 and in the first case, Mr. Runyon argued that Daxton
14 Patterson is not going to the electric chair or life
15 in prison. That was outside of the record.

16 My objection, number one, is it was
17 inappropriate because it was outside of the record,
18 and number two, it was inappropriate because he was
19 comparing what's gonna happen to him with what's
20 happened to someone else that has not been tried, and
21 on the other side of the coin, Your Honor, if I was to
22 argue or compare Mr. Rogers' culpability with some
23 other death penalty crime I had, it would
24 automatically be reversible error via The State versus
25 Damon Shelley, something out of Orangeburg where

1 Norman Fogel argued this. It was the worse case I've
2 seen in eight years of prosecution. The Supreme Court
3 reversed that and reversed several other cases, so if
4 I can't do that comparative analysis, I don't think
5 it's appropriate for the Defense to do it.

6 MR. RUNYON: Your Honor, in all candor, I
7 agree totally with that last statement the Solicitor
8 said. I don't think I can compare this case with any
9 other case that Mr. Bailey has tried or other
10 prosecutors have tried or what have you, but in this
11 particular case, I would respectfully suggest that --
12 that what our argument was was not outside the record.
13 Mr. Patterson testified -- excuse me; Mr. Patterson
14 did not testify.

15 Mr. Patterson -- Mr. Patterson was testified
16 about, his involvement, who was there, what occurred
17 and the simple fact of the matter is -- is that there
18 was plenty of testimony that brought him into the
19 happenings, and I do stand corrected. Mr. Patterson
20 did not testify, but he was testified about, and so I
21 don't think it was necessarily outside the record.
22 Obviously we can't compare this case to some other
23 cases far away, but, I mean, to suggest that there was
24 nothing in the record about Daxton Patterson and his
25 role in this whole thing and what was occurring in

MOTIONS

1 this whole case is -- is not exactly accurate I would
2 suggest, and so, therefore, it's our position that
3 unless there's something in the record that would
4 enable us to compare -- for example, if Mr. Bailey
5 tries this slightly differently, we might, in fact, be
6 prohibited, but obviously that's gonna depend upon --
7 this motion in limine might be appropriately addressed
8 before we make final arguments, and all I would ask is
9 the Court reserve judgment on that until the time
10 comes to see whether or not the facts develop about
11 Daxton Patterson and his -- and his involvement with
12 what occurred and what have you with more -- once
13 again, making a comment -- I think it was a fair
14 comment in the context of testimony previously and I
15 think you'd have to read the entire transcript,
16 but ---

17 THE COURT: Well, I think I'll have to hear
18 the testimony ---

19 MR. RUNYON: Yes, sir.

20 THE COURT: --- that's presented this time
21 before I can rule on that.

22 MR. RUNYON: Yes, sir.

23 THE COURT: That is definitely a situation
24 I've got to hear before I can rule on that one. We'll
25 have to hold this one in abeyance.

1 MR. BAILEY: Your Honor, the next one would be
2 Mr. Runyon made a reference to the life sentences in
3 the World Trade Center bombing in New York, a
4 different jurisdiction, a different set of facts,
5 which is clearly a comparison. It's getting away from
6 circumstances of this crime and the characteristics of
7 this Defendant.

8 MR. RUNYON: And I can't do that. That was --
9 that was outside ---

10 THE COURT: Okay. That one is granted.

11 MR. RUNYON: I was out of bounds on that,
12 Judge.

13 THE COURT: All right. Thank you.

14 MR. BAILEY: Your Honor, the last one in which
15 I asked Mr. Runyon not to elicit victim impact
16 testimony from the Defendant's family, I'm gonna
17 withdraw that.

18 THE COURT: Withdraw.

19 MR. BAILEY: Your Honor, that's all the State
20 has.

21 THE COURT: All right. Well, we are left with
22 one to rule on pending what is presented during the
23 trial.

24 Any other motions from the State?

25 MR. BAILEY: No, sir.

REVIEW OF JUROR EXCUSES

1 THE COURT: Any other motions from the
2 Defendant at this time?

3 MR. RUNYON: Nothing at this time, Your Honor.

4 THE COURT: Okay.

5 Let's hear the Clerk, then, in regard to the
6 excuses that we have.

7 Do y'all -- have you already separated out the
8 sixty-five and older who are requesting that they be
9 excused?

10 THE CLERK: No, I haven't, not yet.

11 THE COURT: All right. These are the requests
12 to be excused?

13 THE CLERK: Yes, sir.

14 THE COURT: All right. Thank you.

15 Okay, let me swear you in, please, ma'am.

16 Raise your right hand. (Madam Clerk raises her right
17 hand.

18 Do you solemnly swear the testimony that you
19 are about to give is the truth, the whole truth and
20 nothing but the truth, so help you, God?

21 THE CLERK: Yes, sir.

22 THE COURT: All right.

23 Does both the State and the Defense have
24 copies of these so we can go through them as they are
25 listed?

1 MR. BAILEY: Yes, sir.

2 THE COURT: All right. What I'll do is deal
3 with the -- give the juror's name, the excuse --
4 requested and if it's something that I can rule on
5 based on what they have written here, I'll rule on
6 that. If you have an objection, I expect you to
7 object.

8 MR. BAILEY: Your Honor, do you want me to
9 bring to the Court's attention when we get to the
10 people who have disqualifying records?

11 THE COURT: Yes, sir.

12 MR. BAILEY: I'll provide them the rap sheets,
13 but they haven't had a chance to look at it yet.

14 THE COURT: Okay. If you have the record,
15 yes, sir, let us know that.

16 MR. BAILEY: All right.

17 THE COURT: Madam Clerk, why don't you address
18 them juror by juror and tell us what the excuse is,
19 please.

20 THE CLERK: Number 3, a Daniel J. Aleff. He
21 requested to be disqualified "Because I am a single
22 parent and" -- I can't read that -- "Employment as
23 plant manager is central to successful business."
24 It's work related.

25 THE COURT: Okay. That's denied. He needs to

1 be here.

2 THE CLERK: Number 6, John Anderson. He's
3 moved.

4 THE COURT: He doesn't say where he's moved
5 to, though, does he?

6 MR. BAILEY: Your Honor, he's got a conviction
7 of strong arm robbery and kidnapping. He's probably
8 in prison.

9 THE COURT: All right. He is excused or
10 disqualified, rather.

11 THE CLERK: And now on a lot of these, the
12 Sheriff's Department has -- has not -- they have not
13 been returned to us.

14 THE COURT: Okay. Well, let's deal with the
15 ones we've got and we know what excuse they are using.

16 THE CLERK: All right. Number 15 ---

17 THE COURT: All right, you skipped Number 11.
18 Is that because you haven't ---

19 THE CLERK: Okay, excuse me. 11 ---

20 THE COURT: Wait a minute. Wait a minute.
21 Yes, sir?

22 MR. RUNYON: Mr. Rogers was going over these
23 as well in the next couple of weeks. I would ask the
24 Court if you would indulge the removal of his
25 handcuffs so he could also mark his sheet while he's

1 here today.

2 THE COURT: Yes, sir, that's fine.

3 MR. RUNYON: Okay.

4 THE COURT: Okay, go ahead with Number 11,
5 please.

6 THE CLERK: Also Number 9, Leonia M. Baker.
7 She's deceased.

8 THE COURT: All right.

9 THE CLERK: Number 11 is a work related
10 problem.

11 MR. BAILEY: Number 11 served in the last
12 three years. She was on Mr. Rogers' first trial. She
13 didn't actually serve, but ---

14 THE COURT: She is excused. She has that on
15 the list here. She'd be exempted if she's requesting
16 to be excused because of that. All right, that was
17 Mrs. Ball (sic).

18 THE CLERK: Number 12, a doctor's excuse. She
19 says she suffers from high blood pressure and is
20 currently taking medicine to try to maintain a normal
21 blood pressure.

22 THE COURT: All right, she is excused, a
23 medical excuse.

24 THE CLERK: Number 20, Archie ---

25 MR. BAILEY: Excuse me. Number 15 is simply a

1 non-resident.

2 THE CLERK: Okay.

3 THE COURT: Yeah, from Maryland.

4 THE CLERK: Archie R. Bigelow, Jr. His ---

5 THE COURT: What number is this one?

6 THE CLERK: Number 20.

7 THE COURT: What about Number 19?

8 THE CLERK: I'm sorry. I'm looking at the
9 postmark -- let's back up.

10 Number 15, he's moved or he's living out of
11 state. Is he excused?

12 THE COURT: He's in Maryland. He's excused.

13 THE CLERK: Number 19, work related; Darlene
14 W. Bennett. "I manage a two person department. If
15 I'm out of work in my department, my two employees
16 will be required to work seven days a week to keep up
17 with work loads. One of my employees is a single
18 parent with a small child. This would be a hardship
19 on her."

20 THE COURT: She is not excused.

21 THE CLERK: Number 20, Archie R. Bigelow, Jr.,
22 has left the State.

23 THE COURT: I assume that he lives out of
24 State, so he is excused.

25 THE CLERK: Number 21, Metta P. Blackburn, is

1 over sixty-five ---

2 MR. BAILEY: Nancy Bishop is 21.

3 MR. RUNYON: Ms. Blackburn is 22.

4 THE CLERK: Excuse me. No problem with Number
5 21.

6 Number 22 is over sixty-five, said, "I am
7 seventy-four years of age and I would prefer to be
8 exempt from jury duty."

9 THE COURT: Okay. She is excused, Number 22.

10 THE CLERK: Number 23, Presley W. Blackmon.
11 He's also over sixty-five.

12 THE COURT: He's excused.

13 THE CLERK: Torey L. Blackmon has left the
14 county.

15 THE COURT: That's Number 24 is excused.

16 THE CLERK: Number 25, James H. Blackwood.
17 He's in U. S. Military out of state.

18 THE COURT: He's on board the U.S.S. Rogers
19 and he is in Mayport, Florida. He is excused.

20 THE CLERK: Number 25, James H. Blackwood --
21 oh, I'm sorry. That's the one we just had -- excused.

22 THE COURT: Yes.

23 THE CLERK: Number 32, Mary L. Jenkins Britt
24 is over sixty-five.

25 THE COURT: She's excused.

1 THE CLERK: Number 37, O'Neal L. Bullock is
2 incarcerated.

3 THE COURT: He's excused.

4 THE CLERK: Number 44, Wesley A. Carver. He's
5 out of the country and is a student.

6 THE COURT: All right, he would be transferred
7 as a full-time student.

8 THE CLERK: Number 48, Joseph L. Clark. He's
9 over 65.

10 THE COURT: He's excused.

11 THE CLERK: Number 55, Judy L. Connors, lives
12 in Berkeley County.

13 THE COURT: She's excused.

14 THE CLERK: Number 58, Donna M. Coomber, is a
15 full-time student. Transfer?

16 THE COURT: I'm looking. Yes, transfer her.
17 She appears to be a full-time student.

18 THE CLERK: Number 59 is over sixty-five.

19 THE COURT: She's excused.

20 THE CLERK: Number 61, Dorothy A. Crum is work
21 related and child care. "I work twelve hours, from
22 7:30 P.M. to 7:30 A.M. and I do not have a babysitter
23 for my three year old son. My husband works at night
24 and attends school during the day."

25 THE COURT: What says the State?

1 MR. BAILEY: No objection, Your Honor.

2 MR. RUNYON: No objection, Your Honor.

3 THE COURT: No objection to excusing her? —

4 MR. RUNYON: No objection to excusing her.

5 THE COURT: All right. She's excused.

6 THE CLERK: Number 64, Eugene F. Dauchert, is
7 over sixty-five.

8 THE COURT: He's excused.

9 THE CLERK: Number 70 -- excuse me -- Number
10 68 is over sixty-five.

11 THE COURT: He's excused.

12 THE CLERK: Number -- Johnny C. Day is
13 deceased.

14 Number 70, Gail J. Deptula, has small
15 children. "I home school my two children so they are
16 home with me all the time. I also have one child in a
17 wheelchair and requires help through the day for just
18 about everything."

19 THE COURT: Okay. I think she would be
20 entitled to be excused.

21 THE CLERK: Number 71, Frank R. Dillingham, is
22 over sixty-five.

23 THE COURT: Excused.

24 THE CLERK: Number 74, Patricia A. Dubis. "I,
25 Patricia A. Dubis, Juror Number 74, ask to be excused

1 from jury service for the term December the 2nd, 1996,
2 the reason being my eighty year old mother, Louise H.
3 Bach, is blind in her right eye and also has dizzy
4 spells at times and I have to be with her to make sure
5 she's all right."

6 THE COURT: She's excused. She also has a
7 note on the bottom of her form where the doctor says
8 her mother's health would be adversely affected if she
9 wasn't there to care for her. That's a similar
10 situation to having children under the age of seven
11 years old and not working outside the home. She's
12 excused.

13 THE CLERK: Number 75, Jeanne M. Dugas. She
14 doesn't have transportation to St. George. "It would
15 be a major problem for me."

16 THE COURT: She's not excused.

17 MR. BAILEY: She's over sixty-five.

18 THE COURT: She's over sixty-five? Then she
19 is excused. How old is she?

20 MR. RUNYON: Seventy.

21 THE COURT: Seventy? She's excused.

22 MR. BAILEY: Number 76 has a disqualifying
23 record.

24 THE CLERK: We sent that one to the Sheriff's
25 Department.

1 MR. BAILEY: Huh?

2 THE CLERK: We sent that one to the Sheriff's
3 Department.

4 MR. BAILEY: Okay. I don't think there's any
5 point in getting him because he's -- it looks like
6 he's got a two year conviction for a DUI, two years
7 suspended to three months, so it would ---

8 THE CLERK: Any objection to excusing him
9 based on his record?

10 MR. RUNYON: No objection.

11 THE COURT: All right, he's excused.

12 THE CLERK: Number 81, ---

13 MR. BAILEY: Excuse me. 78 also, according to
14 my note, has a disqualifying record.

15 THE CLERK: Excused?

16 MR. BAILEY: Several B&E autos, one grand
17 larceny conviction.

18 THE COURT: Any objection to excusing that
19 juror?

20 MR. RUNYON: No objection, Your Honor.

21 THE COURT: All right. He's excused based on
22 his record.

23 THE CLERK: Number 81, Kenneth C. Elmore, Jr.
24 "I have moved from Dorchester County to Colleton
25 County," and his new address; Kenneth Elmore, Jr.

1 THE COURT: He is excused.

2 THE CLERK: Number 82, Stephaine Elmore. "I
3 have two kids under the age of seven years old and
4 would not have anyone to keep them while I am on jury
5 duty." She did not sign it.

6 THE COURT: It doesn't say she works outside
7 the home either, does it?

8 THE CLERK: No.

9 THE COURT: Okay. She'd be entitled to be
10 excused.

11 THE CLERK: Number 91, ---

12 MR. BAILEY: Number 84 has a 1982 Georgia
13 burglary conviction, two of them.

14 THE COURT: Any objection to excusing that
15 juror?

16 MR. RUNYON: No objection, Your Honor.

17 THE COURT: Without objection, that juror is
18 excused based on the record.

19 THE CLERK: Number 91, Eunice D. Fletcher, is
20 over sixty-five.

21 THE COURT: I need to stop and take a phone
22 call real quick; excuse me. That one is excused based
23 on over sixty-five.

24 (OFF THE RECORD)

25 ON THE RECORD

1 THE CLERK: Number 94, Frank M. Fortunato, has
2 a medical problem, is bi-polar manic depressive
3 syndrome.

4 THE COURT: All right, he's excused.

5 THE CLERK: Number 97, Michael T. Francisco,
6 is a work related problem. He says he has to be in
7 Atlanta December the 3rd through the 5th.

8 THE COURT: What says the State?

9 MR. BAILEY: Your Honor, that appears to be
10 just some kind of training thing that he's got to go
11 through as far as employment and I don't think that's
12 an excuse.

13 MR. RUNYON: Judge, the Defense would not
14 object to him being excused for the following reasons:
15 Number 1, obviously this is important to him. Number
16 2, quite frankly we don't want somebody maybe getting
17 on the jury who is thinking about where they should be
18 and not having full attention to the trial, so we have
19 no objection to that person being excused, Your Honor.

20 THE COURT: It sounds like he's already
21 obligated to be there. The fees are probably paid and
22 evidently the transportation is paid for. I'm
23 inclined to excuse him. If it was a vacation and he'd
24 made arrangements to be in Atlanta for a week, we'd
25 excuse him. I'm going to excuse him.

1 THE CLERK: Do you want to transfer him?

2 THE COURT: Transfer him. That will be fine;
3 thank you.

4 THE CLERK: Number 109, Thomas G. Giuntoli.
5 He has left the State.

6 THE COURT: He is excused.

7 MR. BAILEY: 110 has a disqualifying record.

8 THE CLERK: Number ---

9 THE COURT: Wait a minute. 110 is excused
10 based on his record. Any objection ---

11 MR. BAILEY: Possession -- direct possession
12 of crack with intent to distribute in 1992.

13 MR. RUNYON: No objection, Your Honor.

14 THE COURT: Without objection, he is excused.

15 THE CLERK: Number 113, Carol A. Goodier, has
16 a work related problem.

17 THE COURT: All right. That doesn't appear to
18 be a work related problem that would require her to be
19 -- she's a Director of Nurses. She needs to be
20 present. She's not excused.

21 THE CLERK: Number 115, Edna D. Goodwin. She
22 has a doctor's excuse.

23 THE COURT: She's excused based on a doctor's
24 excuse.

25 THE CLERK: Number 120 is deceased.

1 Number 124 ---

2 MR. BAILEY: 121, I've got in Charleston
3 County.

4 THE CLERK: Excuse me. I had Number 121. I
5 just didn't know how to read. Robert Green. "I am
6 disqualified from service because I served on a jury
7 within three years. I don't know the exact date, and
8 I reside in Charleston County."

9 THE COURT: Okay. He lives in Charleston
10 County. He'd be excused. What number is that?

11 THE CLERK: Number 121.

12 THE COURT: Okay, he's excused. I don't have
13 that one, but he's excused.

14 THE CLERK: Number 123, Linda J. Gromacki,
15 states she lives in Berkeley County.

16 THE COURT: Excused.

17 THE CLERK: She's also over sixty-five.

18 Number 130, George F. Herrick, Sr., is over
19 sixty-five.

20 THE COURT: He's excused.

21 THE CLERK: Number 132 is Myron L. Hinton.

22 He's a student. "I'm a full-time college student at
23 the College of Charleston and I will be in final exams
24 at this time."

25 THE COURT: Transfer him, a full-time student.

REVIEW OF JUROR EXCUSES

1 THE CLERK: Number 137; he's left the State.

2 THE COURT: Excused.

3 THE CLERK: Number 138, Bernard A. Hollenbeck.

4 "I thought I lived in Charleston County. I have never
5 served in Dorchester County. I have never been to St.
6 George."

7 THE COURT: What says the State? He appears
8 to live in Charleston County, he thinks.

9 MR. BAILEY: I can't argue with it if he
10 thinks he lives in Charleston County.

11 MR. RUNYON: Your Honor, he does live in
12 Charleston County. The problem with it is he's got
13 a -- he's got basically a Dorchester County mailing
14 address.

15 THE COURT: But you concede that he does live
16 in Charleston County?

17 MR. RUNYON: Yes, sir, no question about that.

18 THE COURT: All right, he's excused.

19 THE CLERK: Number 141 ---

20 MR. BAILEY: 140 says she's a British citizen.

21 THE CLERK: Is what?

22 MR. BAILEY: A British citizen, 140.

23 THE COURT: All right. He'd (sic) be excused
24 if he's (sic) not a U. S. citizen.

25 THE CLERK: Number 141, Cynthia K. Howard,

1 work related. "I cannot afford to take the time off
2 from work. My husband is out to sea and I am the sole
3 caretaker of my children."

4 THE COURT: She is not excused.

5 THE CLERK: Number 146 ---

6 MR. BAILEY: 142 says she's in Orangeburg.

7 THE CLERK: I don't have that -- says she's
8 what?

9 MR. BAILEY: She states in Number 7, "How long
10 have you lived in" -- she's got Orangeburg County.

11 THE COURT: She lives in Orangeburg County.
12 She's excused.

13 MR. BAILEY: She shows a Harleyville address,
14 so I'm not sure what her ---

15 THE CLERK: I know her. She lives in
16 Harleyville.

17 THE COURT: Okay, so she lives in Dorchester
18 County? Then she's not excused.

19 THE CLERK: Number 146, Donna Jennings, a
20 doctor's excuse. "Donna Jennings is currently under
21 my care and has emotional problems that would make her
22 unable to perform the duties required to be a juror.
23 Please excuse her from this obligation."

24 THE COURT: Excused.

25 THE CLERK: Number 147, Lucretia D. Jennings,

1 a full-time student.

2 THE COURT: Transferred.

3 THE CLERK: Number 150, Ethel M. Felder Jones,
4 is child care. "I am writing this letter on behalf of
5 the above referenced individual. Mrs. Jones is the
6 mother of eleven children, the youngest of these
7 children being a one year old special needs child -- a
8 one year old special needs child. This child has
9 several congenital defects and requires extensive care
10 and neutering (nurturing)."

11 THE COURT: She's excused.

12 THE CLERK: Number 151, Larry B. Jones. "I've
13 just been on my new job for two weeks. I work in both
14 South Carolina and North Carolina. Please excuse me
15 from jury duty for this reason."

16 THE COURT: Okay, I would be inclined to
17 transfer him given his situation with his job. If he
18 just started the job, he might lose it if he's only
19 been there a week. Transfer him.

20 MR. RUNYON: No objections, Your Honor, from
21 the Defense.

22 THE COURT: No objection from the Defense?

23 MR. RUNYON: Yes, sir.

24 THE COURT: Thank you.

25 THE CLERK: Number 152, Frances S. Joyner. "I

1 am writing this to request a transfer for jury
2 service. My reason, no matter how small, is one of
3 great importance to my family and to me. For quite
4 some time now we've been planning on being out of town
5 during the Thanksgiving holidays to spend time with my
6 family in Tennessee and are returning to Charleston
7 the 2nd of December. Due to financial difficulty and
8 major problems, we've been unable to join a family
9 gathering for quite sometime now, two years to be
10 exact. I promised my fourteen year old daughter that
11 nothing would interfere with this trip. It is special
12 to us to be with the family for several reasons, but
13 the most important being that I will get to visit with
14 my eighty-five year old grandmother who I haven't seen
15 in two years. I am employed at the Medical University
16 of South Carolina and due to the nature of my job, I
17 am not allowed to take leave during the Christmas
18 holidays except the two days offered by the State, so
19 I cannot visit with my family during that time. I
20 would be so grateful if something could be worked out
21 to postpone jury service for me. I appreciate
22 anything that you can do for me and will look forward
23 to hearing from you."

24 THE COURT: Any objection to transferring that
25 juror?

1 MR. BAILEY: Your Honor, she apparently has a
2 problem just for that one day. If she can be put on a
3 panel that would come back maybe Tuesday. It's just
4 that Monday is her only problem.

5 MR. RUNYON: Your Honor, the Defense has no
6 objection to transferring her.

7 MR. BAILEY: I'm just concerned about running
8 short because we never know who is gonna show up and
9 how many are gonna get qualified.

10 THE COURT: All right. Tell her she needs to
11 be there Tuesday. We are excusing a lot of people.
12 So we won't run short, just tell her to be there.

13 THE CLERK: Number 159, Barbara S. Koester.
14 She has a record, has served time.

15 THE COURT: Excused.

16 MR. BAILEY: She has an embezzlement
17 conviction back in '83.

18 MR. RUNYON: I'm sorry, Madam Clerk, that
19 number again?

20 THE CLERK: 159.

21 Number 161, Jerry R. Krause. "I have been --
22 I have performed jury duty on 8 August 1994 and am
23 selected again for 2 December '96. Would you please
24 excuse me. My home phone is [REDACTED]."

25 THE COURT: He's excused. That's within three

1 years.

2 THE CLERK: Number 163, Laura L. Langland, has
3 left the County.

4 THE COURT: She's excused.

5 THE CLERK: 164, a full-time student, Carey E.
6 Langley.

7 THE COURT: Transferred.

8 THE CLERK: Number 167, James H. Logan, has
9 left the State. He's written a long letter.

10 THE COURT: But he lives out of the State
11 basically?

12 THE CLERK: Yes.

13 THE COURT: All right, he's excused.

14 THE CLERK: Number 168, Beverly Mack, a
15 medical problem. "I have had two surgeries on my
16 shoulders in 1992 and am still experiencing constant
17 pain. I'm waiting for a disability decision from
18 Social Security."

19 THE COURT: She's excused.

20 THE CLERK: Number 172, Chris D. Martin, a
21 full-time student. "I'm a full-time student at The
22 Citadel. I will be returning to school on the date I
23 am supposed to serve."

24 THE COURT: Transfer her.

25 THE CLERK: Number 173, Earl Maxwell, has left

1 the State.

2 THE COURT: He's excused.

3 THE CLERK: Number 174, Terry L. McCluster,
4 full-time student.

5 THE COURT: Transfer her.

6 THE CLERK: Number 175, Helen T. McKee, child
7 care. Do you want me to read the letter?

8 THE COURT: No, ma'am, that's not necessary.

9 Okay, she would be excused. She is the
10 primary caretaker of an eleven year old mentally
11 handicapped autistic son. She provides all the care
12 and transports him back and forth to class, and the
13 husband works out of town a good bit, so there's
14 nobody else to do that. She would be entitled to be
15 excused.

16 Any objection from the State?

17 MR. BAILEY: No, sir.

18 THE COURT: From the Defendant?

19 MR. RUNYON: None from the Defense, Your
20 Honor.

21 THE CLERK: Number 180, Mary J. Mikanovich, is
22 over sixty-five.

23 THE COURT: She's excused.

24 THE CLERK: Number 182 ---

25 MR. BAILEY: 181 is a full-time student.

1 THE COURT: 181 is a full-time student, would
2 be transferred.

3 THE CLERK: Number 182, Christian M. Milligan,
4 is a full-time student out of state.

5 THE COURT: Transfer.

6 THE CLERK: Number 185 ---

7 MR. BAILEY: 183.

8 THE CLERK: Yeah, okay, 183 left the state.

9 THE COURT: Excused.

10 THE CLERK: Number 186, Cleo M. Murray; she's
11 over sixty-five.

12 THE COURT: She's excused.

13 THE CLERK: Number 190, Bette C. Nettles. "I
14 live in Charlotte and work at Nevins Center. I
15 supervise mentally retarded and handicapped in
16 training for work."

17 THE COURT: She lives in Charlotte; she's
18 excused.

19 THE CLERK: Number 191, Darin L. Newton. "On
20 business that needs daily attention. Closing would
21 jeopardize business."

22 THE COURT: Not excused.

23 THE CLERK: Number 192, George -- that's not
24 right -- 192 is over sixty-five.

25 THE COURT: He's excused.

1 THE CLERK: Number 206, Debra K. Plocki, has
2 left the State.

3 THE COURT: She's excused.

4 THE CLERK: Number 207, Stacy L. Power, has
5 left the county.

6 THE COURT: Excused.

7 THE CLERK: Number 211, Joseph A. Ranchich,
8 III, has left the county.

9 THE COURT: He's excused.

10 THE CLERK: Number 213, Claire M. Raymond. "I
11 have to work to pay for child care of my niece. I am
12 the only means of support for myself and my niece."

13 THE COURT: She's not excused.

14 THE CLERK: Number 216. "Poor night vision
15 prohibits my driving after dusk. If the Court did not
16 adjourn by 5:00 P.M., I could not see to drive home
17 and I have no one else to drive me."

18 THE COURT: Not excused. We'll provide her
19 transportation if need be.

20 THE CLERK: Number 217, taking care of an ill
21 husband. "My husband is a disabled vet with multiple
22 sclerosis," I guess, ---

23 THE COURT: Yes.

24 THE CLERK: --- "in a wheelchair."

25 THE COURT: All right. Any objection to

1 excusing that juror?

2 MR. BAILEY: No.

3 MR. RUNYON: None from the Defense, Your
4 Honor.

5 THE COURT: She's excused.

6 THE CLERK: Number 219, Frank Rivers, is over
7 sixty-five.

8 THE COURT: He's excused.

9 THE CLERK: Number 220, trip schedule. "I
10 will be traveling abroad, France and England, as part
11 of my job."

12 THE COURT: Transfer.

13 THE CLERK: Number 222, Gael G. Roming. "I am
14 over sixty-five."

15 THE COURT: She's excused.

16 THE CLERK: Number 228 -- 225, excuse me, John
17 K. Saunders, ---

18 MR. BAILEY: 228?

19 THE CLERK: 225. "I'm hoping you will take
20 this letter before the Judge on my behalf. I've been
21 unemployed since September the 13th, 1996. The Court
22 of St. George requests that I be present on December
23 the 2nd. DuPont Corporation has offered me a
24 position. Unfortunately, the start date for this
25 position is on December the 2nd. Please ask the Judge

1 to excuse me from jury duty so I can catch up on my
2 financial obligations."

3 THE COURT: Any objection to transferring that
4 juror?

5 MR. BAILEY: None from the State.

6 MR. RUNYON: None from the Defense, Your
7 Honor.

8 THE COURT: Transfer him to June and also tell
9 him that if his job situation is still critical at
10 that time, we'll transfer him again, ---

11 THE CLERK: All right.

12 THE COURT: --- but he's transferred past this
13 term.

14 THE CLERK: Number 228, Michael D.
15 Schurlknight, has left the county.

16 THE COURT: He's excused.

17 THE CLERK: Number 234, Mary E. Shelley ---

18 MR. BAILEY: 23- -- we have 233.

19 THE CLERK: I don't have anything on that.

20 MR. BAILEY: Okay. 233 has got a 1994
21 conviction for conspiracy to violate the drug laws and
22 a 1995 habitual offender, got sixteen months.

23 THE COURT: Okay. He'd be excused. Any
24 objection?

25 MR. RUNYON: No objection, Your Honor.

REVIEW OF JUROR EXCUSES

1 THE CLERK: Number 234, Mary E. Shelley, is
2 over sixty-five.

3 THE COURT: She is excused.

4 THE CLERK: Number 238, Gladys L. Singleton,
5 is over sixty-five.

6 THE COURT: Excused.

7 THE CLERK: And 239 is also over sixty-five.

8 THE COURT: Excused.

9 THE CLERK: Number 245, Kenny S. Snider, work
10 related. "I'm responsible for daily medical coverage
11 of the South Carolina Stingray Hockey Team and medical
12 liability requires that I be present at all practices
13 and games."

14 THE COURT: Not excused.

15 THE CLERK: Number 247, Mary B. Spinharney.
16 "My health is very bad, going to two doctors. Also
17 beginning therapy weekly."

18 THE COURT: Excused.

19 THE CLERK: Number 249, served in 1994.

20 THE COURT: Excused.

21 MR. RUNYON: That was 249?

22 THE COURT: 249.

23 THE CLERK: Number 250, Sandra D. Stevenson,
24 small children -- has three children.

25 THE COURT: Okay, and doesn't work outside the

REVIEW OF JUROR EXCUSES

1 home it appears. Wait a minute -- she's a cashier.

2 THE CLERK: Wait a minute -- she does.

3 THE COURT: She does. She's not excused.

4 THE CLERK: Number 252, Mickey Stewart. "I
5 have a Five Hundred Dollar a month child support
6 payment. I have to work in order to be able to make
7 the payment."

8 THE COURT: Not excused.

9 THE CLERK: Number 261 -- we have a 256. 256
10 is over sixty-five.

11 THE COURT: Excused.

12 THE CLERK: 261. "My daughter" -- excuse.
13 Kathi W. Surell. My daughter was murdered in this
14 county and the case is still unsolved due to
15 negligence of the Sheriff's Department and the County
16 of Dorchester. I do not feel that I can be an
17 impartial or biased (sic) juror."

18 THE COURT: If she can't be fair and
19 impartial, she needs to be excused.

20 THE CLERK: Number 268, a death in the family.
21 "My husband's death October 1st, 1996."

22 THE COURT: Any objection to excusing that
23 juror?

24 MR. BAILEY: Not from the State, Your Honor.

25 MR. RUNYON: None from the Defense, Your

1 Honor.

2 THE COURT: She's excused.

3 THE CLERK: Number 270, over sixty-five.

4 THE COURT: What about 268?

5 THE CLERK: That was the one we just had.

6 MR. BAILEY: She was excused.

7 MR. RUNYON: That was the lady whose husband
8 died.

9 THE COURT: All right.

10 270 is over sixty-five; excused.

11 THE CLERK: Number 272, Loretta R. Vitalie,
12 has a doctor's excuse.

13 THE COURT: She's excused.

14 THE CLERK: Number 274, William L. Walden. I
15 have been out of work for an illness. I have just
16 recently returned and I am so far behind on my bills.
17 My wife doesn't work. We have two children. I just
18 cannot afford being out of work. Thank you. William
19 Walden."

20 THE COURT: Based on what we've done with
21 other jurors who have stated similar work problems,
22 I'd be inclined to transfer him for about six months
23 and not make him come to service on this jury.

24 MR. BAILEY: No objection.

25 MR. RUNYON: No objection, Your Honor.

REVIEW OF JUROR EXCUSES

1 THE COURT: Transfer him to June, please,
2 ma'am.

3 THE CLERK: Number 278, has a Florence
4 address.

5 THE COURT: Then he would be excused. He
6 lives out of the county.

7 THE CLERK: 281 is over sixty-five.

8 MR. BAILEY: 279 says they live in Berkeley
9 County.

10 THE CLERK: 279, Berkeley? 279, Mr. Bailey,
11 her and her daughter has been summoned for December
12 Court. I think the daughter has been summoned for
13 December the 9th and the letter stated that she and
14 her daughter had been summoned, so this is for the
15 9th. We haven't received anything from Cecelia.

16 MR. BAILEY: Okay, but the note says that both
17 of them live in Berkeley County.

18 THE CLERK: Okay, so Berkeley County, you want
19 to excuse?

20 THE COURT: She'd be excused.

21 THE CLERK: Okay. That's Number 279.
22 281, over sixty-five.

23 THE COURT: Excused.

24 THE CLERK: 285 ---

25 MR. BAILEY: 284 -- hold on one second -- has

1 a crack distribution conviction in 1992.

2 THE COURT: Excused. Any objection?

3 MR. RUNYON: No objection, Your Honor.

4 THE COURT: Thank you.

5 THE CLERK: Number 285 has left the State.

6 THE COURT: Excused.

7 THE CLERK: Number 286, over sixty-five.

8 THE COURT: Excused.

9 THE CLERK: Number 287, Hollis R. Williams,
10 left the county.

11 THE COURT: Excused.

12 THE CLERK: He has a transportation problem.

13 THE REPORTER: Which number?

14 THE CLERK: 288. Kirk D. Williams.

15 THE COURT: Have the Sheriff pick him up.

16 THE CLERK: Call Sheriff; okay.

17 Number 296, Carol S. Wyley, small children.

18 THE COURT: Okay. She appears to work six
19 hours a week, but that may be home -- work at home.
20 Well, she says she's a receptionist and a bookkeeper
21 six hours a week, so she's not full-time employed
22 outside the home. She'd be entitled to be excused
23 based on the children under seven.

24 THE CLERK: She is excused.

25 MR. BAILEY: Number 294 has a 1990 burglary

REVIEW OF JUROR EXCUSES

1 conviction.

2 THE COURT: Excused.

3 THE CLERK: Number 298, temporarily living out
4 of the State.

5 THE COURT: Excused.

6 THE CLERK: That's it.

7 THE COURT: Do you have any idea how many
8 jurors that leaves us that might show up?

9 THE CLERK: I can quickly count them.

10 THE COURT: The reason I'm asking is to find
11 out whether we need to summon some more.

12 THE CLERK: I'll count them.

13 THE COURT: Okay.

14 While she's counting, anything further from
15 the State?

16 MR. BAILEY: No, sir.

17 THE COURT: From the Defendant?

18 MR. RUNYON: Just housekeeping, Your Honor.

19 For the record, the Defense interposes no objection or
20 exceptions to the excusing of any of the jurors that
21 have been excused by the Court to which we have not
22 entered our consent or non-objection so that the
23 record is clear on that question. We have no
24 difficulty with the Court having excused any of the
25 jurors that the Court has excused.

1 THE COURT: Okay.

2 MR. RUNYON: We would ask, and I know that the
3 Clerk will do it, but we would ask that since this is
4 a capital case, that all of these jury records be kept
5 intact and a part of the record for any future
6 appellate use or post conviction relief use in this
7 area.

8 THE COURT: All right, thank you. That
9 request is granted. Keep those intact, please.

10 MR. BAILEY: Your Honor, in the event we don't
11 get back together between now and December the 2nd,
12 we'll need to do a short Blair Hearing, and when would
13 you like to do that?

14 THE COURT: That ought to be done after the
15 jury is selected, so let's get jury selection done and
16 then we'll do that.

17 MR. RUNYON: We have -- our count indicates
18 approximately ninety-five, Your Honor.

19 MR. BAILEY: Excused?

20 MR. RUNYON: No, ninety-five -- ninety-five
21 excused, yes.

22 THE COURT: Ninety-five excused, okay, so that
23 leaves us over two hundred then.

24 MR. RUNYON: That leaves us two hundred and
25 five.

1 THE CLERK: What is happening, we don't have a
2 lot of responses -- I have a hundred and three, and
3 we've sent -- where's our little paper of how many
4 we've sent? We had fifty-three with no responses and
5 thirty-six has been sent to the Sheriff's Department,
6 so I counted a hundred and three a while ago.

7 THE COURT: So we've got a hundred and three
8 jurors that appear to be the ones who are going to
9 show up at this time. That may increase or decrease.
10 That ought to be enough.

11 MR. RUNYON: I would agree, Your Honor. I
12 would not like to get in the position of being this
13 close to trial and drawing additional jurors for
14 whatever purpose and then having to do the research
15 and what have you.

16 THE COURT: Well, we may be put in a position
17 of drawing jurors when we get there. We'll just have
18 to see how the number goes.

19 MR. RUNYON: Yes, sir.

20 THE COURT: We don't need to do it right now,
21 though.

22 Okay, I'll expect you to keep me advised, Mr.
23 Leiendecker or Mr. Runyon of Mr. Leiendecker's
24 situation in regard to your grandfather, please.

25 MR. LEIENDECKER: Yes, sir, Your Honor.

1 THE COURT: All right, anything further?

2 MR. BAILEY: Not from the State.

3 MR. RUNYON: Not from the Defense.

4 THE COURT: The jury will be in at ten o'clock
5 that Monday morning.

6 CONCLUSION OF TRANSCRIPT OF RECORD.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

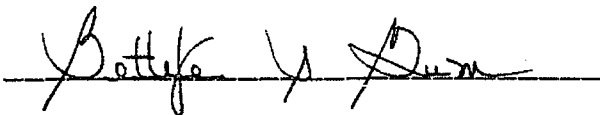
CERTIFICATE OF REPORTER

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF Horry)

3
4 I, the undersigned Bettye S. Gum, Official
5 Court Reporter for South Carolina Court
6 Administration, do hereby certify that the foregoing
7 is a true, accurate and complete Transcript of Record
8 of all the proceedings had and evidence introduced in
9 the hearing of the captioned case, relative to appeal,
10 in the Court of General Sessions for Dorchester
11 County, South Carolina.

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

14
15
16 December 4, 1997

17
18 

19 BETTYE S. GUM, CCR-CVR-CM

20 Official Reporter
21
22
23
24
25

WITNESSES

DOCKET #: 94GS18-0047

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1994

THE STATE

vs.

Timotny Rogers

ARREST WARRANT #:

94DCR04

Arrested on November 25, 1992

INDICTMENT FOR

0159

CRIMINAL SEXUAL CONDUCT WITH MINOR

SECOND DEGREE (16-3-655)

ACTION OF GRAND JURY

Foreman:

Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

1100

STATE OF SOUTH CAROLINA)
)
County of Dorchester)

INDICTMENT #94GS18-0047

At a Court of General Sessions, convened on January 24, 1994,
the Grand Jurors of Dorchester County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT WITH MINOR
SECOND DEGREE (16-3-655)

That Timothy Rogers did in Dorchester County at various times during the
month of August, 1992, wilfully and unlawfully engage in criminal sexual
conduct in the second degree in that Timothy Rogers engaged in sexual battery,
to wit: sexual intercourse with Assault Victim [redacted] and that the said Assault Victim
[redacted] was 15 years old and the defendant was older than her.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR Walt Ray

WITNESSES

DOCKET #: 94GS18-0048

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1994

THE STATE

vs.

Timothy Rogers

ARREST WARRANT #:

94DOR05

Arrested on November 25, 1992

INDICTMENT FOR

0159

CRIMINAL SEXUAL CONDUCT WITH MINOR

SECOND DEGREE (16-3-655)

ACTION OF GRAND JURY

Foreman:

Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

At a Court of General Sessions, convened on January 24, 1994,
the Grand Jurors of Dorchester County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT WITH MINOR
SECOND DEGREE (16-3-655)

That Timothy Rogers did in Dorchester County at various times during the
month of September, 1992, wilfully and unlawfully engage in criminal sexual
conduct in the second degree in that Timothy Rogers engaged in sexual battery,
to wit: sexual intercourse with "Assault Victim" and that the said Assault Victim
[redacted] was 15 years old and the defendant was older than her.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR Walt Bailey

XVII. REPORT OF THE TRIAL JUDGE
OF THE
COURT OF GENERAL SESSIONS FOR DORCHESTER COUNTY,
SOUTH CAROLINA*

The State v. TIMOTHY D. ROGERS

Docket No. 93-GS-18-101

A. Data Concerning the Defendant**

1. Name ROGERS, TIMOTHY, DION 2. Date of Birth [REDACTED]
Last First Middle No. Day Yr.

3. Social Security Number [] [REDACTED] [] Unknown

4. Sex: M [X] F [] 5. Race: W [] B [X] Other (Specify): _____

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 GED 1989
(Circle One) (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes [X] No []

If so, is it

a. Below Average []
b. Average [X]
c. Above Average []

8. Was a psychiatric evaluation performed? Yes [X] No []

a. If performed,*** by whom? THOMAS W. BEHRMANN, M.D.

b. If performed, is defendant:
(1) Able to distinguish right from wrong? Yes [X] No []
(2) Able to cooperate intelligently in his own defense? [X] []

c. If performed, were character or behavior disorders found? [X] []
(If answer is yes please elaborate)

POLYSUBSTANCE ABUSE

RECEIVED
APR 19 1994
COURT

Attach separate sheets where insufficient space provided for response.

**Separate report must be submitted for each defendant sentenced to death.

***If more than one evaluation was performed, attach a separate response for each evaluation.

9. Does the defendant have a record of prior convictions?

Yes [X] No []

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

<u>Offense</u>	<u>Date of Offense</u>	<u>Sentence Imposed</u>
1. PLEASE SEE THE DEFENDANT'S RECORD ATTACHED HERETO.		
2. _____		
3. _____		
4. _____		
5. _____		
6. _____		

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [X] Nonresident []

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on DECEMBER 8, _____, 19 92.

2. Was a preliminary hearing requested? Yes [] No [X]

3. Was a preliminary hearing conducted? Yes [] No [X]

4. The defendant was indicted at the FEBRUARY, 19 93
Term of the Court of General Sessions for
DORCHESTER County, South Carolina.

5. List each charge alleged in the indictment.

- a. MURDER.
- b. _____
- c. _____
- d. _____
- e. _____
- f. _____

6. The defendant was arraigned on AUGUST 17, 1993.
- a. If not arraigned, did the defendant waive arraignment?
Yes No N/A
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?
Yes No
- a. If not, did the defendant waive this right to a three-day sight of the indictment?
Yes No N/A
8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?
Yes No
9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?
Yes No
10. Did the defendant move for a change of venue?
Yes No
- a. If so, was the venue changed?
Yes No
- (1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for DORCHESTER County, South Carolina, on FEBRUARY 28, 1994, during the FEBRUARY, 1994 Term of that Court.
2. How did the defendant plead? Guilty
Not Guilty
3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:
- a. The offense(s) of which the defendant was convicted:
- (1) MURDER
- (2) _____

- (3) _____
- (4) _____
- (5) _____

b. The offense(s) of which the defendant was acquitted:

- (1) N/A
- (2) _____
- (3) _____
- (4) _____
- (5) _____

4. On what date and at what time did the conviction(s) occur?

MARCH 3, 1994, at

APPROXIMATELY 6:00 o'clock, P.m.

D. Data Relating to Sentencing Proceeding*

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury the trial judge
a new jury a new trial judge

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

MARCH 5, 1994, at

APPROXIMATELY 9:00 o'clock, a.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes No N/A

b. If conducted before the trial judge or a new trial judge, N/A

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes No

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonpre-judicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?
 Yes No N/A

(b) On what date and at what time was the sentencing proceeding held?

_____, 19____, at _____ N/A
 _____ o'clock, _____ m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes No

N/A

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

N/A

_____, 19_____.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held? N/A

_____, 19_____.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes No N/A

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	<u>Instructed</u>	<u>Found</u>
a. Murder was committed while in the commission of		
(1) Rape	<input type="checkbox"/>	<input type="checkbox"/>
(2) Assault with intent to ravish	<input type="checkbox"/>	<input type="checkbox"/>
(3) Kidnapping	<input type="checkbox"/>	<input type="checkbox"/>
(4) Burglary	<input type="checkbox"/>	<input type="checkbox"/>
(5) Robbery while armed with a deadly weapon	<input type="checkbox"/>	<input type="checkbox"/>
(6) Larceny with use of a deadly weapon	<input type="checkbox"/>	<input type="checkbox"/>
(7) Housebreaking	<input type="checkbox"/>	<input type="checkbox"/>
(8) Killing by poison	<input type="checkbox"/>	<input type="checkbox"/>
b. Murder was committed by a person with a prior record of conviction for murder.	<input type="checkbox"/>	<input type="checkbox"/>

- | | <u>Instructed</u> | <u>Found</u> |
|---|-------------------------------------|-------------------------------------|
| c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value. | <input type="checkbox"/> | <input type="checkbox"/> |
| e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty. | <input type="checkbox"/> | <input type="checkbox"/> |
| f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person. | <input type="checkbox"/> | <input type="checkbox"/> |
| g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties. | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| THE MURDER OF A CHILD 11 YEARS OF AGE OR UNDER (X) (X) | | |
| 3. Was (were) the aggravating circumstance(s) found supported by the evidence? | | |
| Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> | | |
| 4. Was there evidence of mitigating circumstances? | | |
| Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> | | |
| 5. If so, which of the following mitigating circumstances was in evidence? | | |
| a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. | | <input type="checkbox"/> |
| b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. | | <input type="checkbox"/> |
| c. The victim was a participant in the defendant's conduct or consented to the act. | | <input type="checkbox"/> |
| d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. | | <input type="checkbox"/> |
| e. The defendant acted under duress or under the domination of another person. | | <input type="checkbox"/> |
| f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. | | <input checked="" type="checkbox"/> |

- g. The age or mentality of the defendant at the time of the crime(s). []
- h. The defendant was provoked by the victim into committing murder. []
- i. The defendant was below the age of eighteen at the time of the crime(s). []
- j. Other. []

Please explain if (j) is checked.

- 6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances? Yes [X] No []
- 7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances? Yes [X] No []
- 8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor? Yes [X] No []

E. Data Relating to Offense(s)

- 1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was
 - a. Under the influence of alcohol? Yes [X] No []
 - b. Under the influence of narcotics or other dangerous drugs? Yes [] No [X]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [X] No []

a. If so, check each weapon used

- (1) Poison []
- (2) Pistol (SEMI AUTOMATIC) [X]
- (3) Rifle []
- (4) Shotgun []
- (5) Blunt instrument (Describe) []
- (6) _____ (Describe) []
- (7) Sharp instrument (Describe) []
- (8) Motor vehicle []
- (9) Other (Describe) []
- _____ []

3. Cause of death. GUNSHOT WOUND TO HEAD.

- 4. County in which the body was found. *DORCHESTER
- 5. County in which the murder occurred if different from county in which the body was found. *VICTIM WAS SHOT IN DORCHESTER COUNTY BUT DIED THE NEXT DAY IN CHARLESTON COUNTY

F. Data Relating to Victim

- 1. What was the victim's age? 9
- 2. Was the victim related by blood or marriage to the defendant?
Yes [] No [X]
- a. If so, what was the relationship? _____
- 3. Was the victim the same race as the defendant? Yes [] No [X]
- 4. Was the victim the same sex as the defendant? Yes [] No [X]
- 5. Was the victim physically harmed or tortured? Yes [] No [X]

If yes, state nature of harm or extent of torture:

C Data Collection 4/24/94 Council

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

<u>Name</u>	<u>Mailing Address</u>
a. WILLIAM L. RUNYON, ESQ.	ONE CARRIAGE LANE BUILDING B, SUITE 203 CHARLESTON, SC, 29407
b.	
c. MARK LEIENDECKER, ESQ.	500 OAKBROOK LANE, SUITE D SUMMERVILLE, SC, 29485
d.	

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant

Appointed by court

a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

<u>Name</u>	<u>Date retained or appointed</u>	<u>Years experience as attorney</u>	<u>Years felony trial experience</u>
(1) WILLIAM L. RUNYON	DEC. 15, 1992	27 YEARS	23 YEARS
(2) MARK LEIENDECKER	DEC. 17, 1993	12 YEARS	8 YEARS
(3)			
(4)			

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office

MARK LEIENDECKER

4. Did each counsel serve throughout the trial?

Yes No

a. If not, explain in detail.

I. Chronology of Case

		<u>Elapse Date</u>
1.	Date of offense	<u>NOVEMBER 25, 1992</u>
2.	Date of arrest	<u>DECEMBER 8, 1992</u> 13 DAYS
3.	Date trial began	<u>FEBRUARY 28, 1994</u> 446 DAYS
4.	Date sentence imposed	<u>MARCH 5, 1994</u> 5 DAYS
5.	Date post trial motions ruled on	<u>NONE</u>
6.	Date trial judge's report completed	<u>MARCH , , 1994</u>
7.	*Date received by Supreme Court	<u></u>
8.	*Date sentence review completed	<u></u>
9.	*Total elapsed days	<u></u>

*To be completed by Supreme Court

Andrew B. Gray
 Judge, Court of General Sessions
Dorchester County,
 South Carolina

April 1, 1994
 Date

TIMOTHY D. ROGERS

CRIMINAL RECORD

OFFENSE DATE	CHARGE/ INDICTMENT #	COURT	SENTENCE
11/22/85	TRESPASSING AFTER NOTICE WARRANT #B468538	SUMMERVILLE MUNICIPAL COURT	\$216 FINE OR 30 DAYS
7/27/86	CARRYING A PISTOL INDICTMENT #86-GS-18-388	COURT OF GENERAL SESSIONS FOR DORCHESTER CO.	6 MONTHS IMPRISONMENT OR FINE OF \$350
4/22/87	POSSESSION OF MARIJUANA WARRANT #B792983	SUMMERVILLE MUNICIPAL COURT	FORFEITED \$216 BOND
7/31/87	SHOPLIFTING WARRANT #B873643	SUMMERVILLE MUNICIPAL COURT	FORFEITED \$218 BOND
3/26/88	RESISTING ARREST WARRANT #C071539	SUMMERVILLE MUNICIPAL COURT	FORFEITED \$118 BOND
12/20/88	GRAND LARCENY OF A VEHICLE INDICTMENT #89-GS-18-135	COURT OF GENERAL SESSIONS FOR DORCHESTER CO.	INDETERMINATE SENTENCE NOT TO EXCEED 6 YEARS IMPRISONMENT
9/14/90	POSSESSION OF COCAINE INDICTMENT #91-GS-18-129	COURT OF GENERAL SESSIONS FOR DORCHESTER CO.	45 DAYS IMPRISONMENT
8/92	CRIMINAL SEXUAL CONDUCT WITH A MINOR, 2ND DEGREE INDICTMENT #94-GS-18-047	COURT OF GENERAL SESSIONS FOR DORCHESTER CO.	7 YEARS IMPRISONMENT
9/92	CRIMINAL SEXUAL CONDUCT WITH A MINOR, 2ND DEGREE INDICTMENT #94-GS-18-048	COURT OF GENERAL SESSIONS FOR DORCHESTER CO.	7 YEARS IMPRISONMENT CONCURRENT WITH PRIOR 7 YEAR SENTENCE

Margie Cain McKinick
Clk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 93-GS-18-101

STATE OF SOUTH CAROLINA)

-versus-

DEFENDANT'S REQUESTS TO
CHARGE #1

TIMOTHY ROGERS,
Defendant.

The Defendant by and through Counsel hereby requests that the jury be charged as follows:

1. To charge that should the jury sentence the Defendant to a life sentence, his sentence shall be for life without the possibility of parole. In short, if sentenced to life, he will never be eligible for parole. State v. Rogers, S.C. Supreme Court Opinion #24366; Simmons v. South Carolina, 114 S. Ct. 2187 (1994); State v. Southerland, 447 S.E. 2d 862 (1994).

2. To charge as mitigating circumstances the statutory mitigating circumstances as set out in Title 16-3-20, Code of Laws of South Carolina 1976 as amended, and specifically (b)1, 2 (emotional disturbance).

3. To charge the jury as to the mitigating circumstance of intoxication.

4. To charge the jury

"... In the event that all members of the jury cannot agree on a recommendation as to whether or not the death sentence should be imposed the trial judge shall sentence

the Defendant to life imprisonment" Title 16-3-20(c), Code of
Laws of South Carolina 1976 as amended.

WILLIAM M. RUNYON, JR.
MARK A. LEIENDECKER
Attorneys for the Defendant

By: 

Dated at St. George, South Carolina
this 4th day of December, 1996.

Page two of two

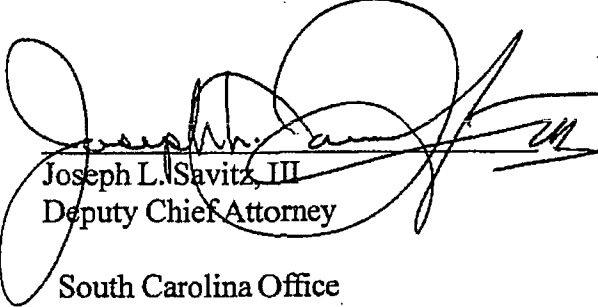
1116

TOTAL P. 04

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 29, 1998



Joseph L. Savitz, III
Deputy Chief Attorney

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
COURT OF GENERAL SESSIONS

HONORABLE CHARLES WILLIAM WHETSTONE, JR.
CIRCUIT COURT JUDGE

CASE NO. 93-GS-18-101

THE STATE,

Respondent,

v.

TIMOTHY D. ROGERS,

Appellant.

NOTICE OF APPEAL

The Appellant, TIMOTHY D. ROGERS, appeals his sentence of death imposed by the Honorable Charles William Whetstone, Jr. on December 5, 1996. The sentence was imposed on December 5, 1996 in open court upon the return of a verdict by a jury.

MARK LEIENDECKER
WILLIAM L. RUNYON, JR.
Attorneys for the Appellant at Trial

By: 

WILLIAM L. RUNYON, SR.
One Carriage Lane
Bldg. B, Suite 203
Charleston, South Carolina 29407
(803) 571-3515

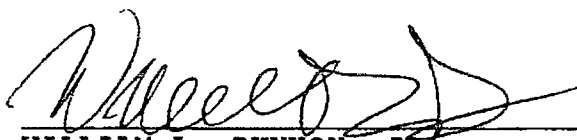
Other Counsel of Record:

Hon. Walter M. Bailey, Jr.
Solicitor, Dorchester County
134 E. Richardson Avenue
Summerville, SC 29483

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF MAILING
COUNTY OF DORCHESTER)

I hereby certify that I am an attorney for the Appellant, TIMOTHY D. ROGERS, and that on the 6th day of December, 1996, in accordance with the Statutory Law of South Carolina, I made due and proper service of the attached APPEAL FROM DORCHESTER COUNTY COURT OF GENERAL SESSIONS upon Hon. Walter M. Bailey, Jr., Solicitor, Dorchester County, by mailing a copy to him by way of the United States Mail, in an envelope with adequate first-class postage duly affixed and a return address clearly indicated thereon and addressed to:

Hon. Walter M. Bailey, Jr.
Solicitor, Dorchester County
134 E. Richardson Avenue
Summerville, SC 29483



WILLIAM L. RUNYON, JR.
Attorney for Timothy D. Rogers

Dated this 6th day of December, 1996.
at Charleston, South Carolina

COPY

WILLIAM L. RUNYON, JR.

*Attorney at Law*ONE CARRIAGE LANE
BUILDING B, SUITE 203
CHARLESTON, SOUTH CAROLINA 29407

FACSIMILE: (803) 766-5085

TELEPHONE: (803) 571-3515

December 6, 1996

CERTIFIED MAIL:R.R.RHon. Clyde N. Davis, Jr.
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Appeal of Mr. Timothy D. Rogers

Dear Mr. Clerk:

Enclosed please find enclosed the Notice of Intent to Appeal in this matter, which is an appointed death penalty case. The Proof of Service is enclosed herewith.

By copy hereof we are filing all documents contemporaneously with the Honorable Clerk of Court for Dorchester County.

Thanking you for your courtesy and cooperation, I remain

Sincerely,


William L. Runyon, Jr.WLR, Jr.:lg
enclosures as statedcc: Mark Leiendecker, Esquire
Mr. Timothy D. Rogers, Edisto Unit, S.C.D.C.
Hon. Walter M. Bailey, Jr. (via Certified Mail)
Hon. Margie Cairn McKissick, Clerk of Court, Dorchester County
(via Certified Mail)
Appellate Defense

THE STATE
VS.

CASE NO. 93-MS-18-101
TICKET/WARRANT NO. _____
COURT REPORTER: Karen Muller

Timothy D. Rogers

THE DEFENDANT IS PUT TO THE BAR AND ARRAIGNED AND, UPON HIS/HER ARRAIGNMENT, WAIVES PRESENTMENT TO THE GRAND JURY AND PLEADS GUILTY AS CHARGED

Murder - Trial

ATTEST:

Signature of Defendant

The defendant, Timothy D. Rogers, is committed to the State Dept. of Corrections/Dorchester County Detention Center for a term of _____ days/months/years and/or to pay a fine of \$ _____; provided the sentence be suspended upon the service of _____ days/months/years and/or payment of \$ _____ plus pay/waive costs and assessment as applicable, the balance suspended with probation for _____ months/years.

Special conditions: Death Penalty to be imposed February 7, 1997 between 6 am & 6 pm
See attached sheet

Restitution (YES/NO) _____ Total \$ _____
Weekly/Monthly \$ _____
to Clerk for _____

Public Defender Fund \$ _____

Date: 12/5/96

Charles W. Whitlow
Presiding Judge, First Judicial Circuit

Fine	\$
CC 62%	\$
Restitution	\$
Public Defender	\$
Extra Fee	\$
Total Fines and Costs	\$ <u>-0-</u>

INFORMATION ON DEFENDANT

Age: S.S. No.
M F Married Single
Date of birth:
Attorney:

ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER'S CHECK. WE CANNOT ACCEPT PERSONAL CHECKS.

Margie Carn McKissick
MARGIE CARN MCKISSICK
DORCHESTER COUNTY CLERK OF COURT
P.O. BOX 158
ST. GEORGE, SC 29477

Clerk of Court/Deputy Clerk
White copy to Clerk
Canary to Detention Center
Pink to Defendant
Goldenrod to Probation

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

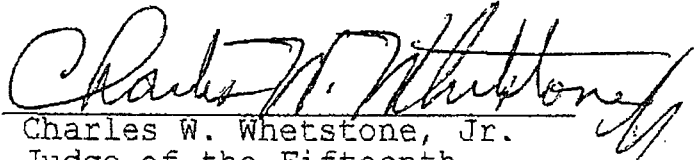
IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 93-GS-18-101

State of South Carolina,)
v.)

AFFIRMATION

Timothy D. Rogers,)
Defendant.)

Prior to the imposition of the Death Penalty, I 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.



Charles W. Whetstone, Jr.
Judge of the Fifteenth
Judicial Circuit

St. George, South Carolina

December 5, 1996

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
State of South Carolina)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 93-GS-18-101

v.

RECOMMENDATION OF SENTENCE
OF DEATH PENALTY

Timothy D. Rogers,

Defendant.

WE, THE JURY, in the above case, find beyond a reasonable doubt the existence of the following statutory aggravating circumstance or circumstances:

(ii) The murder of a child eleven years or younger.

We recommend to the Court that the Defendant, TIMOTHY D. ROGERS, be sentenced to death.

William A. Helms
Foreman

Philip M. Bates

Anna K. Miller

Cynthia K. Howard

Dorlene H. Pisate

Phillip L. O'Neal

Charles H. Bame Jr.

W. F. Baldwin

Jean H. Farnham

Erick Williams

Carolyn R. White

Deborah L. Owens

St. George, South Carolina

December 5, 1996

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
State of South Carolina)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 93-GS-18-101

JURY'S VERDICT ON PROOF OF
AGGRAVATING CIRCUMSTANCES

v.

Timothy D. Rogers,
Defendant.

_____ (a) WE, THE JURY in the above entitled case, find no
statutory aggravating circumstances.

Foreman

✓ _____ (b) WE, THE JURY in the above entitled case, find beyond
a reasonable doubt the following statutory
aggravating circumstance(s):

i:) The murder of a child eleven years of
age or younger.

William F. Helwig
Foreman

Wardene H. Piggs

Charles H. ...

Dean ...

Luelyn B. White

Philip ...

Guthrie Howard

Phillip ...

Walt ...

Kirk Williams

Richard ...

Gina K. Miller


December 5, 1996

St. George, South Carolina

SENTENCING
DEATH PENALTY

Timothy D. Rogers, DO YOU HAVE ANYTHING TO SAY BEFORE I IMPOSE THE SENTENCE WITH REGARD TO THE INDICTMENT FOR MURDER?

AS TO THE INDICTMENT FOR MURDER, I FIND AS AN AFFIRMATIVE FACT THAT THE DEATH PENALTY WAS WARRANTED UNDER THE EVIDENCE OF THIS CASE AND WAS NOT A RESULT OF PREJUDICE, PASSION, OR ANY OTHER ARBITRARY FACTOR. THEREFORE, IT IS THE SENTENCE OF THE COURT THAT THE DEFENDANT, *Timothy D. Rogers*, BE RETURNED TO THE DEPARTMENT OF CORRECTIONS TO BE KEPT THERE IN CLOSE AND SAFE CONFINEMENT UNTIL THE 6th DAY OF February, 1997, BETWEEN THE HOURS OF 6:00 O'CLOCK A.M. AND 6:00 O'CLOCK P.M., WHEN YOU SHALL SUFFER DEATH BY ELECTROCUTION OR LETHAL INJECTION.


Charles W. Whetstone, Jr.
Judge of the Fifteenth Circuit

December 5, 1996

St. George, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Charles William Whetstone, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY D. ROGERS,

APPELLANT.

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Deputy Chief Attorney

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i
TABLE OF AUTHORITIES ii
STATEMENT OF ISSUE ON APPEAL..... 1
STATEMENT OF THE CASE.....2
STATEMENT OF FACTS3
ARGUMENT.....4
CERTIFICATE OF COUNSEL10

TABLE OF AUTHORITIES**CASES**

<u>Commonwealth v. Cross</u> , 508 Pa. 322, 496 A.2d 1144 (1985)	8
<u>Doe by Doe v. Greenville Hosp. System</u> , 323 S.C. 33, 448 S.E.2d 564 (S.C. App. 1994)	4
<u>Gaster v. Evatt</u> , ___ S.C. ___, 483 S.E.2d 197 (1997)	4, 6
<u>State v. Adams</u> , 277 S.C. 115, 283 S.E.2d 582 (1981)	8
<u>State v. Bellamy</u> , 293 S.C. 103, 359 S.E.2d 63 (1987)	7
<u>State v. Caldwell</u> , 300 S.C. 494, 388 S.E.2d 816 (1990)	8
<u>State v. Kirkland</u> , 282 S.C. 14, 317 S.E.2d 444 (1984)	6
<u>State v. Munn</u> , 292 S.C. 497, 357 S.E.2d 461 (1987)	6
<u>State v. Pierce</u> , 289 S.C. 430, 346 S.E.2d 707 (1986)	7
<u>State v. Rogers</u> , 320 S.C. 520, 466 S.E.2d 360 (1996)	2, 3, 5
<u>State v. Walls</u> , 342 N.C. 1, 463 S.E.2d 738 (1995)	8
<u>State v. Wilson</u> , 322 N.C. 117, 367 S.E.2d 589 (1988)	8
<u>State v. Young</u> , 305 S.C. 850, 409 S.E.2d 352 (1991)	8

OTHER AUTHORITIES

S.C. Code Section 16-1-60	6, 8
S.C. Code Section 16-3-20	passim
S.C. Code Section 16-3-651	9
S.C. Code Section 16-3-652	8

S.C. Code Section 16-3-653.....	9
S.C. Code Section 16-3-654.....	9
S.C. Code Section 16-3-655.....	6, 7, 8
S.C. Code Section 17-25-45.....	8
S.C. Code Section 24-21-640.....	7

STATEMENT OF ISSUE ON APPEAL

The judge erred by refusing to instruct the jury, under S.C. Code Section 16-3-20(C)(b)(1), to consider whether appellant had "no significant history of prior criminal conviction involving the use of violence against another person."

STATEMENT OF THE CASE

A Dorchester county grand jury indicted Timothy Rogers for murder on February 8, 1993. Judge Luke N. Brown, Jr., presided at appellant's initial trial, which was held February 28 to March 5, 1994. The jury found appellant guilty of murder and sentenced him to death.

On appeal, the Supreme Court vacated the death sentence and remanded for resentencing. See State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996). Judge Charles W. Whetstone, Jr., presided at resentencing, which was held December 2 through 5, 1996. Once again, the jury sentenced appellant to death.

STATEMENT OF FACTS

The basic facts of this case are recounted in State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996).

ARGUMENT

The judge erred by refusing to instruct the jury, under S.C. Code Section 16-3-20(C)(b)(1), to consider whether appellant had "no significant history of prior criminal conviction involving the use of violence against another person."

[assault victim], fifteen, was with appellant, twenty-three, the day he shot and killed Stephanie B [REDACTED]. According to [assault victim] they had been "going together" for "[a] good while." ROA p. 647, lines 19-25; ROA p. 874, lines 11 and 12. In fact, she was one month pregnant with their son, who was born the following August. ROA p. 648, lines 1-4; ROA p. 913, line 24 - p. 914, line 3.

Appellant and [assault victim]'s relationship was entirely consensual and nonviolent. ROA p. 874, lines 5-7. However, "[a]s a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person." Doe by Doe v. Greenville Hosp. System, 323 S.C. 33, 448 S.E.2d 564, 566 (S.C. App. 1994). S.C. Code Section 16-3-655(3) thus provides:

A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

For purposes of parole eligibility, a violation of this statute is considered a violent crime under S.C. Code Section 16-1-60. See Gaster v. Evatt, ___ S.C. ___, 483 S.E.2d 197 (1997).

ARGUMENT

The judge erred by refusing to instruct the jury, under S.C. Code Section 16-3-20(C)(b)(1), to consider whether appellant had "no significant history of prior criminal conviction involving the use of violence against another person."

assault victim, fifteen, was with appellant, twenty-three, the day he shot and killed Stephanie B [REDACTED]. According to assault victim they had been "going together" for "[a] good while." ROA p. 647, lines 19-25; ROA p. 874, lines 11 and 12. In fact, she was one month pregnant with their son, who was born the following August. ROA p. 648, lines 1-4; ROA p. 913, line 24 - p. 914, line 3.

Appellant and assault victim's relationship was entirely consensual and nonviolent. ROA p. 874, lines 5-7. However, "[a]s a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person." Doe by Doe v. Greenville Hosp. System, 323 S.C. 33, 448 S.E.2d 564, 566 (S.C. App. 1994). S.C. Code Section 16-3-655(3) thus provides:

A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

For purposes of parole eligibility, a violation of this statute is considered a violent crime under S.C. Code Section 16-1-60. See Gaster v. Evatt, ___ S.C. ___, 483 S.E.2d 197 (1997).

On January 24, 1994, the solicitor obtained two indictments charging appellant with violating Section 16-3-655(3) by having sex with "assault victim" at various times" during the months of August and September 1992. ROA p. 1100-1103. Appellant pleaded guilty to the charges, which rendered him ineligible for parole when later convicted of the B [REDACTED] murder. See State v. Rogers and S.C. Code Section 24-21-640.

At resentencing, the parties stipulated appellant's prior record:

- (1) November 1985: trespassing;
- (2) July 1986: carrying a pistol;
- (3) April 1987: possession of marijuana;
- (4) July 1987: shoplifting;
- (5) March 1988: resisting arrest;
- (6) December 1988: grand larceny of a vehicle;
- (7) September 1990: possession of cocaine; and
- (8) the two 1992 second degree criminal sexual conduct convictions.

ROA p. 754, line 11 - p. 755, line 7.

None of these crimes is inherently violent. Defense counsel asked the judge to instruct the jury to consider, as a mitigating circumstance under S.C. Code Section 16-3-20(C)(b)(1), whether appellant had "no significant history of prior criminal conviction involving the use of violence against another person." ROA p. 793, lines 6-11. The solicitor objected and the judge agreed, stating, "CSC 2nd is clearly a violent offense. That's violence against another person. [Since he] has a significant prior record with two

instances of that on his record, he's not entitled to the charge." ROA p. 793, line 15 - p. 794, line 9. Accordingly, the judge did not instruct the jury on that particular statutory mitigating circumstance. ROA p. 1009, lines 12-19.

He erred by refusing to allow the jury to determine whether appellant's prior record, including the two criminal sexual conduct convictions, was mitigating under Section 16-3-20(C)(b)(1). Criminal sexual conduct with a minor under Section 16-3-655(3), while "violent" as a matter of law for purposes of parole under 16-1-60, is not necessarily violent as a matter of fact, nor for purposes of 16-3-20(C)(b)(1). The jury must decide whether a record for that offense is "significant" or mitigating.

Of course, legislative intent controls. See, for example, Gaster v. Evatt and State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984). Our legislature has disclosed its intent by distinguishing Section 16-3-655(3) from higher degrees of criminal sexual conduct. S.C. Code Section 17-25-45(C)(1) removes 16-3-655(3) from the category of "most serious offenses" where the evidence shows that "the conviction obtained for this offense resulted from consensual sexual conduct." No other violent crime listed in Section 16-1-60 receives this special treatment. The legislature recognizes that some violations of Section 16-3-655(3) (such as appellant's) are factually nonviolent.

A comparison of the criminal sexual conduct statutes underscores this conclusion. Sexual conduct is criminal under Section 16-3-655 solely because of the ages of the participants. See State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). Higher degrees of criminal sexual conduct have in common an element of actual violence or the threat of

violence. First degree criminal sexual conduct under Section 16-3-652 occurs when "(a) The actor uses aggravated force to accomplish sexual battery [or] (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act." Second degree criminal sexual conduct under Section 16-3-653 occurs when "the actor uses aggravated coercion to accomplish sexual battery." Third degree criminal sexual conduct under Section 16-3-654 occurs when "(a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances [or] (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery."

The sexual relationship between appellant and assault victim did not involve force or coercion, nor was she physically helpless, mentally defective or incapacitated. See S.C. Code Section 16-3-651. She was simply underage.

Pursuant to Section 16-3-20(C), the judge must instruct the jury as to those statutory mitigating circumstances which may be supported by the evidence. He is to concern himself only with the existence of such evidence, not its weight. State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987). The failure to instruct the jury on a requested statutory mitigating circumstance supported by the evidence cannot be harmless error. See State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986); State v.

Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); State v. Young, 305 S.C. 850, 409 S.E.2d 352 (1991).

As to Section 16-3-20(C)(b)(1) in particular, the Court has stated, "Whether the circumstance is or is not established and what weight shall be accorded the circumstance if found or matters addressed to the jury's deliberations." State v. Adams, 277 S.C. 115, 283 S.E.2d 582, 587 (1981).

[T]he trial court is required to determine whether a rational jury could conclude that [the] defendant had no significant history of prior criminal activity. If the trial court makes such a determination, the mitigating circumstance must then be submitted to the jury. Then, whether the evidence is sufficient to constitute a significant history of criminal activity, thereby precluding a finding of this factor, is for the jury to decide. [Emphasis in original.]

State v. Wilson, 322 N.C. 117, 367 S.E.2d 589, 604 (1988).

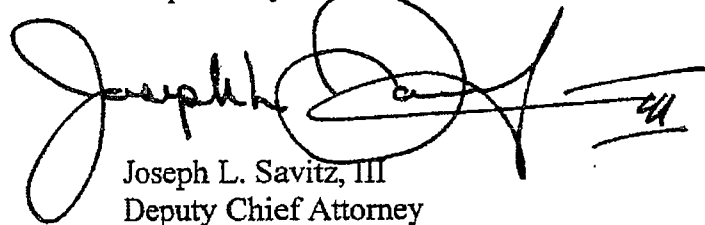
What is of import in the trial court's determination of whether a rational juror could reasonably find this mitigating circumstance to exist is the nature and age of the prior criminal activities, rather than the mere number of criminal activities. [Emphasis added.]

State v. Walls, 342 N.C. 1, 463 S.E.2d 738, 767 (1995).

Appellant's two convictions for second degree criminal sexual conduct did not preclude the submission of Section 16-3-20(C)(b)(1) as a matter of law, since his relations with assault victim were consensual and nonviolent. Compare Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1144 (1985) (involving forcible rape and sodomy convictions). In short, it is impossible to conclude that no rational juror could have found appellant's prior record essentially nonviolent and therefore mitigating.

For this reason, the Court should vacate appellant's death sentence and remand for resentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III". The signature is stylized with large loops and a horizontal line extending to the right, ending in a flourish.

Joseph L. Savitz, III
Deputy Chief Attorney

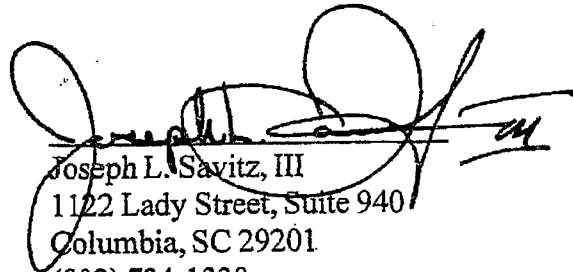
ATTORNEY FOR APPELLANT.

This 17th day of June, 1998.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

June 17, 1998

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330
Attorney for Appellant

STATE OF SOUTH CAROLINA
 IN THE SUPREME COURT

Appeal from Dorchester County

Charles William Whetstone, Jr., Judge

THE STATE,

RESPONDENT,

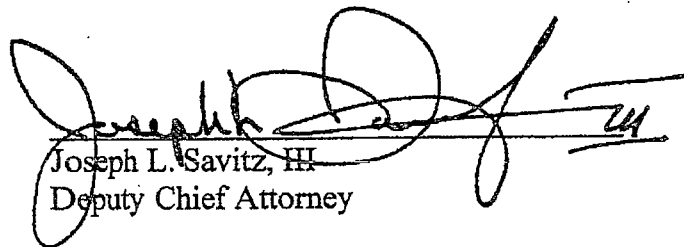
V.

TIMOTHY D. ROGERS,

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 William Edgar Salter, III, Esquire, this 17th day of June, 1998.



Joseph L. Savitz, III
 Deputy Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
 this 17th day of June, 1998.

Karen D. Elliott (L.S.)
 Notary Public for South Carolina

My Commission Expires: March 13, 2007.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Dorchester County
Honorable Charles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

TIMOTHY D. ROGERS,

Appellant.

FINAL BRIEF OF RESPONDENT

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

WALTER M. BAILEY, JR.
Solicitor, First Judicial Circuit

140 North Main Street
Suite 102
Summerville, SC 29483
(843) 871-2640

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	iv
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
ARGUMENT	5
I. Appellant's claim that the trial judge erred by refusing to instruct the jury to consider whether Appellant had "no significant history of prior convictions involving the use of violence against another person" is procedurally barred by his acquiescence in the trial judge's denial of his requested charge, as well as by principles of <i>res judicata</i> and law of the case	5
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<u>Boyd v. California</u> , 494 U.S. 370, 110 S. Ct. 1190 (1990)	10, 11
<u>Buchanan v. Angelone</u> , 118 S. Ct. 757 (1998)	9, 10, 11
<u>Doe by Doe v. Greenville Hospital System</u> , 323 S.C. 33, 448 S.E.2d 564-566 (Ct. App. 1994)	9
<u>Gaster v. Evatt</u> , 326 S.C. 33, 483 S.E.2d 197 (1997)	8
<u>Huggins v. Winn-Dixie Greenville, Inc.</u> , 252 S.C. 353, 166 S.E.2d 297 (1969)	8
<u>Lowe v. Clayton</u> , 264 S.C. 75, 212 S.E.2d 582 (1975)	7
<u>Nelson v. Charleston & Western Carolina Railway Co.</u> , 231 S.C. 351, 98 S.E.2d 798 (1957)	8
<u>Ross v. Medical University of South Carolina</u> , 328 S.C. 51, 462 S.E.2d 62 (1997)	7
<u>Simmons v. South Carolina</u> , 512 U.S. 154, 114 S. Ct. 2187 (1994)	2, 5, 6
<u>State v. Barroso</u> , 328 S.C. 268, 493 S.E.2d 854 (1997)	8
<u>State v. Gilbert</u> , 273 S.C. 690, 258 S.E.2d 890 (1979)	7
<u>State v. Gilbert</u> , 277 S.C. 53, 283 S.E.2d 179 (1981)	7
<u>State v. Rogers</u> , 320 S.C. 520, 466 S.E.2d 360 (1996)	2, 4, 5, 7, 8
<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991)	9
<u>State v. Whipple</u> , ___ S.C. ___, 476 S.E.2d 683 (1996)	7
<u>Warren v. Raymond</u> , 17 S.C. 163 (1882)	8

<u>Whitner v. State</u> , Op. No. 24468 (S.C. S. Ct., filed October 22, 1997)	9
--	---

OTHER AUTHORITIES

1991 Op. Att’y. Gen. 91-46	5
S.C. Code Ann. § 16-1-60, 1986 S.C. Acts 2992	5, 7, 8
S.C. Code Ann. § 16-3-20(B)(1) (Supp. 1997)	8
S.C. Code Ann. § 16-3-20(C)(a)(10) (Supp. 1997)	2
S.C. Code Ann. § 16-3-20(C)(b)(1) (Supp. 1997)	6, 8
S.C. Code Ann. § 16-3-25 (1991)	3
S.C. Code Ann. § 16-3-655 (1985)	5, 7
S.C. Code § 24-21-640 (Supp. 1997)	5

STATEMENT OF ISSUES ON APPEAL

I.

Whether Appellant's claim that the trial judge erred by refusing to instruct the jury to consider whether Appellant had "no significant history of prior convictions involving the use of violence against another person" is procedurally barred by his acquiescence in the trial judge's denial of his requested charge, as well as by principles of *res judicata* and law of the case?

STATEMENT OF THE CASE

The Dorchester County Grand Jury indicted Appellant at the February, 1993 term of court for murder in connection with the killing of nine-year-old Stephanie B [REDACTED], on November 25, 1992. The State served notice of intent to seek the death penalty and the first notice of evidence in aggravation of punishment on January 27, 1993. An amended notice of evidence in aggravation was served on July 29, 1993. The Honorable Charles W. Whetstone, Jr., held pre-trial hearings on August 17 and 19, 1993. Appellant again appeared before Judge Whetstone on February 2, 1994, to plead guilty to murder. However, he withdrew his plea before it was accepted. The State thereupon notified Appellant it would seek the death penalty in the ensuing jury trial, and there would be no further plea negotiations.

On February 28-March 5, 1994, Appellant was tried by the Honorable Luke N. Brown, Jr., and a jury. The jury found Appellant guilty of murder. Following his exercise of his statutory right to a twenty-four hour waiting period, a sentencing proceeding was held on March 5, 1994. The State relied upon the statutory aggravating circumstances that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Appellant killed a child under the age of eleven years old. The jury unanimously found the existence of the above statutory aggravating circumstances and sentenced him to death. Judge Brown imposed this sentence on Appellant. Appellant was represented at trial by William L. Runyon, Jr., Esquire. Appellant thereafter filed a timely notice of appeal.

On appeal, this Court affirmed his murder conviction, but reversed his death sentence and remanded the matter back for resentencing because the trial judge erroneously refused to give a Simmons¹ instruction on his parole ineligibility. State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996) (Rogers I).

Motions hearings, in connection with the resentencing proceeding, were held on February 8 and November 20, 1996.² On December 2-5, 1996, a resentencing proceeding was held before Judge Whetstone and a jury. Appellant was represented by Mr. Runyon and Mark Alan Leiendecker, the Dorchester County Public Defender. The State, again, relied upon the statutory aggravating circumstances that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and, that Appellant killed a child under the age of eleven years old. The jury unanimously found that Appellant had killed a child under the age of eleven, see S.C. Code Ann. § 16-3-20(C)(a)(10) (Supp. 1997), and it recommended a sentence of death.

Judge Whetstone imposed the death sentence. Before imposing this sentence, he first found as an affirmative fact that the death penalty was warranted under the evidence presented, and that it was not the result of prejudice, passion or any other arbitrary factor.

¹ 512 U.S. 154, 114 S. Ct. 2187 (1994).

² The February 8, 1996, hearing was before the Honorable Victor A. Rawl. Judge Whetstone conducted the November 20, 1996, hearing.

A timely notice of appeal was served and filed. This appeal consolidates Appellant's direct appeal with this Court's sentence review under S.C. Code Ann. § 16-3-25 (1991).

STATEMENT OF FACTS

This Court's discussion of the testimony of Mr. Mike B [REDACTED] concerning Appellant's brutal murder of his nine-year-old daughter, Stephanie, provides sufficient factual basis for purposes of this direct appeal. State v. Rogers, 320 S.C. 520, 523, 466 S.E.2d 360, 361-362 (1996) (Rogers I).

ARGUMENT

I.

Appellant's claim that the trial judge erred by refusing to instruct the jury to consider whether Appellant had "no significant history of prior convictions involving the use of violence against another person" is procedurally barred by his acquiescence in the trial judge's denial of his requested charge, as well as by principles of *res judicata* and law of the case.

In Appellant's original direct appeal, he argued that the trial judge erred by failing to give him a Simmons³ instruction "because appellant, who had previously been convicted of two violent crimes would have been ineligible for parole under S.C. Code § 24-21-640 if sentenced to life, and the state made his future dangerousness a major issue at sentencing." (Rogers I, Final Brief of Appellant at p. 24). This Court agreed that his prior convictions were "violent" crimes and held in pertinent part that:

Rogers was twice convicted of violating S.C. Code Ann. § 16-3-655 (1985) (criminal sexual conduct with a minor), which crimes we find constituted violent crimes within the meaning of the original version of S.C. Code Ann. § 16-1-60, 1986 S.C. Acts 2992, when they were committed in August and September 1992. See 1991 Op. Atty. Gen. 91-46, p. 118.

Rogers I, 320 S.C. at 526 n.1, 466 S.E.2d at 363 n.1. In light of these convictions, the Court held it was error not to give a Simmons charge. Therefore, the Court reversed Rogers' death sentence and remanded for a new sentencing proceeding. Id. at 526-528, 466 S.E.2d at 363-364.

³ Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994).

In accordance with Appellant's position at the November 20, 1996, pre-trial motions hearing (R. pp. 1058-1060; pp. 5-6), the trial judge instructed the entire *venire* that Appellant had previously been convicted of murder, and that their purpose was to recommend the appropriate punishment. Also, the only choices of punishment would be the death penalty or life without parole. (R. pp. 19-20). The trial judge likewise included a Simmons instruction in his jury charge. (R. pp. 998-999).

Nevertheless, the sole issue before this Court is that the trial judge erroneously refused to instruct the jury, in accordance with S.C. Code § 16-3-20(C)(b)(1) (Supp. 1997), to consider whether Appellant had "no significant history of prior criminal conviction involving the use of violence against another person." Assuming that the issue is not barred by Appellant's failure to object to the charge as given, the State submits this claim is procedurally barred by principles of *res judicata* and law of the case because this Court has previously found that he has two prior convictions for a violent crime. Even if it is not procedurally barred, however, his argument is completely without merit because this Court has already determined that criminal sexual conduct with a minor in the second degree is a violent crime.

Initially, the State submits Appellant's argument is procedurally barred on appeal. When Appellant submitted his request-to-charge (R. p. 1115), the trial judge refused to grant the instruction because criminal sexual conduct with a minor in the second degree is a "violent" offense. Appellant agreed that "[s]tatutorily it's a violent offense, there's no question about that definition, Your Honor. I can't differ with that." (R. pp. 793-794). Also, Appellant failed to object at the conclusion of the charge to the trial judge's

failure to give the requested instruction. Therefore, he may not complain on appeal. State v. Whipple, ___ S.C. ___, 476 S.E.2d 683 (1996).

The present situation is very similar to that confronted by this Court in State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (Gilbert I) and State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1981) (Gilbert II). In Gilbert II, this Court held the defendant could not raise a question concerning the voluntariness of his confession on appeal because that matter had been decided and resolved adversely to him by this Court in Gilbert I. Therefore, the defendant's challenge in Gilbert II was barred by the doctrine of *res judicata*. 277 S.C. at ___, 283 S.E.2d at 181. Appellant's claims are likewise barred by *res judicata*, since this Court has previously held in Rogers I, *supra*, that his prior convictions for criminal sexual conduct with a minor in the second degree were "violent crimes" under § 16-1-60. See also Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975).

Even if this Court determines that Appellant's claim is not barred by *res judicata* because his death sentence was reversed in Rogers I, *supra*, this Court's previous holding is still the law of the case. As the Court recently explained in Ross v. Medical University of South Carolina, 328 S.C. 51, ___, 462 S.E.2d 62, 68 (1997):

The doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in this same case. . . . The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.

(Citations omitted). Here, the Court actually addressed Appellant's contention that he had two convictions for violent crimes, based on his guilty plea to two counts of violating § 16-3-655. This holding is the law of the case and Appellant may not

relitigate this issue. Id. See also State v. Barroso, 328 S.C. 268, ___, 493 S.E.2d 854, 855 (1997); Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969); Nelson v. Charleston & Western Carolina Railway Co., 231 S.C. 351, 98 S.E.2d 798 (1957); Warren v. Raymond, 17 S.C. 163 (1882) (all points decided by Court on appeal, or necessarily involved in what was decided, are *res judicata* and cannot be considered again in the cause).

Alternatively, Appellant's argument is without merit because this Court has twice determined that criminal sexual conduct with a minor in the second degree is a violent offense under § 16-1-60. See Gaster v. Evatt, 326 S.C. 33, 483 S.E.2d 197 (1997); Rogers I, 320 S.C. at 526 n.1, 466 S.E.2d at 363 n.1. As this Court's decision in Gaster makes quite clear, a conviction for the offense at issue is a conviction for criminal sexual conduct in the second degree. 326 S.C. at ___, 483 S.E.2d at 198.

Nor is there any merit to Appellant's suggestion his convictions for criminal sexual conduct in the second degree "while 'violent' as a matter of law for purposes of parole under 16-1-60, is not necessarily violent as a matter of fact, [for] purposes of 16-3-20(C)(b)(1)." (BOA, p. 6). It is true that some convictions involving acts of violence against other persons, but not listed as a violent offense under § 16-1-60, *could* constitute a significant history of prior criminal convictions involving use of violence against another person. However, this does not mean that a "violent" offense under § 16-1-60 may be considered non-violent for purposes of whether a capital defendant is entitled to an instruction on the mitigating circumstance in § 16-3-20(B)(1).

Appellant's construction of § 16-3-20(B)(1) would lead to a patently absurd result because while the State can introduce the conviction itself as well as facts underlying the

conviction, it cannot inform the sentencer that the General Assembly has determined the offense is "violent" as a matter of law and this is the *only* reason the defendant would be parole ineligible. This would give a capital defendant a windfall to which he is not entitled by either the Constitution or statute. Thus, the Court should reject this position. See Whitner v. State, Op. No. 24468 (S.C. S. Ct., filed October 22, 1997) (Court will avoid statutory construction that leads to absurd result).

Further, Appellant's contention he was entitled to such an instruction because his relationship with the victim was consensual and non-violent overlooks the obvious point made on page four of his brief. "As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person." Doe by Doe v. Greenville Hosp. System, 323 S.C. 33, ___, 448 S.E.2d 564-566 (Ct. App. 1994)!

More importantly, he cannot show any conceivable prejudice resulting from the trial judge's ruling.⁴ Clearly, the trial judge's failure to instruct the jury on the mitigating circumstance at issue (or any other specific mitigating circumstance) does not violate the Eighth Amendment. Buchanan v. Angelone, 118 S. Ct. 757, 761-762 (1998). Further, there was no "reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant

⁴ Appellant relies on a series of cases decided by this Court prior to abolition of *in favorem vitae* review and suggests the failure to charge on a mitigating circumstance can never be harmless error. (BOA, pp. 7-8). Although the State submits the trial judge did not err, his argument in this regard is quite misleading since the Court routinely reversed cases *in favorem vitae* based on the presence of error, even though the defendant clearly was not prejudiced by any such error. See State v. Torrence, 305 S.C. 45, ___, 406 S.E.2d 315, 322-329 (1991) (Toal, A. J., concurring in result).

evidence." Boyd v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990); Buchanan, 118 S. Ct. at 761.

To the contrary, the State introduced all of Appellant's prior criminal convictions. It also elicited testimony from [assault victim], the victim in the two CSC second degree convictions, that she and Appellant "were going together" in November, 1992 when she was only fifteen years old. The State further elicited that subsequently she had Appellant's baby. (R. pp. 647-648). Likewise, Appellant testified at length concerning his relationship with [assault victim]. He also explained the facts concerning each of his prior convictions. (R. pp. 865-874; p. 900; pp. 902-904; pp. 913-914). Also, his mother testified that his baby with [assault victim] had spent Thanksgiving with her and they enjoyed it (R. p. 923); and, both Appellant and counsel addressed his relationship with [assault victim] as well as the circumstances surrounding his other prior convictions through closing argument. Indeed, Appellant attributed many of his problems, including the murder, to his abuse of drugs and alcohol. (R. pp. 979-983; pp. 985-988).

Finally, the trial judge's jury instructions did not preclude the jury from considering, as a mitigating circumstance, the factual basis which he suggested underlined his CSC second convictions as well as his other various convictions to which he testified. The trial judge clearly instructed the jury they were to consider whether there was any evidence presented as to any statutory mitigating circumstance or any other mitigating circumstance. He also instructed the jury they could choose to recommend a sentence of life imprisonment if they found the presence of either a statutory or non-statutory mitigating circumstance, and they could recommend a sentence of life imprisonment "for any reason or for no reason at all" -- i.e., they could recommend a

sentence of life as an act of mercy. (R. pp. 1008-1015). Therefore, there was no reasonable likelihood that the jury would have applied the instruction given as to preclude their consideration of any mitigating circumstance and there was no error. Buchanan and Boyd, *supra*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

WALTER M. BAILEY, JR.
Solicitor, First Judicial Circuit

By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

June 17, 1998.

WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Dorchester County
Honorable Charles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

TIMOTHY D. ROGERS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR
210(b).


WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

June 17, 1998.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Dorchester County
Honorable Charles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

TIMOTHY D. ROGERS,

Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Deputy Chief Attorney, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

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

This 17th day of June, 1998.


WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
Timothy D. Rogers, Appellant.

Appeal From Dorchester County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25032
Heard October 21, 1998 - Filed December 6, 1999

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of
South Carolina Office of Appellate Defense, of
Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy
Attorney General John W. McIntosh, Assistant
~~Deputy Attorney General Donald J. Zelenka~~, Senior
Assistant Attorney General William Edgar Salter,
III, all of Columbia; and Solicitor Walter M. Bailey,
Jr., of Summerville, for respondent.

TOAL, A.J.: Timothy Rogers has appealed his death sentence for
murder. He argues that the resentencing judge improperly denied his
request for a mitigating jury charge. We disagree and affirm.

FACTUAL/PROCEDURAL BACKGROUND

There are different versions of the factual events leading up to Timothy Rogers's shooting of Stephanie B [REDACTED]. These accounts, and the history of this case, can be found in our decision *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996).

On November 25, 1992, Rogers shot and killed nine-year-old Stephanie B [REDACTED]. A jury found Rogers guilty of murder. On appeal, this Court affirmed Rogers's murder conviction, but reversed his death sentence and remanded for resentencing due to jury instruction errors made during the sentencing phase.¹ At Rogers's resentencing, the State again sought the death penalty based on the following aggravating circumstances: (1) Rogers, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and (2) Rogers killed a child under the age of eleven-years-old. See S.C. Code Ann. § 16-3-20(C)(a) (Supp. 1998). The jury returned a unanimous finding that Rogers had killed a child under the age of eleven and recommended death. The judge imposed the sentence of death.

Prior to his murder conviction, Rogers's criminal record included:

- (1) November 1985: Trespassing After Notice;
- (2) July 1986: Carrying a Pistol;
- (3) April 1987: Possession of Marijuana;
- (4) July 1987: Shoplifting;
- (5) March 1988: Resisting Arrest;
- (6) December 1988: Grand Larceny of a Vehicle;
- (7) September 1990: Possession of Cocaine;
- (8) August 1992: Criminal Sexual Conduct with a Minor;
- (9) September 1992: Criminal Sexual Conduct with a Minor.

assault victim, a witness to the killing of Stephanie B [REDACTED], had been Rogers's girlfriend before his arrest and conviction for murder. At the time,

¹The trial court improperly denied Rogers a *Simmons* charge on parole ineligibility. See *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (holding that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposition of the death penalty, the defendant is entitled to have the jury informed of his ineligibility for parole either by way of arguments by defense counsel or instruction by the trial judge).

Ms. [assault victim] was only fifteen-years-old and Rogers's two CSC convictions are a result of their relationship. Ms. [assault victim] is also the mother to one of Rogers's five children and was pregnant with this child at the time of the murder. The only evidence produced at trial shows that their sexual relationship was mutually desired.

During Rogers's resentencing, defense counsel requested the judge to give the statutory mitigating charge as set out in S.C. Code Ann § 16-3-20(C)(b)(1) (Supp. 1998). The judge refused because he believed Rogers's previous convictions of CSC second prevented giving the charge. The issue before this Court is whether the judge erred by refusing to instruct the jury, under S.C. Code Ann. § 16-3-20(C)(b)(1), to consider that Rogers had "no significant history of prior criminal conviction involving the use of violence against another person."

LAW/ANALYSIS

Pursuant to S.C. Code Ann. § 16-3-20(C) (Supp. 1998), the trial judge must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989). Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury. *Id.* Under section 16-3-20(C)(b)(1), if the judge makes the determination that the defendant does not have "a significant history of prior criminal conviction involving the use of violence against another person" then he is entitled to the mitigating jury charge stating that fact to the jury. When the General Assembly enacted the death penalty statute in its current form on June 8, 1977, the Code did not define for trial judges which crimes involved "violence against another person" that would preclude giving this mitigating jury charge.

Our primary function in interpreting the death penalty statute, as with any statute, is to ascertain the intention of the General Assembly. See *Busby v. Moore*, 330 S.C. 201, 203, 498 S.E.2d 883, 884 (1998) ("The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly."). In 1986, the legislature enacted S.C. Code Ann. § 16-1-60 which states: "For purposes of definition under South Carolina law a violent crime includes the offenses . . . criminal sexual conduct with minors,

first and second degree." S.C. Code Ann. § 16-1-60. By providing a list of the crimes which are to be defined as violent, the legislature ended the necessity for a case-by-case analysis into the specific convictions of each defendant's history. We do not believe the legislature intended there to be situations where the courts would treat offenses defined as "violent crimes" under one section and not treat these same offenses as "crimes involving the use of violence" under another section of the same title.

CSC second is a "violent crime" under section 16-1-60. See also *Gaster v. Evatt*, 326 S.C. 33, 483 S.E.2d 197 (1997).² Rogers argues that his two convictions should not be treated as "crimes involving violence against another person" because he contends his sexual conduct with a minor was consensual. We disagree. In section 16-1-60 the legislature spoke on the issue of which crimes are violent crimes and which crimes are not. Rogers's construction of the law would result in cases where offenses designated as violent crimes by the legislature would not be considered violent by the court. Rogers's argument also ignores the legislature's intent and policy in enacting the CSC second statute. See *Doe by Doe v. Greenville Hosp. System*, 323 S.C. 33, 37, 448 S.E.2d 564, 566 (Ct. App. 1994) ("As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person.").

In the current case, the legislature designated Rogers's CSC offenses as violent crimes. The courts need not conduct any further inquiry into the facts of each conviction to make a determination regarding Roger's entitlement to the mitigating charge provided in section 16-3-20(C)(b)(1).³

²In Rogers's first trial, this Court noted that "Rogers was convicted of violating S.C. Code Ann. § 16-3-655 (1985) (criminal sexual conduct with a minor), which crimes we find constituted violent crimes" *State v. Rogers*, 320 S.C. 520, 526 n.1, 466 S.E.2d 360, 363 n.1 (1996). Although this recognition is not the law of the case in the current matter, the results reached are the same.

³We are aware there may be some crimes involving violence against another person that are not part of the list in section 16-1-60, noticeably among them is the common law offense of assault and battery of a high and aggravated nature (ABHAN). Since the legislature has undertaken the responsibility to designate which offenses the courts will consider violent, if the General Assembly wishes to add ABHAN or any other crime to the list of violent offenses, it is within their power to do so.

For the foregoing reasons, Rogers's sentence is AFFIRMED.

Finney, C.J., Moore and Waller, JJ., concur. Burnett, A.J., concurring separately in result.

STATE v. TIMOTHY D. ROGERS

BURNETT, A.J.: While I concur in the result reached by the majority, I disagree the enactment of § 16-1-60 “ended the necessity for a case-by-case analysis.” I have reservations about this limitation on judges’ discretion and its impact on pending cases. Although I agree there are no situations where the courts would not treat offenses defined as “violent crimes” under one section as “crimes involving the use of violence” under another section, the converse is not necessarily true. Section 16-1-60 encompasses statutory crimes, yet common law crimes may also involve the use of violence against another person. For example, as the majority notes, common law assault and battery of a high and aggravated nature (ABHAN) is not included in § 16-1-60's list of violent crimes. The interpretation of § 16-3-20(C)(b)(1) given by the majority precludes use of common law crimes of violence in a death penalty case. The legislature could not have intended for criminals with a history of violent common law crimes to be entitled to a mitigating jury charge that they have “no significant history of prior criminal conviction involving the use of violence against another person.”

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

TIMOTHY D. ROGERS,

APPELLANT:

Appeal from Dorchester County

Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25032

PETITION FOR REHEARING

Appellant petitions for rehearing because the Court's opinion does not comply with S.C. Code Section 16-3-25, specifically Subsections (C) and (E). Subsection (C) states:

With regard to the sentence, the court shall determine:

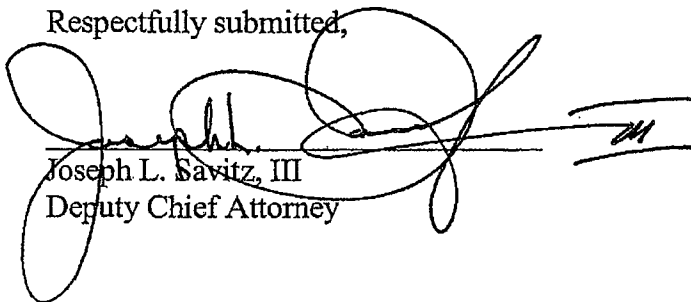
- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's... finding of a statutory aggravating circumstance as enumerated in Section 16-3-20, and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Subsection (E) provides, "The court shall include in its decision a reference to those similar cases which it took into consideration."

In essence, these two subsections require the Court to view the case as a whole in the context of other death penalty cases, to look at the big picture as it were. In this case, for instance, the shooting of the victim was clearly not premeditated and quite possibly unintentional. There were also racial undertones which may have contributed to an arbitrary result.

For these reasons, the Court should grant rehearing, reverse appellant's death sentence, and remand for resentencing.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is written over a horizontal line.

Joseph L. Savitz, III
Deputy Chief Attorney

This 20th day of December, 1999.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester CountyCharles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

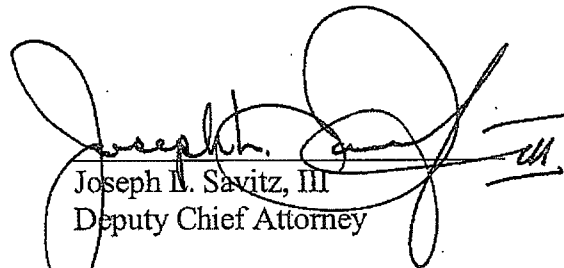
V.

TIMOTHY D. ROGERS,

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 William Edgar Salter, III, Esquire, this 20th day of December, 1999.



Joseph N. Savitz, III
Deputy Chief Attorney
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of December, 1999.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

The Supreme Court of South Carolina

The State,

Respondent,

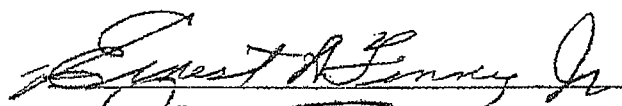
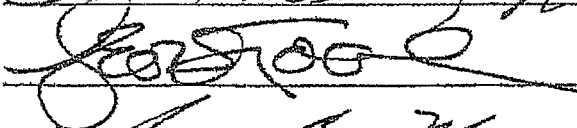


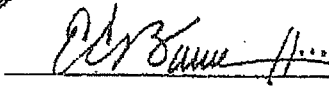
v.

Timothy D. Rogers,

Appellant.

ORDER

We grant the Petition for Rehearing to review our decision in *State v. Rogers*, Op. No. 25032 (S.C. Sup. Ct. filed Dec. 6, 1999) (Shearouse Adv. Sh. No. 37 at 63). That opinion is withdrawn and the attached opinion is substituted in its place.

 C.J.
 A.J.
 A.J.
 A.J.
 A.J.

Columbia, South Carolina

January 24, 2000

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Timothy D. Rogers, Appellant.

Appeal From Dorchester County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25032

Heard October 21, 1998 - Filed January 24, 2000

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Walter M. Bailey, Jr., of Summerville, for respondent.

TOAL, A.J.: Timothy Rogers has appealed his death sentence for murder. He argues that the resentencing judge improperly denied his request for a mitigating jury charge. We disagree and affirm.

FACTUAL/PROCEDURAL BACKGROUND

There are different versions of the factual events leading up to Timothy Rogers's shooting of Stephanie B [REDACTED]. These accounts, and the history of this case, can be found in our decision *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996).

On November 25, 1992, Rogers shot and killed nine-year-old Stephanie B [REDACTED]. A jury found Rogers guilty of murder. On appeal, this Court affirmed Rogers's murder conviction, but reversed his death sentence and remanded for resentencing due to jury instruction errors made during the sentencing phase.¹ At Rogers's resentencing, the State again sought the death penalty based on the following aggravating circumstances: (1) Rogers, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and (2) Rogers killed a child under the age of eleven-years-old. See S.C. Code Ann. § 16-3-20(C)(a) (Supp. 1998). The jury returned a unanimous finding that Rogers had killed a child under the age of eleven and recommended death. The judge imposed the sentence of death.

Prior to his murder conviction, Rogers's criminal record included:

- (1) November 1985: Trespassing After Notice;
- (2) July 1986: Carrying a Pistol;
- (3) April 1987: Possession of Marijuana;
- (4) July 1987: Shoplifting;
- (5) March 1988: Resisting Arrest;
- (6) December 1988: Grand Larceny of a Vehicle;
- (7) September 1990: Possession of Cocaine;
- (8) August 1992: Criminal Sexual Conduct with a Minor;
- (9) September 1992: Criminal Sexual Conduct with a Minor.

¹The trial court improperly denied Rogers a *Simmons* charge on parole ineligibility. See *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (holding that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposition of the death penalty, the defendant is entitled to have the jury informed of his ineligibility for parole either by way of arguments by defense counsel or instruction by the trial judge).

assault victim a witness to the killing of Stephanie B [REDACTED] had been Rogers's girlfriend before his arrest and conviction for murder. At the time, Ms. assault victim was only fifteen-years-old and Rogers's two CSC convictions are a result of their relationship. Ms. assault victim is also the mother to one of Rogers's five children and ~~was pregnant with this child at the time of the murder.~~ The only evidence produced at trial shows that their sexual relationship was mutually desired.

During Rogers's resentencing, defense counsel requested the judge to give the statutory mitigating charge as set out in S.C. Code Ann § 16-3-20(C)(b)(1) (Supp. 1998). The judge refused because he believed Rogers's previous convictions of CSC second prevented giving the charge. The issue before this Court is whether the judge erred by refusing to instruct the jury, under S.C. Code Ann. § 16-3-20(C)(b)(1), to consider that Rogers had "no significant history of prior criminal conviction involving the use of violence against another person."

LAW/ANALYSIS

Pursuant to S.C. Code Ann. § 16-3-20(C) (Supp. 1998), the trial judge must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989). Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury. *Id.* Under section 16-3-20(C)(b)(1), if the judge makes the determination that the defendant does not have "a significant history of prior criminal conviction involving the use of violence against another person" then he is entitled to the mitigating jury charge stating that fact to the jury. When the General Assembly enacted the death penalty statute in its current form on June 8, 1977, the Code did not define for trial judges which crimes involved "violence against another person" that would preclude giving this mitigating jury charge.

Our primary function in interpreting the death penalty statute, as with any statute, is to ascertain the intention of the General Assembly. *See Busby v. Moore*, 330 S.C. 201, 203, 498 S.E.2d 883, 884 (1998) ("The Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly."). In 1986, the legislature enacted S.C. Code Ann. § 16-1-60 which states: "For purposes of definition under South Carolina law a violent crime includes the offenses . . . criminal sexual conduct with minors, first and second

degree." S.C. Code Ann. § 16-1-60. By providing a list of the crimes which are to be defined as violent, the legislature ended the necessity for a case-by-case analysis into the specific convictions of each defendant's history. The lengthy list of statutory sections found in the "cross references" to section 16-1-60 reveals the legislative intention for a uniform definition of violent crimes throughout the Code. We do not believe the legislature intended there to be situations where the courts would treat offenses defined as "violent crimes" under one section and not treat these same offenses as "crimes involving the use of violence" under another section of the same title.

CSC second is a "violent crime" under section 16-1-60. *See also Gaster v. Evatt*, 326 S.C. 33, 483 S.E.2d 197, 198 (1997).² Rogers argues that his two convictions should not be treated as "crimes involving violence against another person" because he contends his sexual conduct with a minor was consensual and therefore should not constitute a "prior criminal conviction involving the use of violence against another person." We disagree. In section 16-1-60 the legislature spoke on the issue of which crimes are violent crimes and which crimes are not. Rogers's construction of the law would result in cases where offenses designated as violent crimes by the legislature would not be considered violent by the court. Rogers's argument also ignores the legislature's intent and policy in enacting the CSC second statute. *See Doe by Doe v. Greenville Hosp. System*, 323 S.C. 33, 37, 448 S.E.2d 564, 566 (Ct. App. 1994) ("As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person.").

In the current case, the legislature designated Rogers's CSC offenses as violent crimes. The courts need not conduct any further inquiry into the facts of each conviction to make a determination regarding Roger's entitlement to the mitigating charge provided in section 16-3-20(C)(b)(1).³

²In Rogers's first trial, this Court noted that "Rogers was convicted of violating S.C. Code Ann. § 16-3-655 (1985) (criminal sexual conduct with a minor), which crimes we find constituted violent crimes . . ." *State v. Rogers*, 320 S.C. 520, 526 n.1, 466 S.E.2d 360, 363 n.1 (1996). Although this recognition is not the law of the case in the current matter, the results reached are the same.

³We are aware there may be some crimes involving violence against another person that are not part of the list in section 16-1-60, noticeably among them is the common law offense of assault and battery of a high and aggravated nature (ABHAN). Since the legislature has undertaken the responsibility to designate which offenses

PROPORTIONALITY REVIEW

Upon review the entire record in this case, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of statutory aggravating circumstances is supported by the evidence. See S.C.Code Ann. § 16-3-25 (1985). Further, the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996).

CONCLUSION

For the foregoing reasons, Rogers's sentence is **AFFIRMED**.

FINNEY, C.J., MOORE and WALLER, JJ., concur. BURNETT, A.J., concurring separately in result.

the courts will consider violent, if the General Assembly wishes to add ABHAN or any other crime to the list of violent offenses, it is within their power to do so.

STATE v. TIMOTHY D. ROGERS

BURNETT, A.J.: While I concur in the result reached by the majority, I disagree the enactment of § 16-1-60 “ended the necessity for a case-by-case analysis.” I have reservations about this limitation on judges’ discretion and its impact on pending cases. Although I agree there are no situations where the courts would not treat offenses defined as “violent crimes” under one section as “crimes involving the use of violence” under another section, the converse is not necessarily true. Section 16-1-60 encompasses statutory crimes, yet common law crimes may also involve the use of violence against another person. For example, as the majority notes, common law assault and battery of a high and aggravated nature (ABHAN) is not included in § 16-1-60's list of violent crimes. The interpretation of § 16-3-20(C)(b)(1) given by the majority precludes use of common law crimes of violence in a death penalty case. The legislature could not have intended for criminals with a history of violent common law crimes to be entitled to a mitigating jury charge that they have “no significant history of prior criminal conviction involving the use of violence against another person.”

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Charles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY D. ROGERS,

APPELLANT.

PETITION FOR STAY OF EXECUTION

Counsel for Timothy D. Rogers petitions the Court to stay his execution pending post-conviction relief. In support of this request, counsel shows:

(1) Petitioner's original trial was held in February and March 1994. He was convicted of murder and sentenced to death. On appeal, the Supreme Court reversed the death sentence and remanded for resentencing. State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996).

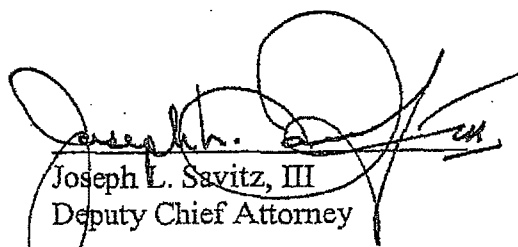
(2) A resentencing hearing was held in December 1996. Once again, a jury sentenced petitioner to death. The Supreme Court affirmed that sentence on appeal. State v. Rogers, Op. No. 25032, filed January 24, 2000.

(3) Petitioner intends to file an application for post-conviction relief alleging that he

did not receive effective assistance of counsel at trial as required by the Sixth Amendment and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Among other things, petitioner will show that counsel failed to impeach key state's witnesses with discrepancies in their testimony given at the time of the original trial and at rehearing. The Center for Capital Litigation is currently searching for qualified counsel to represent petitioner on post-conviction relief.

WHEREFORE, counsel for Timothy D. Rogers petitions the Court to stay his execution pending post-conviction relief.

Respectfully submitted,



Joseph L. Savitz, III
Deputy Chief Attorney
Attorney for Appellant.

This 7th day of February, 2000.

STATE OF SOUTH CAROLINA
 IN THE SUPREME COURT

Appeal from Dorchester County

Charles W. Whetstone, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

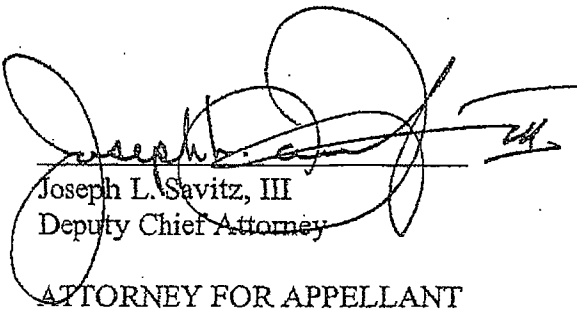
V.

TIMOTHY D. ROGERS,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for stay of execution in the above entitled case has been served upon William Edgar Salter, III, and Teresa Norris, this 7th day of February, 2000.


 Joseph L. Savitz, III
 Deputy Chief Attorney

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
 Of February, 2000.

Karen D. Elliott (L.S.)
 Notary Public for South Carolina

My Commission Expires: March 13, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

February 9, 2000

REMITTITUR

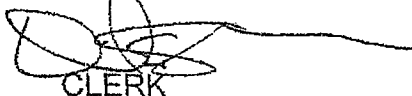
The Honorable Margie K. Carn McKissick
Clerk of Court, Dorchester County
Post Office Box 158
St. George, SC 29477-0158

Re: The State v. Rogers, Timothy D.
93-GS-18-101

Dear Ms. McKissick:

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

Very truly yours,



CLERK

DES/djp

Enclosure

cc: Deputy Chief Attorney Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III
Walter M. Bailey, Jr., Esquire

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: S.C. Supreme Court
- (b) the result in each such Court to which you appealed:
- i. Murder conviction affirmed; Death sentence reversed; Remanded for resentencing.
- ii. Death sentence affirmed after resentencing hearing.
- (c) the date of each such result:
- i. January 22, 1996.
- ii. January 24, 2000.
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (S.C. 1996) (Rogers I).
- ii. State v. Rogers, Op.No. 25032 (S.C.S.Ct. Jan. 24, 2000) (Rogers II).
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) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
- (b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial due to counsel's deficient performance in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt or to effectively cross-examine state's witnesses.

(b) Defense counsel failed to thoroughly investigate and present relevant evidence in mitigation of punishment during applicant's resentencing trial although such evidence was available. Counsel failed to adequately prepare for the sentencing re-trial and failed to prepare and present adequate defenses to the aggravating circumstances presented by the State, and failed to adequately cross-examine state's witnesses.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? Applicant directly appealed to the S.C. Supreme Court after the original 1994 trial, and after the 1996 resentencing hearing. 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.

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? See # 11(a).

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? See # 11(a).

(d) any other petitions, motions or applications in this or any other Court? See # 11(a).

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof: See # 11(a) and # 7(d).

(b) the name and location of the Court in which each was filed: See # 11(a) and # 7(d).

(c) the disposition thereof: See # 11(a) and # 7(d).

(d) the date of each such disposition: See # 11(a) and # 7(d).

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition: See # 11(a) and # 7(d).

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: N/A.
- (b) the proceedings in which each ground was raised: N/A.
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) These grounds rely on additional facts outside of the record which was before the previous courts.
16. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes.
- (c) your sentencing? Yes.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A.
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. William L. Runyon, Jr., One Carriage Lane, Bldg. B, Su. 203, Charleston, S.C., 29407.
- ii. Mark A. Leindecker, 610 N. Cedar St., Summerville, S.C., 29483.
- iii. Joe Savitz, Office of Appellate Defense, 1122 Lady St., Su. 940, Columbia, S.C., 29201.
- (b) the proceedings at which each such attorney represented you:
- i. 1994 Trial and 1996 Resentencing hearing.
- ii. 1994 Trial and 1996 Resentencing hearing.
- iii. Appeals from both 1994 and 1996 trial/resentencing hearing.
18. State clearly the relief you seek in riling this application.
Applicant seeks vacation of his convictions and sentences.
19. Are you now under sentence from any other court that you have not challenged? No.

STATE OF SOUTH CAROLINA

VERIFICATION

County of DORCHESTER

I, TIMOTHY D. ROGERS, 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.

X Timothy D. Rogers

SWORN to and subscribed before me this _____

day of June 5, 2000, 19

[Signature] (L.S.)
Notary Public

My Commission Expires: 4-17-06

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, TIMOTHY D. ROGERS, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

X Timothy D. Rogers
Applicant

SWORN or affirmed to and subscribed before me this

5th day of June, 2000, 19

[Signature]
Notary Public

My Commission Expires: 4-17-06

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Timothy Dion Rogers,)
SCDC # 4883,)

C. A. No. 00-CP-18-575

Applicant,)

-vs-)

Doug Catoe, Commissioner, S. C.)
Dept. of Corrections, and the State)
of South Carolina,)

Respondents.)

2000 JUL 13 PM 1:20
CERTIFIED COPY
DORCHESTER COUNTY
CLERK OF COURT

RETURN

ATTORNEY GENERAL'S OFFICE

RECEIVED 7-14-00

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

HAVE COPIES MADE

ROUTE TO

ORDER: TRANSCRIPT

PEN RECORDS - CLERK RECORDS

OTHER:

Respondents, making Return to the Application for Post-Conviction Relief filed on June

12, 2000, would respectfully show unto the Court as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), pursuant to commitment orders from the Dorchester County Clerk of Court. The Dorchester County Grand Jury indicted Applicant for murder at the February 1993 term of court. On January 27, 1993, the State served its Notice Of Intent To Seek The Death Penalty and Notice Of Evidence In Aggravation. It served an amended Notice Of Evidence In Aggravation on July 29, 1993.

The Honorable Charles W. Whetstone, Jr., held pre-trial hearings on August 17 and 19, 1993. Applicant again appeared before Judge Whetstone on February 2, 1994, to plead guilty to murder. However, he withdrew his plea before it was accepted. The State then notified Applicant

that it would seek the death penalty in the ensuing jury trial, and that there would be no further plea negotiations.

On February 28-March 5, 1994, Applicant was tried by the Honorable Luke N. Brown, Jr., and a jury. William Runyon, Esquire, and Mark Leiendecker, Esquire, represented him at trial. The Honorable Walter M. Bailey, Jr., Solicitor for the First Judicial Circuit, and Assistant Solicitor Harrison Bell represented the State. The jury found Applicant guilty of murder on March 3.

Following Applicant's exercise of his right to a twenty-four hour waiting period, see S.C. Code Ann. § 16-3-20(B) (Supp. 1999), a sentencing proceeding was held on March 5, 1994. The State relied upon two statutory aggravating circumstances: (1) that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, and (2) that Applicant killed a child under the age of eleven years old. See § 16-3-20(C)(a)(3)&(10). Applicant relied upon the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired, see § 16-3-20(C)(b)(6), as well as three non-statutory mitigating circumstances. After hearing all of the evidence and listening to arguments from the prosecution, defense counsel and Applicant, the jury unanimously found the existence of both statutory aggravating circumstances and sentenced Applicant to death on March 5. Judge Brown imposed sentence upon him on that same day. Before imposing sentence, Judge Brown found as an affirmative fact that the death penalty was warranted under the evidence presented, and that it was not the result of prejudice, passion, or any other arbitrary factor.

A timely Notice of Appeal was served and filed. Applicant filed his Final Brief of Appellant in the South Carolina Supreme Court, in which he raised the following grounds for relief on direct appeal:

1. The trial judge erred by refusing to instruct the jury on voluntary manslaughter, where appellant's statement and other evidence in the case would have supported a verdict finding appellant guilty of that lesser offense.
2. The judge erred by refusing to instruct the jury that 'a life sentence imposed on this defendant means life without hope for release by operation of law,' because appellant, who had previously been convicted of two violent crimes would have been ineligible for parole under S.C. Code § 24-21-640 if sentenced to life, and the state made his future dangerousness a major issue at sentencing.

Final Brief of Appellant at 3. Respondent filed the Final Brief of Respondent on July 7, 1995.

The South Carolina Supreme Court affirmed his murder conviction, but reversed his death sentence and remanded the matter back for resentencing because the trial judge erroneously refused to give a Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994), instruction on his parole ineligibility. State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996) (Rogers I). Applicant was represented on direct appeal by Joseph L. Savitz, III, Chief Deputy Appellate Defender.

Motions hearings in connection with the resentencing proceeding were held on February 8 and November 20, 1996.¹ On December 2-5, 1996, a resentencing proceeding was held before Judge Whetstone and a jury. Applicant was represented by Mr. Runyon and Mark Alan

¹ The February 8, 1996, hearing was before the Honorable Victor A. Rawl. Judge Whetstone conducted the November 20, 1996, hearing.

Leiendoeker, the Dorchester County Public Defender. The State, again, relied upon the statutory aggravating circumstances that the offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and, that he killed a child under the age of eleven years old. The jury unanimously found that Applicant had killed a child under the age of eleven, see § 16-3-20(C)(a)(10), and it recommended a sentence of death.

Judge Whetstone imposed the death sentence. Before imposing this sentence, he first found as an affirmative fact that the death penalty was warranted under the evidence presented, and that it was not the result of prejudice, passion or any other arbitrary factor. A timely Notice of Appeal was again served and filed. The direct appeal consolidated Applicant's direct appeal with the South Carolina Supreme Court's sentence review under S.C. Code Ann. § 16-3-25(C) (1991).

On June 17, 1998, Applicant filed his Final Brief of Appellant, in which he presented the following ground for relief to the South Carolina Supreme Court:

The judge erred by refusing to instruct the jury, under S.C. Code Section 16-3-20(C)(b)(1), to consider whether appellant had 'no significant history of prior criminal conviction involving the use of violence against another person.'

Rogers II, Final Brief of Appellant at 1. The Final Brief of Respondent was also filed on June 17, 1998. Mr. Savitz, from the South Carolina Office of Appellate Defense, again represented Applicant on direct appeal. Respondent was again represented by Senior Assistant Attorney General William Edgar Salter, III.

The South Carolina Supreme Court heard oral arguments on October 21, 1998, and it filed

a decision affirming Applicant's death sentence on December 6, 1999. A timely Petition for Rehearing was filed. On January 24, 2000, the State Supreme Court issued an unpublished Order denying the rehearing petition but substituting a refiled Opinion for the original decision. State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000) (Rogers II). The Court also set an execution date for Applicant. Mr. Savitz then filed a Motion for Stay of Execution so that Mr. Rogers could pursue Post-Conviction Relief remedies. Respondent did not oppose the request, and the Supreme Court granted a stay pursuant to In Re: Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), in its March 9, 2000, Order.

In the same Order, the Supreme Court appointed the Honorable Diane Schafer Goodstein to preside over this case and granted the Court exclusive jurisdiction over it. The Supreme Court's Order also directed this Court to hold a hearing to determine whether Mr. Rogers desired to pursue an Application for Post-Conviction Relief and whether he wished to have counsel appointed. In accordance with In Re: Stays of Execution, the South Carolina Supreme Court's March 9, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), this Court convened a hearing at the Charleston County Courthouse.

At the conclusion of this hearing, the Court indicated it would appoint Jeffrey P. Bloom, Esquire, and Diana L. Holt, Esquire, to represent Applicant. On April 11, 2000, the Court signed an Order appointing Mr. Bloom and Ms. Holt. Applicant thereafter timely filed his PCR Application in accordance with In Re: Stays.

II.

Applicant raises the following grounds for relief in his June 12, 2000, PCR Application:

9. (a) Applicant was denied the effective assistance of counsel at

the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt or to effectively cross-examine state's witnesses.

9. (b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial due to counsel's deficient performance in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

Defense counsel failed to thoroughly investigate and present relevant evidence in mitigation of punishment during applicant's resentencing trial although such evidence was available. Counsel failed to adequately prepare for the sentencing re-trial and failed to prepare and present adequate defenses to the aggravating circumstances presented by the State, and failed to adequately cross-examine state's witnesses.

III. DISCUSSION.

Respondents submit both of Applicant's allegations are without merit but would request an evidentiary hearing as to these claims.

Ground 9(a).

Applicant first contends that trial counsel failed to conduct an independent and adequate investigation of his case, in order to develop and present evidence creating a reasonable doubt as to Applicant's guilt or to adequately cross-examine the prosecution witnesses. Respondents disagree and submit he has failed to prove either deficient performance or resulting prejudice.

"Deficient performance is not merely below-average performance; rather, the attorney's

actions must fall below the wide range for generally competent performance." Matthews v. Evatt, 105 F.3d 907, 919 (4th Cir. 1997) (citation omitted).

The United States Supreme Court has set forth a two-part test to determine whether a convicted defendant is entitled to relief based upon ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2025 (1984). A defendant must first show counsel's performance was deficient. In making this determination:

. . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound strategy.' . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689, 104 S.Ct. at 2065.

A reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Also, the court must eliminate the effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. The reviewing court must also be deferential to counsel and not second-guess counsel's acts or omissions after an adverse result, which may easily lend itself to a finding that counsel's assistance was unreasonable based upon the fact of the adverse result. Id. See also Mazzell v. Evatt, 88 F.3d 263 (4th Cir. 1996). The mere fact that trial or appellate counsel's defense strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995), cert. denied, 116 S.Ct. 2533 (1996).

Even if an inmate can show deficient performance by his trial or appellate attorney, he must also prove that he was prejudiced by counsel's performance. To establish prejudice, a criminal defendant must show "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 probability sufficient to undermine confidence in the outcome." Id.; Palacio v. State, 511 S.E.2d 62 (S.C. 1999). 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 a 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000). Finally, all of these determinations must be based upon the totality of the circumstances. Strickland, 466 U.S. at 695, 104 S.Ct. at 2069. Applying this standard to the case at bar, Respondents submit Applicant cannot meet his burden of proof but would ask for a hearing on this allegation.

Ground Nine (b).

Applicant next contends that trial counsel were ineffective for failing to adequately investigate and present relevant evidence in mitigation of punishment during Applicant's resentencing proceeding; and that counsel failed to adequately prepare and present defenses to the State's case in aggravation of punishment or to adequately cross-examine the prosecution's witnesses. Once again, Respondents submit that Applicant cannot show either deficient performance or resulting prejudice.

With respect to counsel's investigation of mitigating evidence, counsel's performance is deficient only if he fails to make a "reasonable" investigation for possible mitigating evidence.

Id. Further, reviewing courts must apply a "heavy measure of deference to counsel's strategic judgments." Strickland, 466 U.S. at 690-91; Matthews, 105 F.3d at 919. "Trial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case." Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991). "Failure to present particular mitigating evidence often leads to claims that counsel should have introduced such evidence or investigated further. On the other hand, the introduction of evidence that the jury does not credit or that the state turns to its advantage leads to ineffectiveness claims also." Thus, the best course of action for a court reviewing counsel's performance in a collateral proceeding is to credit plausible, strategic decisions. Truesdale v. Moore, 142 F.3d 749, 754-55 (4th Cir. 1998). See also Jones v. State, 322 S.C. 329, 504 S.E.2d 22 (1998).

Even if a defendant can establish that counsel's representation fell below an objective standard of reasonableness, he must still prove that the deficient performance prejudiced the defense. Jones. The Court in Jones recently held that:

When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'

504 S.E.2d at 823, citing Strickland, 466 U.S. at 695, 104 S.Ct. at 2069. Further, a "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Jones. Here, Applicant has not shown deficient performance. Again, however, Respondents would request an evidentiary hearing on this allegation.

IV. CONCLUSION.

Each and every allegation contained within the Application for Post-Conviction Relief not herein above either expressly admitted, qualified or explained is expressly denied.

WHEREFORE, having made return to the Application for Post-Conviction Relief, Respondents respectfully request a hearing on the grounds raised in the Application.

CHARLES M. CONDON
Attorney General

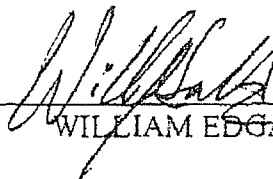
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____



WILLIAM EDGAR SALTER, III

ATTORNEY FOR RESPONDENTS

July 12, 2000.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF DORCHESTER)

Timothy Dion Rogers,) C. A. No. 00-CP-18-575
 SCDC # 4883,)

Applicant,)

-vs-)

CERTIFICATE OF SERVICE

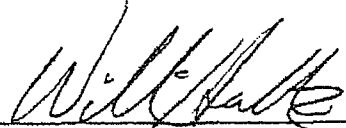
Doug Catoe, Commissioner, S. C.)
 Dept. of Corrections, and the State)
 of South Carolina,)

Respondents.)

The undersigned hereby certifies that on the 12th day of July, 2000, a copy of the Respondents' Return was served on counsel for the Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

Diana L. Holt, Esquire
 P. O. Box 6454
 Columbia, South Carolina 29260

Jeffrey P. Bloom, Esquire
 1945 Blossom Street
 Columbia, South Carolina 29205



 WILLIAM EDGAR SALTER, III
 ATTORNEY FOR RESPONDENTS

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 TIMOTHY DION ROGERS,)
 Applicant,)
)
 vs.)
)
 GARY MAYNARD, Director,)
 South Carolina Department)
 of Corrections)
 Respondent.)

IN THE COURT OF COMMON PLEAS

00-CP-18-575

First Amended Application for Post Conviction Relief

FILED
 2001 AUG 20 PM 3:23
 DORCHESTER COUNTY

{Note: This Application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF}

1. Applicant is detained at Lieber Correctional Institute, S.C. Dept. of Corrections, [REDACTED] Ridgeville, S.C. [REDACTED].
2. Sentence of death was imposed at the Dorchester County Court of General Sessions, after a jury trial on September 16 - 23, 1996, with the Hon. Charles Whetstone presiding.
3. (a) For the offense of murder, the indictment number is: 93-GS-18-101.
 (b) For the offenses of criminal sexual conduct with a minor, the indictment numbers are: 94-GS-18-47 and 94-GS-18-48.
4. (a) For the offense of murder:
 - (i) On February 28 - March 5, 1994, Applicant was convicted of murder and sentenced to death at a jury trial, with the Hon. Luke Brown, presiding. On appeal, the murder conviction was affirmed, but the death sentence was reversed and remanded.

- (ii) On September 16 - 23, 1996, Applicant was sentenced to death at a re-sentencing jury trial, with the Hon. Charles Whetstone, presiding.
- (b) For the offenses of criminal sexual conduct:
 - (i) On January 25 and 27, 1994, Applicant pled guilty and was sentenced to seven years on each count, with the Hon. Charles W. Whetstone presiding, General Sessions Court of the Second Circuit, Dorchester County.
- 5. See (4), *supra*.
- 6. (a) Applicant appealed from the judgment of conviction and imposition of sentence, as to the murder conviction and death sentence.
 - (b) Applicant did not appeal his guilty pleas to the offenses of criminal sexual conduct with a minor, two counts.
- 7. (a) The Court to which Applicant appealed the murder conviction and death sentences was: The South Carolina Supreme Court.
 - (b) The results in the Court to which Applicant appealed were:
 - (i) Murder conviction affirmed; Death sentence reversed and remanded for re-sentencing ("Rogers I").
 - (ii) Death sentence affirmed after re-sentencing trial (Rogers II).
 - (c) The dates of each such result were:
 - (i) January 22, 1996 (Rogers I).
 - (ii) January 24, 2000 (Rogers II).
 - (d) Citations of any written opinions or orders entered pursuant to such results:

- (i) *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (Rogers I).
- (ii) *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (Rogers II).

8. Applicant did not appeal the guilty pleas to criminal sexual conduct with a minor because Applicant had pled guilty on advice of trial counsel, prior to Applicant's first capital jury trial in 1994.

9. and 10. Grounds for Relief and Concise Statement of Supporting Facts.¹

9(A). GROUND A

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that trial counsel (i) failed adequately to advise the Applicant regarding the attempted but failed guilty plea to murder, which, if the Applicant had been properly and effectively advised, would have avoided a death sentence; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed to object to the improper removal of a potential juror for cause; (v) failed to object to removal of a selected and seated African-American juror for hardship when a white selected and seated juror with an identical situation was not excused from service; (vi) failed properly or adequately to investigate and prepare the guilt-innocence phase of the trial; (vii) failed to seek expert assistance regarding a material medical condition of Applicant, (viii) failed effectively to confront and rebut the State's witnesses and evidence; (ix) failed to present

¹Applicant reserves his right to amend this application.

readily available and favorable defense witnesses and evidence;(x) failed to object to introduction of actual Department of Corrections incident report; (xi) failed to object to improper closing arguments by the State; failed to request jury instructions to which the applicant was entitled and, (xi) the cumulative impact of these errors and the resulting prejudice. Applicant was prejudiced by trial counsels' failures. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (capital defendant has a right to maintain innocence during a guilty plea); *Hill v. Lockhart*, 474 U.S. 52 (1985) (*Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel); *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify). Trial counsel did not investigate and present facts and circumstances which would have supported the defense at the trial phase. *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (Ineffective for failing to investigate possible defenses); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (Ineffectiveness so pervasive that showing of prejudice unnecessary); *Strickland v. Washington*, 466 U.S. at 668, 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury") (emphasis added); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535-37 (2003) (holding trial counsel's failure to investigate and present mitigation evidence required new trial where counsel's failure to investigate was unreasonable under "prevailing professional norms," as measured in part by the ABA Standards); *Williams v. Taylor*, 529 U.S. at 397 (in assessing prejudice flowing from

deficient performance, reviewing court must consider “the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding”); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) (“cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial”); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999) (“[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (A). FACTS IN SUPPORT OF GROUND A

The trial record is replete with counsels’ failures to protect Applicant’s rights and the integrity of the trial. Trial counsel was ineffective for failing to advise Applicant prior to and during the aborted guilty plea that would have resulted in a life sentence for Applicant, had it been completed. The Solicitor had agreed to a negotiated plea for a life sentence. Trial counsel never advised applicant that he could both plea guilty and maintain his innocence of murder. Applicant never denied firing the shot that killed Stephanie B [REDACTED] but he has always adamantly said that he never intended to hurt Stephanie. While Legally the point is a distinction without a difference, it represented a significant moral difference to Applicant. Trial counsel failed to conduct any voir dire examination of several venirepersons who sat as jurors on the trial of this case. Trial counsel failed to object to the trial court’s description to venirepersons during voir dire of the accusation against

Applicant as being that Applicant "shot a child in the back of her head." Trial counsel did not interview available witnesses who could have corroborated the defendant's testimony and defenses at the guilt or innocence phase of his trial. Trial counsel failed effectively to cross-examine several state witnesses. Trial counsel failed to seek the assistance of experts who could have and would have provided crucial information concerning Applicant's diminished guilt and culpability. The State notified trial counsel of several independent witnesses who revealed potentially favorable information during interviews with state agents. Applicant also separately made the existence of these several independent witnesses known to trial counsel. Applicant also made known to trial counsel the existence of other witnesses who could corroborate Applicant's explanation of the factual developments regarding the events surrounding the death of Stephanie B [REDACTED]. Trial counsel failed to interview any of these witnesses. Because counsel failed to interview these witnesses to discover what meaningful information they could provide to the jury charged with deciding Applicant's guilt or innocence and because of each of trial counsels' failures, Applicant was deprived of his constitutional guarantee to the effective assistance of counsel and due process of law, and other rights provided by South Carolina law. Trial counsels' ineffective assistance of counsel resulted in prejudice to applicant in that the fact-finder was deprived of material evidence that would have diminished applicant's culpability. Applicant will adduce additional evidence at an evidentiary hearing in support of the Ground A for relief.

9 (B). GROUND B

Applicant was denied the right to effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that during the sentencing phase of applicant's trial, trial counsel (i) failed adequately to advise Applicant

in accordance with *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), prior to and during the aborted guilty plea; (ii) failed to conduct adequate or any voir dire examination of several potential jurors, some of whom sat as jurors; (iii) Failed to conduct voir dire examination concerning possible race of victim and race of the Applicant; (iv) failed to object to the improper removal of a potential juror for cause; (v) failed to object to removal of a selected African-American juror for hardship when a white juror with an identical situation was not excused from service; (vi) failed to present available mitigating evidence at the sentencing phase of Applicant's trial; (vii) failed to seek expert assistance regarding a material medical condition of Applicant, (viii) failed effectively to confront and rebut the State's witnesses and evidence; (ix) failed to present readily available and favorable defense witnesses and evidence; (x) failed to object to introduction of actual Department of Corrections incident report; (xi) failed to object to improper closing arguments by the State; (xii) failed to request jury instructions to which the applicant was entitled; and, (xiii) the cumulative impact of these errors. See *Williams v. Taylor*, 529 U.S. 362 (2000) (Counsel ineffective for failing to investigate, interview witnesses, and present available mitigation evidence). Trial counsel failed to present available mitigating evidence at the sentencing phase. *Id.* Trial counsels' failures were unreasonable. Counsel's conduct was prejudicial to Applicant. See *Strickland v. Washington*, 466 U.S. 668 (1984). *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (Counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (Ineffective for failing to interview witnesses who could have contradicted state's evidence); *Ingle v. State*, 25416 (2002) (Ineffective for failing to interview a witness before calling the witness to testify); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988)

(Ineffectiveness so pervasive that showing of prejudice unnecessary); *Strickland v. Washington*, 466 U.S. at 668, 695 (“In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury”) (emphasis added); *Williams v. Taylor*, 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider “the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding”); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) (“cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial”); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999) (“[t]he question is not whether the defendant would more likely than not have received a different verdict with [effective counsel], but whether in [the] absence [of effective counsel] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence”) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

10 (B). FACTS IN SUPPORT OF GROUND B

The record of Applicant’s resentencing trial is replete with trial counsels’ failures to preserve applicant’s rights and the integrity of the trial, as noted above. Trial counsel failed to investigate and interview available and favorable witnesses for the sentencing phase. Applicant will adduce additional evidence at an evidentiary hearing in support of Ground B for relief.

9(C). GROUND C

Applicant was denied the right to effective assistance of counsel, and the due process

of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution in that the trial court lacked jurisdiction as to the indictment(s) for criminal sexual conduct with a minor, and as such, the convictions for said offense(s) were inadmissible and Applicant's death sentence must be vacated. Additionally, trial counsel was ineffective for failing to object to lack of jurisdiction as to the indictments for criminal sexual conduct with a minor; and, counsel was ineffective for failing to withdraw the plea to such offenses.²

10(C). FACTS IN SUPPORT OF GROUND C

The trial court lacked jurisdiction to accept the defendant's guilty plea of two (2) counts of criminal sexual conduct with a minor because no such offenses occurred in Dorchester County. *Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *Odom v. State*, 350 S.C. 300, 566 S.E.2d 528 (2002); *Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001). Lack of subject matter jurisdiction can be raised at any time. *State v. Funderburk*, 259 S.C. 256, 191 S.E.2d 520 (1972). Where a criminal conviction is admitted for the sentencing jurors consideration, and such conviction is later shown to be void, the defendant shall be entitled to a new sentencing trial. *Johnson v. Mississippi*, 486 U.S. 578, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988). Furthermore, trial counsel was ineffective for failing to object to lack of jurisdiction. *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994) (Counsel ineffective for failing to object

²Because trial counsel failed to inform Applicant that he could maintain his innocence of murder during the guilty pleas to these charges, trial counsel's ineffectiveness tainted these guilty pleas, which were integral to the guilty plea for murder. *North Carolina v. Alford*, 400 U.S. 25 (1970) (capital defendant has a right to maintain innocence during a guilty plea). The cumulative impact of the two interrelated failures also prejudiced Applicant.

to amendment of indictment which enhanced offense). Additionally, counsel was ineffective for failing to move to withdraw defendant's guilty plea to criminal sexual conduct with a minor when the plea to life was withdrawn. *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (Ineffective for failing to move to withdraw the guilty plea entered where prosecution promised not to oppose probation then prosecution reneged). Thus, counsel's conduct was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel. See *Hill v. Lockhart*, 474 U.S. 52 (1985). In order to satisfy the Strickland "prejudice" standard, the defendant must show that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 57-58.

9(D). GROUND D

Appellate counsel was ineffective for failing to raise and argue that reversal of the conviction was required because (i) trial court improperly admitted a highly prejudicial and wholly unreliable hearsay statement during the guilt-or-innocence phase of applicant's trial, the admission of which trial counsel preserved for review; and, (ii) Applicant's sentence should be reversed because the trial court erred in striking a qualified juror for cause all thereby depriving Applicant of rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

10 (D). FACTS IN SUPPORT OF GROUND D

Trial counsel objected to the admission of a previously undisclosed, dubious, and rank hearsay statement by State's witness Anthony Riley 1994 Tr. 805-12. The trial court allowed Riley to testify that he heard two unidentifiable and unidentified people utter a

highly inflammatory statements, "Did you get the mother fucker?" and "Yeah, I got the mother fucker." 1994 Tr. 804-15. The state surely intended for the jurors to insinuate that the words, "Yeah, I got that motherfucker," were uttered by Applicant. Trial counsel objected to the trial court's disqualification of a juror. 1996 Tr. 257-272. Appellate counsel failed to raise the issue on appeal, even though the issue was preserved and meritorious, and would have constituted reversible error. Appellate counsel failed to raise these issues on appeal, even though the issues were preserved and meritorious, and would have constituted reversible error. *Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002) (PCR relief required where trial counsel failed to object to hearsay); *same Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); and *see Ingel v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (requiring new sentencing trial where appellate counsel failed to raise on appeal a preserved and meritorious issue); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective appellate counsel must give assistance of such quality as to make appellate proceedings fair)); and *see Strickland v. Washington*, 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984).

9(E). GROUND E

Applicant was deprived of a fair trial and the interest of justice requires his conviction be vacated and he be granted a new trial because a material witness committed perjury when the witness testified he had no prior knowledge of or experience with Applicant. The witnesses false testimony deprived Applicant and the jury of important facts that would impeach the witness' testimony, when it is true that the witness both, in fact, knew Applicant and held a grudge against him, all in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments to the U.S. Constitution and South Carolina law, and which resulted in a miscarriage of justice. Far from being an unbiased and uninvolved eyewitness, Mr. Riley concealed his bias. Further, the state failed to disclose the fact that Mr. Riley was also a long-time employee of the victim's uncle, in violation of *Brady v. Maryland*, 373 US 83 (1963). *Brady* entitles Applicant to this information because it would have further exposed the witness' bias against Applicant. In the alternative, to the extent trial counsel failed to discover this close employer/employee relationship, Applicant was deprived of the effective assistance of counsel required by the Sixth, Eighth and Fourteenth Amendments and South Carolina law. see *Strickland v. Washington*, 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.Ed.2d 674, 692, 699 (1984). This false testimony was highly prejudicial to Applicant and requires a new trial for Applicant. The state's failure to disclose the impeachment evidence requires a new trial because Mr. Riley's testimony was highly material. In the alternative, trial counsel's failure to learn this information about Mr. Riley was unreasonable and it prejudiced Applicant at both phases of the trial.

10(E). FACTS IN SUPPORT OF GROUND E

State's witness Anthony Riley testified in the guilt or innocence portion of Applicant's 1994 trial that he had never seen Applicant before. 1994 Tr. 799. However, Applicant has now learned that Mr. Riley was not telling the truth. Mr. Riley, in fact, by his own sworn testimony, now admits that he had encountered Applicant before and the result of the contact left Mr. Riley bitter at Applicant. According to Mr. Riley, he briefly encountered Applicant when the two were in the Dorchester County Jail at the same time. During that stay, Mr. Riley had a very negative encounter with Applicant that Mr. Riley was able to recount in great detail almost twenty years later, when he was deposed in 2003 in

relation to the instant action. Moreover, Mr. Riley has had now disclosed that, as of 2003, he has worked for the victim's close relatives for more than twenty years, which would have been approximately eleven or more years at the time of his testimony in 1994.

11. Applicant appealed directly to the South Carolina Supreme Court; however, Applicant, did not petition the United States Supreme Court for a writ of certiorari. Applicant has neither previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court. For reference, in this action, PCR counsel was appointed in state court on April 11, 2000; Applicant's state PCR was filed on June 12, 2000.

12. See response to section 11, *supra*.

13. Applicant has not previously set forth any of the grounds listed in section 9, *supra*, to this or any other Court, State or Federal, in any petition, motion or application.

14. Not Applicable.

15. These grounds, as listed in section 9, *supra*, rely on additional facts outside the record considered by the previous courts in this case.

16. Applicant was represented at trial, both in 1994 and 1996, and at his guilty pleas to criminal sexual conduct with a minor in 1994, by the following attorneys: William L. Runyon, Jr., One Carriage Lane, Bldg. B, Su. 203, Charleston, S.C., 29407; and, Mark Leiendecker, 610 N. Cedar St., Summerville, S.C., 29483. Applicant was represented on direct appeal by Joseph Savitz, Chief Deputy, Office of Appellate Defense, 1122 Lady St., Ste. 940, Columbia, S.C., 29201.

17. See section 16, *supra*.

18. Applicant seeks vacation of his convictions and sentences, as to the indictments for

both murder and criminal sexual conduct with a minor.

19. Applicant is also under sentence for criminal sexual conduct with a minor as reflected in Indictment No. 94-GS-18-47 and 94-GS-18-48. These convictions arose from a guilty plea related to Applicant's pre-trial capital proceedings. The guilty plea was entered before the Hon. Charles W. Whetstone, General Sessions Court of the Second Circuit, Dorchester County, on January 25 and 27, 1994, and the Applicant was sentenced to seven (7) years on each indictment. Applicant was represented by William Runyon, Esq., and Mark Leiendecker, Esq.

Respectfully submitted,

Jeffrey P. Bloom
Attorney at Law
1911 Pickens St.
Columbia, SC 29201
(803)256-7001

Diana Holt
Diana Holt, LLC
P.O. Box 6454
Columbia, SC 29260
(803)782-1663

By: 
Counsel for Applicant

August 27, 2004
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

00-CP-18-575

TIMOTHY DION ROGERS,)

Applicant,)

CERTIFICATE OF SERVICE

vs.)

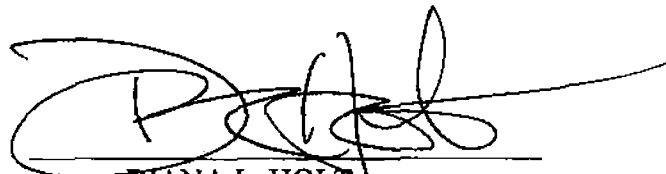
JON E. OZMINT, Director,)
South Carolina Department)
of Corrections)

Respondent.)

FILED-RECORDED
2004 AUG 30 PM 3:22
CLERK OF COURT
DORCHESTER COUNTY

I, Diana L. Holt, hereby certify that I have this date served the Applicant's First Amended Request for Post-Conviction Relief, in the above-captioned case upon counsel for Respondent by U.S. Mail to his address as follows:

Wm. Edgar Salter, III
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211


DIANA L. HOLT

August 27, 2004

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
):
COUNTY OF DORCHESTER) CASE NO. 2000-CP-18-0575

TIMOTHY DION ROGERS,) VOLUME I, Pages 1 - 218
 Applicant,)
):
) TRANSCRIPT OF RECORD
):
) POST-CONVICTION RELIEF
):
) September 27, 2004
JON E. OZMINT, DIRECTOR,)
SOUTH CAROLINA DEPARTMENT) of CORRECTIONS,)
of CORRECTIONS,)
) Respondent.) St. George, South Carolina

B E F O R E:
The Honorable Diane S. Goodstein

A P P E A R A N C E S:
Jeffrey P. Bloom, Esquire
Law Office of Jeffrey P. Bloom
1911 Pickens Street
Columbia, SC 29201
 -and-
Diana Holt, Esquire
Diana Holt, LLC
P. O. Box 6454
Columbia, SC 29260-6454
 For the Applicant

Edward Salter, Esquire
Jeffrey Jacobs, Esquire
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211-1549
 For the Respondent

**Robin L. Keil, RMR
Resident Court Reporter
First Judicial Circuit
Post Office Box 3335
Summerville, SC 29484-3335**

I N D E X

	<u>Page</u>	<u>Line</u>
ANTHONY RILEY		
Direct Exam By Mr. Bloom	31	15
Cross-Exam By Mr. Salter	48	10
Redirect Exam By Mr. Bloom	63	23
Recross-Exam By Mr. Salter	67	7
Fruther Redirect Exam By Mr. Bloom	67	24
JOSEPH SAVITZ		
Direct Exam By Mr. Bloom	72	5
Cross-Exam By Mr. Salter	80	22
Redirect Exam By Mr. Bloom	87	19
MARK LEIENDECKER		
Direct Exam By Mr. Bloom	89	3
Cross-Exam By Mr. Salter	171	6
Redirect Exam By Mr. Bloom	189	20
Recross-Exam By Mr. Salter	199	5
Further Redirect Exam By Mr. Bloom	201	21
Further Recross-Exam By Mr. Salter	210	23
Further Redirect Exam By Mr. Bloom	211	12
Examination By The Court	211	21
Further Redirect Exam By Mr. Bloom	212	19
Further Recross-Exam By Mr. Salter	213	24
Further Redirect Exam By Mr. Bloom	214	18

PETITIONER'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
P-01	Transcript		29
P-02	Transcript		29
P-03	Transcript		30
P-04	Statement of Anthony Riley		32
P-05	Order of Appointment of Legal Counsel for Indigent Defendant		96
P-06	September 29, 1993 Letter		97
P-07	Report of Jeff Yungman	130	
P-08	Supplementary Report		146
P-09	Incident Report		146
P-10	February 9, 1994 Letter		146
P-11	February 15, 1994 Letter		146
P-12	February 27, 1994 Letter		146
P-13	February 9, 1996 Letter		146
P-14	April 18, 1996 Letter		146
P-15	Order of Appointment of Legal Counsel		146
P-16	Order of Appointment of Legal Counsel		146

P-17	Order of Appointment of Legal Counsel		147
P-18	Photograph	147	
P-19	Indictments of CSC with a Minor		207

RESPONDENT'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
R-01	February 14, 1994 Letter	177	178
R-02	February 17, 1994 Letter	177	178
R-03	February 22, 1994 Letter	177	178

COURT'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-01	Mark A. Leiendecker's Deposition	216	
C-02	Anthony Riley's Deposition	216	

1 (Monday, September 27, 2004.)

2 THE COURT: Thank you, everyone, and
3 please be seated. All right. I should say
4 good morning, Mr. Rogers, how are you this
5 morning?

6 MR. ROGERS: Okay.

7 THE COURT: You doing okay?

8 MR. ROGERS: Yes, ma'am.

9 THE COURT: Did you get breakfast and
10 everything this morning?

11 MR. ROGERS: Yes, ma'am.

12 THE COURT: And let me just ask, it's my
13 understanding there's a discovery motion
14 outstanding and a motion in limine; is that
15 right?

16 MR. SALTER: Correct, Your Honor.

17 THE COURT: I see Ms. Wafford back
18 there. Good morning, Ms. Wafford. You're
19 here with the family. I'm delighted you're
20 here, good to see you this morning, as
21 always. Very good, all right.

22 Well, I tell you what. Why don't
23 we begin -- probably, I gather with the
24 discovery motion, if there's a motion of
25 outstanding discovery, better deal with that

1 first, then we'll get into the motion in
2 limine, so let me hear from you.

3 MR. JACOBS: May it please the Court,
4 I'm Jeff Jacobs representing the respondents
5 in this case. We served some interrogatories
6 on the applicant and we received some answers
7 to those interrogatories, we contend that
8 numbers 5, 7, 8, 14, 16 and 17 are
9 insufficient. I don't know if Your Honor has
10 a copy of them.

11 THE COURT: I see a motion to compel and
12 I'm sure I've attached them. I don't see it,
13 that it's, you know, very evident, but let me
14 just flip through the file, see what we have.
15 I do have it right here, Mr. Jacobs. And
16 here is the second set of interrogatories.

17 Now, tell me what your concerns are
18 with those specific numbers again.

19 MR. JACOBS: The specific numbers, Your
20 Honor, are 5, 7, 8, 14, 16 and 17. And
21 essentially what we've done in those
22 interrogatories is ask for the factual basis
23 for their allegations they've made in their
24 application.

25 THE COURT: Okay.

1 MR. JACOBS: And their response, I'll
2 read the response, for example, to number 5.

3 THE COURT: Okay.

4 MR. JACOBS: And this pattern follows
5 for all six of these interrogatories.
6 Applicant has already answered this
7 interrogatory in the pertinent part of
8 experts available to respondents. Moreover,
9 trial counsel did virtually nothing in
10 preparation for applicant's 1994 trial.

11 We contend, first of all, if
12 they've answered it, it hasn't been in
13 response to an interrogatory, it's not in an
14 answer to an interrogatory and we're entitled
15 to that answer, we believe. And it is not
16 incumbent upon us to extract their theory of
17 the case from documents they provided. They
18 can identify documents in their answer, but
19 they need to do so and they have not. And
20 that holds true for all six, Your Honor.

21 THE COURT: Okay. Who's going to
22 respond to that for me?

23 MS. HOLT: I will, Judge, Diana Holt.
24 May it please the Court.

25 THE COURT: Yes.

1 MS. HOLT: Judge, we have answered these
2 interrogatories to the best of our ability.
3 I will note that quite a few of these came
4 with less than 30 days left prior to the
5 hearing. We have bent over backwards, in our
6 estimation, making materials available to
7 counsel for respondent, but copying them for
8 them and delivering them to them. I don't
9 think we're required to prepare their case
10 for them, but we have done everything and
11 more that I think we're required to do under
12 the rules.

13 THE COURT: Okay. Very well.

14 MR. JACOBS: Your Honor, to address 30
15 days, we served these interrogatories as soon
16 as we got the amended application which was
17 filed at the very end of the deadline for
18 filing that amended application within 30
19 days of this hearing.

20 THE COURT: All right, very well. Let
21 me tell you what my feeling is certainly at
22 this juncture. I'm going to deny your motion
23 to compel. Really a couple of reasons. I
24 have also read the amended PCR application
25 that I thought was -- I thought that that

1 document in and of itself maintained quite a
2 bit of detail, much more detail than I'm used
3 to seeing in an application for PCR, even a
4 capital PCR. So certainly at the end of the
5 day when I had finished I knew pretty
6 substantially where I thought they were going
7 with those theories in mind.

8 So I must say that I think the
9 application itself, coupled with the
10 discovery response, I think adequately
11 puts -- certainly puts the State on notice of
12 what the theories are, where they're going,
13 who the folks are going to be, experts and
14 the like. So I'm going to respectfully deny
15 motion and note your exception thereto.

16 Now you have a motion in limine.

17 MR. SALTER: May it please the Court, my
18 name is Ed Salter.

19 THE COURT: Yes.

20 MR. SALTER: It has been brought to our
21 attention that the applicant intends to
22 present the expert testimony of G. Ashley
23 Pennington, IV, on the issue of whether or
24 not trial counsel is deficient in their
25 performance. We would move in limine to

1 prohibit any such testimony based upon the
2 State Supreme Court's opinion in Green v.
3 State. In Green v. State the Court rejected
4 the argument by the petitioner, I was going
5 to say appellant, but the petitioner's
6 argument that the trial judge erred, and the
7 PCR judge err in failing to allow expert
8 testimony.

9 THE COURT: On the practice of law.

10 MR. SALTER: On the practice of law,
11 correct. That's essentially what they want
12 to do. Just like in that case what we have
13 is we're going to have Mr. Pennington come in
14 here being nothing more than an expert
15 mouthpiece for them. They argue in a
16 memorandum, which I just provided a copy of a
17 couple minutes ago, this is required by
18 Wiggins v. Smith. It's not required.

19 Wiggins v. Smith doesn't set any
20 State evidentiary standards. They relied
21 upon the ABA standards in Wiggins, but that
22 can be done by way of argument. It is not
23 necessary to put up an expert to testify to
24 this or to testify again that his conclusion
25 is counsel's deficient in this regard or that

1 regard.

2 They also rely upon the Dawkins
3 case where the Court of Appeals -- I mean,
4 I'm sorry, the Supreme Court allowed the
5 testimony of a Professor Freeman. Professor
6 Freeman's testimony, however, dealt with
7 facts -- I'm sorry, excuse me, that were --
8 I'm sorry, dealt with an ethical issue which
9 is completely different.

10 The Court is familiar with PCR, the
11 Court is familiar with capital cases, Your
12 Honor's tried capital cases. You do not need
13 an expert to come in here and explain the law
14 to you. Now, ethics are a completely
15 different matter, perhaps. But not PCR.

16 THE COURT: Great. Thank you so much,
17 Mr. Salter.

18 MR. SALTER: Thank you.

19 THE COURT: Yes, sir, Mr. Bloom.

20 MR. BLOOM: If it please Court.

21 THE COURT: Yes, sir.

22 MR. BLOOM: First I'm handing up through
23 your law clerk a memorandum on this issue.
24 The Green v. State case I would first say
25 doesn't apply to this case for several

1. reasons. First, Green v. State is a non
2 capital case. Secondly, it is a pre Wiggins
3 v. Smith case. Both of those are very
4 important distinctions.

5 First, since it's a non capital
6 case, every time the U. S. Supreme Court has
7 looked at a capital proceeding and balanced
8 state evidentiary rules versus the
9 applicant's right to due process as well as
10 under the Eighth Amendment to present
11 reliable testimony, the U. S. Supreme Court
12 has erred in favor of the defendant or the
13 applicant. And there's a whole line of cases
14 in my memorandum which I've cited there,
15 namely Green v. Georgia, for example, which
16 dealt with a State evidentiary rule. And the
17 U. S. Supreme Court held the defendant was
18 entitled to put up some hearsay evidence
19 during his mitigation case to establish a
20 fact in contention, that the State
21 evidentiary rule on hearsay had to fall to
22 Mr. Green's right to put up hearsay evidence.

23 There's a plethora of other cases,
24 for example, Skipper v. South Carolina, where
25 the U. S. Supreme Court held under the Eighth

1 Amendment the defendant is entitled to put up
2 adjustment to prison evidence, and State
3 evidentiary rules blocking that are
4 overridden.

5 Here, in the context of a capital
6 case, the only way I can get into the record
7 of this case for Your Honor's consideration
8 as the fact finder of the ABA standards and
9 guidelines is through testimony. I can't
10 just stand here and argue it because it's not
11 a part of the record. Argument is not
12 something for the fact finder to base a
13 decision on in terms of finding facts.

14 Even the Dawkins case at a minimum,
15 at a minimum, the Dawkins case said that an
16 attorney expert is entitled to testify to
17 facts that that attorney expert has gleaned
18 from a review of certain records and
19 materials in the case. Where Professor
20 Freeman was stopped short in the Dawkins case
21 was in his affidavit where it then went into
22 legal opinions and conclusions.

23 So we would argue under even the
24 Dawkins case that Mr. Pennington's testimony
25 would be allowed up to the point where he

1 could elucidate into the record pertinent
2 facts, not his opinion or conclusions, but
3 pertinent facts that he's gleaned from
4 various records and materials to place into
5 the record for Your Honor's consideration.

6 Lastly, Your Honor, I would note
7 that my familiarity with this issue in
8 capital PCR's, every circuit judge, including
9 those post cases, capital cases post Green v.
10 State which the attorney general relies on,
11 every circuit judge has allowed the testimony
12 and then take it under advisement to decide
13 whether or not to consider it, and if they
14 do, what weight to give it.

15 THE COURT: You can have a proffer in
16 any event. I mean, the testimony has got to
17 be one way or the other.

18 MR. BLOOM: I would have to have a
19 proffer, yes, ma'am.

20 THE COURT: That was my question to you.
21 When would you propose to call Mr. Pennington
22 to give me an opportunity to do those review?
23 Because clearly the testimony has got to come
24 in, in any event, if only in some form or
25 fashion as a proffer.

1 MR. BLOOM: Yes, ma'am.

2 THE COURT: However, and that's the way
3 that I've handled it in PCR's in the past,
4 I'll share that with you. And also,
5 Mr. Salters, you probably know Mr. Zelenka
6 had Professor Freeman testify in a matter,
7 another capital PCR as to the ethical issues
8 involved in what is a conflict, and is a
9 conflict in a capital case waivable, under
10 what circumstances is it waivable, if it is
11 waivable. So I certainly have had discussion
12 along those lines.

13 I obviously would like to have --
14 it's been awhile since I looked at the Green
15 case particularly, and I'd like an
16 opportunity to do that if, I can, before
17 Mr. Pennington testifies, only so that you
18 all will know how I am considering it because
19 I think that makes a difference for your
20 preparation and your response to it, quite
21 frankly. So is he, like, your first witness?

22 MR. BLOOM: No, ma'am.

23 THE COURT: Okay.

24 MR. BLOOM: He would be probably --

25 THE COURT: Good.

1 MR. BLOOM: -- Wednesday.

2 THE COURT: Okay. Good. That will give
3 me some time for some study.

4 MR. BLOOM: Struggling with the weather,
5 some other witnesses.

6 THE COURT: What we might do is meet a
7 little bit earlier tomorrow morning, that
8 gives me the evening to do some of the work
9 on that issue, maybe we can have argument on
10 that tomorrow morning so that you all can
11 help me as fully as I'll need help on that
12 issue.

13 MR. BLOOM: Yes, ma'am. The few other
14 things I would point out, Your Honor.

15 THE COURT: Sure.

16 MR. BLOOM: Is in my memorandum I quote
17 the Green v. State case which the attorney
18 general is relying on verbatim. In fact,
19 I've lifted out of the opinion everything our
20 Supreme Court said about that attorney expert
21 in Green. I deleted all the other issues --

22 THE COURT: And just that. Oh, great.

23 MR. BLOOM: So the section in green that
24 addresses --

25 THE COURT: So I don't have to wait to

1 see the movie, I can just read what you put
2 in there?

3 MR. BLOOM: That's the short answer.

4 THE COURT: Okay.

5 MR. BLOOM: And the last thing I would
6 point out, the attorney general in their
7 motion in limine cites a fourth circuit case,
8 Nolan v. French. Just to distinguish that
9 briefly first, that also is a pre Wiggins
10 case, but secondly I happen to be licensed
11 and practice in North Carolina and I do these
12 types of hearings in North Carolina. North
13 Carolina leaves attorney expert testimony in
14 capital cases on ineffective assistance of
15 counsel claims totally in the discretion of
16 the judge, your contemporary who is hearing
17 the case. Some judges who have specific
18 capital defense trial experience and know
19 what it's like to be a defense attorney in a
20 capital case say, you know, I don't need that
21 testimony. Other judges who don't have that
22 similar experience accept the testimony. So
23 North Carolina does not have a blanket
24 prohibition on it, it leaves it totally to
25 the Court's discretion. I think that's an

1 important thing to point out in the case that
2 they rely upon.

3 THE COURT: The Fourth Circuit case is
4 out of North Carolina?

5 MR. BLOOM: Yes, ma'am. It's a capital
6 post-conviction case out of North Carolina.

7 MR. SALTER: Yes, ma'am, Your Honor,
8 it's Millan v. French which is also a capital
9 case. Wiggins can't be controlling because
10 PCR's is a state statutory remedy that
11 doesn't have to exist. We don't even have to
12 a state PCR statute, so Wiggins can't be
13 controlling. It doesn't set any guidance for
14 what state evidentiary laws should be.

15 Also Mr. Pennington is being
16 proffered as an expert to give his expert
17 opinion. As a matter of law, if this Court
18 should rule counsel is deficient, that's
19 precisely what Green says you can't do.
20 That's our position in a nutshell. I would
21 like you to know I likewise have quoted the
22 Green case verbatim.

23 THE COURT: Oh, thank you. So I'm
24 covered both ways, that's fabulous. Thank
25 you all so much.

1 MR. SALTER: Yes, ma'am.

2 THE COURT: What I heard, Mr. Salter, I
3 got you very clearly, and what I also heard
4 was if this doesn't work for Mr. Pennington
5 to testify to the ultimate issue, they'll
6 take something less is what I heard, I think.
7 I think they got one of those fallback
8 positions. Your position is it doesn't exist
9 with regards to attorney expert testimony
10 when the attorney is testifying regarding
11 ineffective assistance of counsel not on an
12 ethical issue such that Professor Freeman
13 testified.

14 MR. SALTER: Correct.

15 THE COURT: But on the ultimate issue.

16 MR. SALTER: Correct.

17 THE COURT: I think probably what we'll
18 do is get together at 9:00 in the morning and
19 we'll talk more about that since that gives
20 me some time to do some study. Have you all
21 given me the -- I don't need the Green case
22 apparently, but have you given me the Wiggins
23 case?

24 MR. BLOOM: I have a copy of Wiggins for
25 Your Honor.

1 THE COURT: Okay. And you don't have to
2 get that now.

3 MR. BLOOM: All right.

4 THE COURT: Because I'm not going to
5 look at it probably until lunch or this
6 evening. Great.

7 Now, so I guess I've got that one
8 under advisement and further discussion, the
9 motion in limine.

10 All right. Now, does that satisfy
11 the pretrial matters at this point?

12 MR. SALTER: I believe so, Your Honor.

13 THE COURT: Okay.

14 MR. BLOOM: Yes, Your Honor.

15 THE COURT: Very well. Do you -- it's
16 completely up to you whether or not you wish
17 to make an opening. I'm happy to hear from
18 you if you want to give me an outline and
19 if -- or we can get right to it. In other
20 words, whatever works for you works for me.

21 MR. BLOOM: Yes, ma'am. I'd be glad to
22 and I can summarize since you have our
23 pleadings and that sort of thing.

24 THE COURT: I do.

25 MR. BLOOM: But our case goes to

1 ineffective assistance of counsel at jury
2 selection in terms of inadequate voir dire,
3 it goes to ineffective assistance of counsel
4 in the 1994 guilt phase trial. In essence at
5 that phase there were key witnesses not
6 interviewed who would have been helpful to
7 the defendant, there were key matters that
8 weren't corroborated on behalf of the
9 defendant's own testimony that was presented.

10 Lastly, we allege ineffective
11 assistance of counsel at sentencing in 1996,
12 or I should say the resentencing, that the
13 defense counsel did not conduct an adequate
14 or thorough mitigation investigation that's
15 required under Wiggins v. Smith. Indeed, I
16 would note our State Supreme Court in its
17 first post Wiggins decision addressing the
18 full panoply and principles in Wiggins
19 decided this issue in favor of a PCR
20 applicant, and that is Von Dohlen v. State of
21 South Carolina which was just decided within
22 a month or two ago. And I have that case as
23 well which I'll hand up to the Court with
24 Wiggins.

25 THE COURT: Great. Very well. Now, two

1 things, Mr. Bloom. The amended application
2 has to do with the plea. Am I to anticipate
3 that that will continue to be a ground?

4 MR. BLOOM: Yes, ma'am. In fact,
5 co-counsel politely reminded me --

6 THE COURT: Poked you.

7 MR. BLOOM: I left off we're also
8 alleging the aborted murder plea itself
9 constituted to ineffective assistance of
10 counsel because there was no discussion or
11 advice to the defendant regarding Alford v.
12 North Carolina in his right to move before
13 the Court to accept his plea under Alford.

14 Additionally in that context, we're
15 also alleging that the defendant pled to two
16 criminal sexual conduct with a minor
17 indictments prior to the aborted murder plea.
18 Those are wholly without jurisdiction. They
19 occurred, if at all, in Charleston County,
20 not Dorchester. That fact was never
21 investigated or checked by any of the
22 parties, and so we're alleging that the CSC
23 indictments are also before Your Honor for
24 post-conviction release -- relief because
25 they were without jurisdiction and

1 jurisdiction can be raised at any time.

2 THE COURT: Let me ask you this
3 question: It's further my understanding, and
4 I wasn't absolutely certain, but at the time
5 of the murder plea the CSC plea was entered
6 first?

7 MR. BLOOM: That's correct.

8 THE COURT: And then on to the murder
9 plea, the murder plea aborted and there was
10 no motion to withdraw the CSC pleas; is that
11 right?

12 MR. BLOOM: That's correct, Your Honor.
13 That's correct. And lastly there are some
14 appellate ineffective assistance of counsel
15 issues as well.

16 THE COURT: Okay. Outline those for me
17 because I don't....

18 MR. BLOOM: One of them -- our first
19 witnesses this morning will be Mr. Savitz of
20 appellate defense, two or three issues placed
21 into the transcript but not raised on appeal.
22 One has to do with the disqualification of a
23 juror, one has to do with some hearsay
24 testimony, and I think there is a third issue
25 as well regarding an exhibit that was entered

1 into evidence that there was no objection to.
2 In that regard I think I'm done with my brief
3 opening. But I would also note it was my
4 understanding I think the clerk of court was
5 going to have the trial exhibits up here.

6 THE COURT: I've got it -- I believe
7 this is the file.

8 MR. BLOOM: From the trial.

9 THE COURT: And we'll make that inquiry
10 where would be the exhibits.

11 MR. BLOOM: Because we may need to use
12 some of those exhibits.

13 THE COURT: Sure.

14 MR. BLOOM: Thank you, Your Honor.

15 THE COURT: Mr. Salters.

16 MR. SALTER: Thank you, Your Honor. It
17 would be our position that counsel's
18 investigation and presentation at trial was
19 reasonable and objectively so under
20 Strickland, that what happened here was a
21 situation where counsel engaged in some
22 initial investigation, got all their ducks in
23 a row, didn't realize that Mr. Rogers had
24 some culpability involved, and Mr. Runyon
25 went about what he felt was the best way to

1 save Mr. Rogers' life, that was to construct
2 the pleas to two counts of criminal sexual
3 conduct with a minor in the second degree,
4 thereafter enter a murder plea, so Mr. Rogers
5 would get life without parole, and apparently
6 all was well and good until during the course
7 of the murder plea itself Mr. Rogers had
8 backed out, although previously been in
9 agreement.

10 Thereafter, counsel engaged in what
11 we consider to be reasonable conduct, engaged
12 in what we consider to be adequate voir dire.
13 There are key strategic reasons that lead
14 counsel will advance for most of the
15 allegations against him, including the
16 failure to call certain witnesses or failure
17 to present certain evidence.

18 One thing that was not addressed
19 and is raised in the application is one of
20 the few things I could discern without filing
21 the motion or the interrogatories, was
22 there's a failure to raise a King charge,
23 failure to request a King charge. We submit
24 there was no evidence of involuntary
25 manslaughter, this was basically a gift by

1 the trial judge to charge it.

2 Now, with respect to the issues of
3 ineffective assistance of appellate counsel,
4 I think the testimony will show that
5 Mr. Savitz was effective, that he made a
6 reasonable determination as to which issues
7 to raise on both appeals.

8 THE COURT: Very well. All right. Now,
9 Mr. Salter, let me ask you this question
10 because I received some correspondence from
11 both sides regarding an ophthalmologist
12 expert, and you received that correspondence
13 because I may have actually received your
14 letter first, Mr. Salter, where you indicated
15 that you understand that Dr. Price practiced
16 in Summerville and at one point was my
17 ophthalmologist and you were fine with that.

18 MR. SALTER: Your Honor, we take the
19 position that it's up to you. That if you
20 don't feel like there's any reason to
21 disqualify yourself, we certainly are not
22 going to suggest that you should.

23 THE COURT: Well, let me, let me just
24 disclose to everyone so everyone knows fully
25 my relationship regarding Dr. Price.

1 Dr. Price lives in Summerville, we live in
2 the same neighborhood, our properties back up
3 next to each other and he has certainly in
4 the past, he is not my ophthalmologist only
5 because I seem to work all the time, have to
6 go to those places at the mall at the weekend
7 to get my eyes checked because they're open a
8 more convenient time and he has normal hours.

9 I will tell you that we have
10 visited in each other's homes. It is
11 certainly not an ongoing friendship. I think
12 there was a symphony function several years
13 ago, and we went to his home for that, and
14 beyond that I don't know that I've ever been
15 in his home for any other reason. I think
16 he's been in our home once or twice over the
17 years and I've lived there since 1988.

18 Although I should tell you that it is a very
19 pleasant relationship, but it's just not, you
20 know, what is that TV show that the fellow's
21 always at the back fence and you never see
22 him, you know Tim Allen's in it, that
23 certainly would not be descriptive of our
24 relationship.

25 He is very busy, we are very busy,

1 I'm rearing children, he's finished and on to
2 other things. So that would be the
3 relationship. It is a very pleasant
4 acquaintanceship. I know him, I know him
5 pleasantly. Would that have an affect on me?
6 I certainly don't think so, but at the end of
7 the day I certainly would want everyone to be
8 at peace or have any concern or question
9 about that, so I will leave it to you.

10 If anyone has any concerns about
11 that relationship, I think he was my
12 mother-in-law's ophthalmologist, found a
13 cataract, sent her to the Storm Eye
14 Institute, when my children were little he
15 did their eye exams, when I became a judge
16 same things happened, they got to go to the
17 mall too, so but that was very pleasant, so
18 that's sort of the extent of I think all the
19 disclosure that I can think to make.

20 MR. SALTER: Thank you, Your Honor, for
21 putting that on the record. But we've never
22 made a motion recuse, would not do so now.

23 THE COURT: Okay. Very well. Now, let
24 me say to you just as a general observation,
25 this is non jury, everyone's comfort is

1 important. If you all need a comfort break
2 before I call time, please let me know
3 because I certainly don't want anyone being
4 uncomfortable. If y'all need to take a
5 break, just let me know, be a little more
6 casual and comfortable in doing that. You've
7 learned to do that in Beaufort County. Poor
8 Ms. Keil has been my court reporter forever,
9 knows about that, so if anyone needs to take
10 a break before I think we do just please let
11 me know. And without further ado, if you
12 would call your first witness.

13 MR. BLOOM: If it please the Court, I do
14 have a few exhibits to mark which are without
15 objection from the attorney general.

16 THE COURT: Great. Y'all go over those.
17 And what I will do is I know I'll take paper
18 notes. I'll also take some notes on my
19 computer, so I wanted you to know when I'm
20 messing with my computer I'm actually taking
21 notes. I lose my computer less than I lose
22 my notes, but I'll do that.

23 MR. SALTER: Your Honor, if I might add
24 the exhibits he's talking about are
25 transcripts. I believe that most of these

1 transcripts are contained within the record
2 on appeal from the very first appeal with the
3 exception of the guilty pleas to criminal
4 sexual conduct with a minor. I don't believe
5 that was included.

6 THE COURT: Okay.

7 MR. SALTER: And I believe Your Honor
8 already has a copy of the --

9 THE COURT: I think I do, too. I've had
10 a little debate with my young secretary who
11 is new, and I think I do, too.

12 MR. SALTER: If Your Honor does not, we
13 have an extra copy, I would be glad --

14 THE COURT: If I may use it today I do
15 believe that I do, but I would truly love
16 that. If I could make use of it today I'll
17 return it this evening, because I'm satisfied
18 that I do have a copy of it because I'm
19 satisfied that I've seen it. Actually wanted
20 to have an opportunity to read it over the
21 weekend, but I'll be doing that tonight as
22 well.

23 (Entered into evidence was Petitioner's
24 Exhibit 1, transcript.)

25 (Entered into evidence was Petitioner's

1 Exhibit 2, transcript.)

2 (Entered into evidence was Petitioner's
3 Exhibit 3, transcript.)

4 (Recess, from 11:14 a.m. to 11:25 a.m.)

5 THE COURT: I now have the transcript
6 from downstairs. Let me return this, if I
7 may.

8 Now, you all -- both sides have had
9 an opportunity to look at the exhibits from
10 the trial below; is that right?

11 MS. HOLT: Yes, Your Honor.

12 MR. SALTER: Yes, Your Honor.

13 THE COURT: And now you're ready to
14 begin?

15 MR. BLOOM: Yes, ma'am.

16 THE COURT: And you're going to call
17 your first witness.

18 MR. BLOOM: Thank you, Your Honor. If I
19 may just briefly, in the record of this case
20 without objection is Petitioner's
21 Exhibit Number 1, which is a transcript of
22 record in this case of a motion hearing dated
23 August 17th and 19th, 1993. Also in the
24 record is Petitioner's Exhibit Number 2, the
25 guilty pleas in this case of the criminal

1 sexual conduct with minor indictments on
2 January 25th and 27th, 1994, that is
3 transcript two. And lastly Petitioner's
4 Exhibit Number 3, which is the transcript of
5 record in this case dated February 2, 1994
6 and that is the aborted murder plea
7 transcript. Thank you, Your Honor.

8 We now call Anthony Riley.

9 THE COURT: Mr. Riley, please come
10 around and raise your right hand.

11 (Anthony Riley, called as a witness, having
12 first been duly sworn, is examined and
13 testified as follows:)

14 DIRECT EXAMINATION

15 BY MR. BLOOM:

16 Q. Mr. Riley, my name is Mr. Bloom. If there's
17 any question I ask you that you don't understand,
18 please feel free to ask me to repeat it or explain
19 it. All right, sir?

20 A. Yes.

21 Q. All right. And you are Anthony Riley?

22 A. Yes.

23 Q. All right. And you testified in this case in
24 1994?

25 A. Yes.

Anthony Riley - Direct Exam by Mr. Bloom

1 Q. And where were you living in 1994?

2 A. [REDACTED] Road.

3 Q. All right. In fact, were you living on
4 [REDACTED] Road at the time this incident occurred in
5 November 1992?

6 A. Yes.

7 Q. Were you at Spell's Grocery Store that
8 evening?

9 A. Yes.

10 Q. All right. After the incident, did you give
11 a statement to police?

12 A. Yes.

13 Q. All right.

14 MR. BLOOM: Court's indulgence one
15 moment, Your Honor.

16 THE COURT: Sure.

17 (Entered into evidence was Petitioner's
18 Exhibit 4, statement of Anthony Riley.)

19 Q. Mr. Riley, let me show you what is
20 Petitioner's Exhibit 4 without objection in the
21 record of this case. Can you please take that
22 document, sir? Is that the statement you gave?

23 A. Yes.

24 Q. In November 1992?

25 A. Yes.

Anthony Riley - Direct Exam by Mr. Bloom

1 Q. What is the -- are you able to tell me the
2 date you gave that statement, is it reflected there?

3 A. The next day.

4 Q. All right. That would be November 28th,
5 1992? Is that date on the record?

6 A. I don't have my glasses, so....

7 Q. The record speaks for itself. And what was
8 your address on [REDACTED] Road?

9 A. [REDACTED].

10 Q. All right, sir. That's reflected on
11 Petitioner's Exhibit 4 also, your address?

12 A. Yes.

13 Q. Describe briefly for us, if you could, where
14 [REDACTED] Road is regarding Spell's Grocery Store.

15 A. It's right on the left-hand side of Spell's
16 Grocery Store.

17 Q. If I could show you from the original trial
18 of this case State's Exhibit Number 16, is this
19 Spell's Grocery Store at the top of State's
20 Exhibit 16?

21 A. Yes.

22 Q. Is this [REDACTED] Road running off to the
23 left side?

24 A. Yes.

25 Q. So how close did you live on [REDACTED] Road

Anthony Riley - Direct Exam by Mr. Bloom

1 from Spell's?

2 A. Well, I stayed behind Spell's really.

3 Q. All right.

4 A. Right next door to the graveyard.

5 Q. Okay. And how long would it take you roughly
6 to walk from Spell's to your house or back?

7 A. Three to five minutes.

8 Q. Now, at any time between November 1992 when
9 this incident happened and your testimony in 1994,
10 did the attorneys for Mr. Rogers ever come talk to
11 you?

12 A. Yeah.

13 Q. They did?

14 A. Yeah.

15 Q. And who would that be?

16 A. I don't remember them.

17 Q. You don't remember them?

18 A. No.

19 Q. Okay. When did he come talk to you?

20 A. I don't remember. They harassed me a lot,
21 they come on my job, interfere with my work.

22 Q. Are you talking about me, sir?

23 A. I don't know. I don't remember.

24 Q. Okay. Let me ask you this: Did a
25 Mr. William Runyon ever come see you?

Anthony Riley - Direct Exam by Mr. Bloom

1 A. I don't remember these people.

2 Q. Okay. How about Mr. Leiendecker?

3 A. I don't remember.

4 Q. Okay. Where were you working back at that
5 time?

6 A. Floors & More of Charleston.

7 Q. Okay. And is that where you still work, sir?

8 A. Well, no, I quit.

9 Q. And why did you quit, sir?

10 A. Because of y'all harassing me.

11 Q. Okay. Could you explain that for me?

12 A. You come on my job, I can't do my work, I
13 done been in this court before. The second time you
14 didn't wanted me to testify, you had nothing to do
15 with me. Now you come back and I'm going through the
16 same thing again.

17 Q. Okay. So when you talk about -- let's back
18 up and talk about that for a minute. You said you
19 testified in this case before?

20 A. One time, yes, sir.

21 Q. One time. That was at the trial in 1994?

22 A. Yes, sir.

23 Q. All right. And then the second trial in
24 1996, did you testify then?

25 A. No.

Anthony Riley - Direct Exam by Mr. Bloom

1 Q. Okay.

2 A. Because you told me you didn't wanted me.

3 Q. Okay. And when you say, "You told me you
4 didn't want me," you're referring to me, sir?

5 A. Y'all didn't want me to testify. Y'all said
6 I didn't have to appear to court.

7 Q. Okay. And are you referring to me
8 personally?

9 A. Like I said, I don't remember you. I don't
10 know you, man.

11 Q. Okay. So do you know who came and talked to
12 you before your testimony in 1994?

13 A. I know it was a Caucasian man.

14 Q. Okay. So that could have been someone with
15 the police department?

16 A. No, it wasn't with the police department.

17 Q. Could it have been someone with Solicitor
18 Walter Bailey's office?

19 A. Could have been.

20 Q. If we could do this, if you could let me
21 finish my question and then answer.

22 A. Yes.

23 Q. Because this kind woman here can't type while
24 both of us talk.

25 A. All right.

Anthony Riley - Direct Exam by Mr. Bloom

1 Q. So if you would, sir, let me ask my question.

2 A. Yes.

3 Q. Then I'll let you say whatever you need to in
4 response; is that fair?

5 A. Yes, sir.

6 Q. Thank you, sir. The white Caucasian man who
7 you said came by and talked to you before 1994, could
8 that have been someone from Solicitor Walter Bailey's
9 office?

10 A. It could have been.

11 Q. So you don't know if Mr. Rogers' attorneys in
12 1994 ever came and talked to you?

13 A. No, I don't remember.

14 Q. Okay. And I certainly didn't come talk to
15 you in 1992?

16 A. I don't remember.

17 Q. All right. Or 1993?

18 A. I don't remember.

19 Q. Okay. Or 1994?

20 A. I don't remember.

21 Q. Do you remember giving a deposition in this
22 case, sir?

23 A. What's that?

24 Q. Okay. Let me refresh your recollection. A
25 deposition is where Mr. Salter and I came with a

Anthony Riley - Direct Exam by Mr. Bloom

1 court reporter to where you were --

2 A. Yeah, in Berkeley County Jail.

3 Q. -- in Berkeley County.

4 A. Yeah.

5 Q. And we took a statement from you at that
6 time.

7 A. Yes.

8 Q. So the two subpoenas I've given you in this
9 case would be what, sir, that deposition when we took
10 your statement?

11 A. Yes.

12 Q. All right. And then for today, right?

13 A. Yes.

14 Q. All right. So I've subpoenaed you twice in
15 this proceeding?

16 A. Twice, yeah. Okay.

17 Q. Do you remember in that deposition if I asked
18 you if Mr. Rogers' lawyers in 1992 ever sat down and
19 interviewed you about this case, do you remember what
20 your answer was?

21 A. No, I don't remember. I don't remember.

22 Q. Let me show you, sir, page 23 of the
23 deposition we took, your statement on November 26th
24 of 2003 in Berkeley County. You were asked: "Do you
25 remember if Timothy Rogers' lawyers ever sat down and

Anthony Riley - Direct Exam by Mr. Bloom

1 interviewed you about the case?" And your answer
2 was: "No, I don't know." Do you remember that
3 answer sir, on page 23, line 8?

4 A. Yeah, I remember that.

5 Q. All right. So let me back up a little bit.
6 Where did you work again in 1992 when this incident
7 occurred?

8 A. Floors & More of Charleston.

9 Q. Okay. And until recently I guess you still
10 worked for them you say?

11 A. Yes.

12 Q. And so how long have you worked for them
13 roughly?

14 A. Almost 25 years.

15 Q. Okay. And who was your employer there?

16 A. David Johnson.

17 Q. Okay. Where there two David Johnsons there,
18 a father and a son?

19 A. No, just one.

20 Q. Okay. Is there a father and son who are
21 similarly named?

22 A. Yes.

23 THE COURT: Remember now you know what
24 that -- I know you know what the answer is
25 after way through the question, but our court

Anthony Riley - Direct Exam by Mr. Bloom

1 reporter, she's just got to take it down.
2 She talented, but she don't type so good with
3 her toes, so if you could just let him
4 finish. I know you know the answer. Just
5 let him finish.

6 Go ahead.

7 MR. BLOOM: Thank you, Your Honor.

8 Q. Are the father and son similarly named?

9 A. Yes.

10 Q. And what is the father's full name, do you
11 know?

12 A. David Johnson.

13 Q. And the son is also named David Johnson?

14 A. The son's name is David Andrew Johnson.

15 Q. That's who you've been working for for some
16 25 plus years?

17 A. Uh-huh.

18 Q. How are they related to the B [REDACTED] family,
19 Stephanie B [REDACTED]?

20 A. David is married to Mike sister.

21 Q. Okay. So Stephanie, who was killed in this
22 case was, the niece of the Johnson family?

23 A. Yes.

24 Q. How close were you then to the Johnson
25 family, if you worked for them that many years?

Anthony Riley - Direct Exam by Mr. Bloom

1 A. Close.

2 Q. Could you explain that for us?

3 A. I could go in their house with them not being
4 home.

5 Q. Okay.

6 A. He would give me the key to go in his house
7 and get whatever he would want me to get.

8 Q. Okay. What kind of things would he want you
9 to get?

10 A. A checkbook, sometime clothes.

11 Q. So work related type things?

12 A. Not all the time.

13 Q. Okay. And so how long have you known the
14 Johnson and the B [REDACTED] family?

15 A. Twenty something years.

16 Q. All right. And how well did you know
17 Stephanie B [REDACTED] who was killed in this case?

18 A. Real good.

19 Q. All right. Could you explain that for us?

20 A. Well, Stephanie and my daughter -- well, my
21 kids, used to play together, and at times we did
22 babysit Stephanie.

23 Q. I'm sorry, I didn't hear that last part.

24 A. We did babysit.

25 Q. Thank you. I didn't hear that.

Anthony Riley - Direct Exam by Mr. Bloom

1 A. Yes.

2 Q. Okay. And so Stephanie had been in your
3 house many occasions?

4 A. Many times.

5 Q. And your children had been in her house?

6 A. Yes, sir.

7 Q. How close were you and Mike B [REDACTED],
8 Stephanie's father?

9 A. Closer than me and my own brother.

10 Q. Okay. You consider Mike B [REDACTED] a brother?

11 A. Yes.

12 Q. Could you explain that a little bit?

13 A. Well, just like I said about David, sometime
14 I have money problems with paying my bills, I can go
15 to him and ask him, or I need a favor and he'll do it
16 for me. No hesitation, he'll do it for me.

17 Q. When you say "he," you mean Mike B [REDACTED]?

18 A. Yes, sir.

19 Q. As well as the Johnsons?

20 A. All of them, yes, sir.

21 Q. So you consider the B [REDACTED] and Johnson
22 families like your own family, is that correct, fair
23 to say?

24 A. Yes.

25 Q. No one asked you these types of questions

Anthony Riley - Direct Exam by Mr. Bloom

1 though in 1994; is that fair to say?

2 A. No, sir. Nobody.

3 Q. And just as the B [REDACTED] and Johnson family
4 did things for you, I take it you did things for them
5 as well, it wasn't just a one-way street?

6 A. Right.

7 Q. Okay. What kinds of things would you do for
8 the B [REDACTED] family?

9 A. If he needed help work on his car or his
10 truck, I would help him. If he needed me to go
11 someplace with him, I go with him.

12 Q. All right. And what kind of places would you
13 and Mike go together that he would use your help?

14 A. Well, he did a lot of work, he used to build
15 a racing car, I helped him worked on that.

16 Q. And the Johnson family the same way, you've
17 done favors for them as well outside of work?

18 A. Yes.

19 Q. So it's a two-way street?

20 A. Yes, sir.

21 Q. All right. What kinds of things have you
22 done for the Johnson family?

23 A. Well, I went pick up his son from day-care
24 after school. I've gone to pick up his daughter from
25 school. Sometime he might -- he be too busy he just

Anthony Riley - Direct Exam by Mr. Bloom

1 lost his sister, I went cut his grass for him.

2 Q. So it's fair to say the Johnson family
3 trusted you like family?

4 A. Yes, sir.

5 Q. And you trusted them like family?

6 A. Yes, sir.

7 Q. The same with the B [REDACTED] family, they
8 trusted you like family?

9 A. Yes, sir.

10 Q. The same way you trusted them like family?

11 A. Yes, sir.

12 Q. Y'all did things for each other and helped
13 each other?

14 A. Yes, sir.

15 Q. And, in fact, you attended Stephanie
16 B [REDACTED]'s funeral, I believe?

17 A. Yes.

18 Q. Okay. Explain that for me if you would,
19 please.

20 A. Well, it was me and my four kids went, my
21 wife didn't go because the car that we had wasn't big
22 enough to hold all of us.

23 Q. But no one asked you any of those kinds of
24 questions in 1994; is that fair to say?

25 A. No, sir.

Anthony Riley - Direct Exam by Mr. Bloom

1 Q. All right. Now, lastly you knew Timothy
2 Rogers before this incident in November 1992?

3 A. I didn't know him personally, but I was in
4 St. George for driving under suspension, and I was
5 getting my hair cut and he took the clippers from the
6 person, and that's how I got to know him.

7 Q. All right. And when you say you were in the
8 St. George with him, you mean county jail in
9 St. George?

10 A. Yes, sir.

11 Q. So and you Mr. Rogers were incarcerated,
12 locked up in the county jail together for a period of
13 time?

14 A. Well, he was on one side, I was on the other
15 side.

16 Q. But you and he had some type of conflict?

17 A. No.

18 Q. You had some type of problem with him?

19 A. No.

20 Q. Did you not see eye to eye with him about
21 some things?

22 A. No, I never did.

23 Q. Okay. In your deposition again on
24 November 26th, 2003, page 13, line 12 through 13, if
25 your answer is in St. George County Jail and when we

Anthony Riley - Direct Exam by Mr. Bloom

1 was in St. George County Jail we didn't see eye to
2 eye, would that be a correct statement?

3 A. Well, eye to eye meaning that he -- my head
4 was halfway cut, and he took the clippers. If you
5 consider that as eye to eye.

6 Q. Tell me what you consider it. Because it was
7 your answer, sir, tell me what you consider it.

8 A. Well, I mean he saw the man cutting my hair
9 and he took the clippers, you know, so I mean how
10 would that feel you walking around half of your head
11 cut, the other half is out.

12 Q. How did you feel then at that time?

13 A. I felt hurt, you know.

14 Q. So you didn't consider him a friend in 1992?

15 A. He never was my friend.

16 Q. Okay. Could you explain that for me?

17 A. How can somebody be your friend if you don't
18 know them? You see them, but you don't know them,
19 you don't socialize with them.

20 Q. And nobody asked you any of these kinds of
21 questions in 1994 either?

22 A. No, sir.

23 MR. BLOOM: Court's indulgence one
24 moment.

25 Q. Did that disagreement you had with Timothy

Anthony Riley - Direct Exam by Mr. Bloom

1 Rogers when you were both in the county jail
2 together, did that occur back in the 1980s or when
3 roughly?

4 A. It might have been -- yeah, it was '80s, you
5 know, early part of the '80s. Or can I say this. I
6 can go back before they remodeled the jail, this is
7 how long.

8 Q. I'm sorry, say that again, sir.

9 A. Before they remodeled the jail, this is how
10 far.

11 Q. Okay. All right. And is it fair to say you
12 never really cared for Timothy Rogers; is that a fair
13 statement?

14 A. No, that's not a fair.

15 Q. Okay.

16 A. Because like I said, I don't know him.

17 Q. Okay. Y'all weren't friends?

18 A. No, sir.

19 Q. Like you and the B [REDACTED] s and Johnsons were
20 friends?

21 A. Right.

22 Q. And, sir, if someone had asked you the
23 questions I've asked you here today, if someone had
24 asked you these questions at your testimony in 1994,
25 you would have given the same answers back then --

Anthony Riley - Direct Exam by Mr. Bloom

1 A. Yes, sir.

2 Q. -- as you've given today?

3 A. Yes, sir.

4 Q. Thank you. Please answer any questions
5 opposing counsel or Her Honor may have.

6 A. Yes, sir.

7 THE COURT: Mr. Salter,
8 cross-examination.

9 CROSS-EXAMINATION

10 BY MR. SALTER:

11 Q. Good morning, Mr. Riley.

12 A. Good morning.

13 Q. I'm Ed Salter, I believe we've met once
14 before.

15 A. Yes.

16 Q. Back in November of '92 you were living you
17 said two to three minutes away from Spell's Grocery
18 Store?

19 A. Yes, sir.

20 Q. All right. That's by foot. You went down
21 there, what, roughly 6:30 in the evening on the 25th
22 of November?

23 A. Yes, sir.

24 Q. All right.

25 A. Because they were almost getting ready to

Anthony Riley - Cross-Exam by Mr. Salter

1 close and I went down there.

2 Q. And you were there almost until the time
3 little Stephanie was shot; is that correct?

4 A. Yes, sir.

5 Q. Several days later you gave a statement that
6 was introduced as Applicant's Exhibit 4. Can you
7 tell me how you went about giving that statement?

8 A. Say that again now.

9 Q. Can you tell me what the circumstances were
10 around giving the statement?

11 A. What statement?

12 Q. The statement that was just introduced, the
13 one you gave to the sheriff's department.

14 A. Can I tell you about it?

15 Q. Yes, can you tell how they went about taking
16 the statement from you?

17 A. Well, they told me to wrote it down.

18 Q. All right. Did they sit around, ask you
19 questions while you were writing it down, or did they
20 just put you at a table, say write it down?

21 A. Put me at a table so I can write it down.

22 Q. All right, sir. And I don't want to
23 embarrass you.

24 A. No.

25 Q. Can you read and write real well?

Anthony Riley - Cross-Exam by Mr. Salter

1 A. No.

2 Q. All right, sir. But did you try to put down
3 everything you could think of that was relevant to
4 what had happened at Spell's Grocery Store?

5 A. Yes, sir.

6 Q. All right. Now, on the evening of
7 November 25, 1992 what was the lighting out at the
8 Spell's store?

9 A. It was getting dark.

10 Q. All right. Were there any lights?

11 A. Yes, was lights in front -- well, got one
12 streetlight in front of the store besides the
13 display, beer signs and whatever in the window.

14 Q. All right. You didn't have any problems
15 seeing out there, did you?

16 A. No, sir.

17 Q. And I believe after you used the telephone
18 that Mr. B [REDACTED] pulled up with Stephanie and
19 Mr. Carver?

20 A. Who? Oh, Jimmy.

21 Q. Jimmy.

22 A. But I didn't use the phone.

23 Q. Did you not?

24 A. No, I went inside Spell's to buy something.

25 Q. All right. But you saw them after you came

Anthony Riley - Cross-Exam by Mr. Salter

1 out?

2 A. Time as I walked out the store I saw Mike.

3 Q. Okay. Now, you testified at trial that you
4 had known Mr. B [REDACTED] for about 13 years.

5 A. Yes, sir, at that time.

6 Q. And you testified that you babysat for
7 Stephanie before, correct?

8 A. Yes, sir.

9 Q. All right. But you don't mention any of this
10 in your statement to the sheriff's department. Can
11 you explain why you didn't?

12 A. Because all they did was tell me to write
13 down what happened, that was all they did.

14 Q. All right.

15 A. Matter of fact, they walked out the office,
16 they let me -- just like you say, sat me down, give
17 me a piece of paper, and they walked out.

18 Q. But you referred to Mr. B [REDACTED] in the
19 statement as Mike, simply as Mike?

20 A. Yes, sir.

21 Q. All right. That's because he's your friend.

22 Do you remember talking to either
23 Solicitor Bailey or Mr. Rogers' trial attorneys
24 before the '94 trial and telling them you and
25 Mr. B [REDACTED] was friends?

Anthony Riley - Cross-Exam by Mr. Salter

1 A. No, I don't remember telling them that.

2 Q. All right. Now, going back to the night of
3 the incident, while you and Mr. B [REDACTED] were talking,
4 Mr. Rogers approached, I believe, with two other
5 people?

6 A. Yes, sir. It was Caucasian man and a black
7 girl.

8 Q. All right.

9 A. And you want me to finish?

10 Q. Yes, sir. Please.

11 A. And me and Mike was standing right on the
12 corner, it's a blue trash can, and Timothy and the
13 three people came up and what I did, I moved closer
14 to Mike so, you know, that they couldn't walk between
15 us, and Timothy went to the phone and he told the
16 white dude to stand right there and if they so and so
17 say anything about us let me know and I'll take care
18 of them.

19 Q. Okay.

20 A. So I looked at Mike, Mike looked at me. And
21 then the Caucasian dude, he took a cigarette and flip
22 it at my feet. And I looked at Mike and I didn't
23 know them two. So I told Mike, I think I need to go
24 ahead and go because I don't need no trouble. My
25 kids were in the house and I need to go ahead and get

Anthony Riley - Cross-Exam by Mr. Salter

1 home.

2 So Mike said, Anthony, well, you can go
3 ahead and jump in the back of the truck and I can go
4 ahead and take you home. I said, Mike, the time it
5 takes you to turn around I could be done home in my
6 house.

7 So I started down the road. And I know
8 Mike used to always -- he was legal to tote a gun
9 from his work, but I told him, I said, Mike, I don't
10 like to be round you, you know, when you got them
11 guns because, you know....

12 Q. Right. You didn't say that to him the night
13 of the incident though, did you?

14 A. Hum?

15 Q. You didn't tell him the night of the incident
16 you don't want to be around him when he has a gun?

17 A. No, I told him that a long time I don't like
18 to be around no guns.

19 Q. Sorry, didn't mean to interrupt you.

20 A. No problem. So I started down the road. And
21 I got middle ways of the graveyard and I heard a
22 shot. I didn't bother to turn around, I just kept on
23 going and until I got on my porch that's when I heard
24 the second short.

25 Q. All right, sir.

Anthony Riley - Cross-Exam by Mr. Salter

1 A. And so I came back out on the porch, my kids
2 started crying because about next three or five
3 minutes all I heard was a bunch of police cars. So I
4 didn't wanted to go and leave them in the house
5 because it was already completely dark. And say 20,
6 30 minutes later when they did went to sleep, might
7 have been longer than that, I started to walk down
8 there.

9 And I saw this man, I asked him what
10 happened, and he said, you know, little girl got
11 shot. But prior to that, standing on the porch, like
12 I said, I stay next to the graveyard and you could
13 hear somebody running through the bushes, and it was
14 a girl. Then two people came down the road and they
15 said --

16 MR. BLOOM: Judge, I'm going to object
17 to what anyone said, he's never been able to
18 identify that to anyone and that's one of our
19 grounds for appellant IAC, so I'm going to
20 object on rank hearsay grounds as to what
21 someone said. He can't even identify who it
22 was who said the statement. It's in the
23 transcript at page 805 is where I believe
24 he's going.

25 THE COURT: All right. In other

Anthony Riley - Cross-Exam by Mr. Salter

1 words --

2 MR. BLOOM: It's hearsay.

3 THE COURT: In other words, this hearsay
4 was testified to at trial.

5 MR. BLOOM: Yes, ma'am.

6 THE COURT: There was no objection
7 regarding this hearsay at trial?

8 MR. BLOOM: There was an objection.

9 THE COURT: There was an objection.

10 MR. BLOOM: And there was no appeal
11 taken from that issue.

12 THE COURT: There was no appeal taken
13 from that issue, all right. And you're
14 objecting to the hearsay coming in, in this
15 proceeding?

16 MR. BLOOM: Yes, ma'am. Yes, Your
17 Honor.

18 THE COURT: In this record?

19 MR. BLOOM: Yes, Your Honor.

20 THE COURT: But it's already in the
21 record and this testimony is a ground for the
22 PCR?

23 MR. BLOOM: That's correct, Your Honor.

24 THE COURT: And you're satisfied that it
25 is sufficiently in the record to preserve

Anthony Riley - Cross-Exam by Mr. Salter

1 what you need to preserve in this record?

2 MR. BLOOM: That's correct.

3 MR. SALTER: Your Honor, it is our
4 position that it's not hearsay, that if I
5 might clarify.

6 BY MR. SALTER:

7 Q. The statement to which you are about to
8 testify, that occurred how long after you heard the
9 second shot?

10 A. Five, ten minutes.

11 Q. Five minutes?

12 A. Five to ten minutes.

13 Q. All right, sir. And now you had just
14 previously jogged down Pigeon Bay Road several
15 minutes earlier?

16 A. Yes, sir.

17 Q. Did you pass anyone out there?

18 A. No, sir.

19 Q. All right, sir. And the people that you saw,
20 although you weren't able to identify them, can you
21 tell me from which direction they were coming?

22 A. From Spell's Grocery Store.

23 Q. So they were coming from the same direction
24 as Spell's Grocery Store, correct?

25 A. Yes, sir.

Anthony Riley - Cross-Exam by Mr. Salter

1 Q. And about -- and shortly afterwards or
2 shortly after you also saw a black girl run across
3 your property?

4 A. Yes, sir.

5 Q. And she was also coming from the direction of
6 Spell's Grocery Store?

7 A. Yes, sir.

8 MR. SALTER: It's our position that any
9 statement would fall within what used to be
10 the res gestae but now what is an excited
11 utterance.

12 THE COURT: All right.

13 MR. SALTER: I certainly don't know how
14 they can be prejudiced by introduction of
15 this testimony in light of the fact that he's
16 previously testified to it, whether there was
17 an objection taken and preserved the issue
18 for appellate review.

19 MR. BLOOM: And that's precisely our
20 point. There was no appeal taken from it,
21 it's blatant hearsay to allow it into this
22 record, just compounds the error even more.
23 In fact, Mr. Riley's testimony today is even
24 a little different now from what he testified
25 to in 1994 on page 805, he's added about a

Anthony Riley - Cross-Exam by Mr. Salter

1 five- to ten-minute time span which makes it
2 less likely it's attributable or even
3 inferred to the defendant. So I would object
4 profoundly and not under hearsay, also under
5 the Fifth, Sixth, Eighteenth and Fourteenth
6 Amendment and the new case of Crawford v.
7 Washington, the right to confront witnesses.

8 THE COURT: Okay. I think it's hearsay.
9 I think it's inadmissible hearsay. I don't
10 know -- I don't believe there's a sufficient
11 foundation at this point in this record to
12 admit that hearsay as being an excited
13 utterance. So I would exclude it on the
14 basis of hearsay.

15 MR. BLOOM: Thank you, Your Honor.

16 THE COURT: But certainly unusual at
17 this juncture, in that it came into the
18 trial. However, I think it's hearsay and I
19 have ruled on it. All right. Very well.

20 Mr. Salter, I know that you'll need
21 to ask Mr. Riley another question.

22 MR. SALTER: I take exceptions to Your
23 Honor's ruling.

24 THE COURT: Yeah, absolutely.

25 MR. SALTER: Okay. I realize we don't

Anthony Riley - Cross-Exam by Mr. Salter

1 have to do that under the new rules, but it's
2 so ingrained.

3 THE COURT: I do understand, sure.

4 BY MR. SALTER:

5 Q. Backing up just briefly, when you saw
6 Mr. Rogers at Spell's Grocery Store, do you recall
7 whether or not he was wearing glasses?

8 A. No, I can't remember.

9 Q. You don't remember one way or the other?

10 A. No, sir.

11 Q. Did he appear to have any problem seeing you
12 that night?

13 A. No, sir.

14 Q. Did he appear to have any problem seeing
15 Mr. B [REDACTED]?

16 A. No, sir.

17 Q. Now, had either you or Mr. B [REDACTED] ever said
18 anything to this group, anyone in this group?

19 A. No.

20 Q. Did you hear Mr. B [REDACTED] at any time while
21 you were there use a racial slur?

22 A. No, sir.

23 Q. Not at all?

24 A. No, sir.

25 Q. The substance of your conversation with him,

Anthony Riley - Cross-Exam by Mr. Salter

1 was he trying to get you to come with him on a
2 holiday or vacation?

3 A. Yes, sir. He had -- his wife parents always
4 had a boathouse that they always go on Thanksgiving,
5 and that's where they would always celebrate
6 Thanksgiving at up on the lake, in Santee. But I
7 don't get on no boat, so I never went.

8 Q. Now, the testimony which Her Honor's just
9 ruled is inadmissible, there's no reference to that
10 in your statement to the sheriff's department. Is it
11 fair to say that the events of November 25, 1992
12 upset you greatly?

13 A. Well, it upsets me when I talk about it.

14 Q. All right, sir.

15 A. And then it upsets me when I say something
16 just like right now, you know, I testified the first
17 time, the second time you didn't want me. Now coming
18 back again and you called me, you know.

19 Q. Right.

20 A. I got bills to pay at home. Y'all aren't
21 going to pay my bills.

22 Q. Yes, sir. Now, you testified on direct
23 examination that you had previously known Mr. Rogers
24 based on an incident that occurred back in the '80s,
25 correct?

Anthony Riley - Cross-Exam by Mr. Salter

1 A. Yes, sir.

2 Q. All right. Now, you don't mention that in
3 your statement. Do you know why?

4 A. Why?

5 Q. Yes, sir.

6 A. Because at the time when I filled out that,
7 signed on that paper they didn't tell me to write
8 down my whole life history whether I know this man or
9 not. All they did was tell me to wrote down what
10 happened.

11 Q. And you did so to the best of your ability?

12 A. Yes, sir.

13 Q. All right. Now, this -- you were asked on
14 direct examination whether or not you were friends
15 with Mr. Rogers after the incident. And I believe
16 you indicated that you weren't friends with him
17 before the incident?

18 A. No, sir.

19 Q. So you never were friends?

20 A. No, sir.

21 Q. And did you ever -- did you two ever get in a
22 fight about the -- this incident?

23 A. No, sir.

24 Q. Did you ever exchange words?

25 A. No, sir.

Anthony Riley - Cross-Exam by Mr. Salter

1 Q. You just didn't like what he did?

2 A. That's all.

3 Q. All right. And did you carry a grudge
4 against him because of it?

5 A. No, sir. I didn't know him.

6 Q. All right. And you'd never had any other
7 run-ins with him since that, had you?

8 A. No, sir.

9 Q. This would have occurred, what, maybe ten
10 years before Stephanie was murdered?

11 A. Yes, sir.

12 Q. All right. But no one ever asked you, I
13 believe, questions about either your relationship
14 with Mr. B [REDACTED] or your knowledge of Mr. Rogers
15 before the '94 trial; is that correct?

16 A. No, sir.

17 Q. Okay. Did the fact that you and Mr. Rogers
18 had been involved in an incident back some ten years
19 earlier, did that cause you to either falsely
20 implicate him in the confrontation at Spell's store?

21 A. That wasn't no involvement. He was -- I was
22 in one cage and he was on the outside. So we didn't
23 even come close as me and you.

24 Q. All right, sir. But that didn't cause you to
25 falsely implicate him in the incident, did it?

Anthony Riley - Cross-Exam by Mr. Salter

1 A. No, sir.

2 Q. Didn't cause you to exaggerate his role in
3 it?

4 A. No, sir.

5 Q. I'll ask you the same questions with respect
6 to your friendship with either the Johnson family or
7 the B [REDACTED] family. That didn't cause you to falsely
8 implicate Mr. Rogers in the crime, did it?

9 A. No, sir.

10 Q. Didn't cause you to exaggerate his role?

11 A. No, sir.

12 Q. All right. You never tried to hide any of
13 these matters; no one ever asked you about them. Is
14 that correct?

15 A. No, sir.

16 MR. SALTER: I don't believe I have
17 anything further, Your Honor.

18 THE COURT: Very well. Redirect?

19 MR. BLOOM: Briefly, Your Honor.

20 THE COURT: All right.

21 MR. BLOOM: If it please the Court.

22 REDIRECT EXAMINATION

23 BY MR. BLOOM:

24 Q. Mr. Riley, I believe you stated you knew
25 Mr. B [REDACTED] carried a firearm?

Anthony Riley - Redirect Exam by Mr. Bloom

1 A. Yes, sir.

2 Q. All right. Did you see it that night?

3 A. No, sir.

4 Q. But you didn't want to be around it. Is that
5 fair to say? Is that your testimony?

6 A. That's not fair to say.

7 Q. Okay. Then explain for me.

8 A. Because I told him when he come around me I
9 don't want him to bring no gun. When he come to my
10 house, I don't want him to bring no gun.

11 Q. And you don't have the kind of relationship
12 with Mr. Rogers or his family that you have with the
13 B [REDACTED] family; is that fair to say?

14 A. No, sir.

15 Q. All right.

16 A. You see people you, hale them, you keep on
17 going about your business.

18 Q. Okay. Mr. Riley, I believe you answered some
19 questions from Mr. Salter about not wanting to get in
20 the back of Mr. B [REDACTED]'s truck to get a ride home.
21 Do you remember those questions?

22 A. Yes, sir.

23 Q. And why didn't you want to get in
24 Mr. B [REDACTED]'s truck for a ride home?

25 A. Because I didn't got in his truck to go up

Anthony Riley - Redirect Exam by Mr. Bloom

1 there. And just like I said, the time it took him to
2 turn his truck around I was home.

3 Q. Okay. All right. Did you see his firearm or
4 any kind of gun in the back of the truck?

5 A. No.

6 Q. You're sure about that?

7 A. I'm positive, because I never did went to his
8 truck.

9 Q. Just one more thing, sir. The offense that
10 you were in the county jail for when Mr. Rogers was
11 also in the county jail, was that failure to stop for
12 a blue light?

13 A. You got it right there. I mean, you tell me.
14 I mean, you're talking years back.

15 Q. Okay.

16 A. You know, you got it right there.

17 Q. And that's what I'm asking, do you remember
18 the offense you were in there for?

19 A. No, I don't remember that, sir.

20 Q. Okay. Is it fair to say from your demeanor
21 and in your discussions with me that you don't want
22 your testimony in any way to help Mr. Rogers; is that
23 fair to say?

24 A. I already did what I'm supposed to do. And
25 you're throwing these big words at me right now.

Anthony Riley - Redirect Exam by Mr. Bloom

1 Like I said, I told you one time, I told you twice
2 and a third time, because all these papers and stuff
3 y'all serve me, me and my wife done split up. You
4 know, I mean, the first time I testified, the second
5 time you didn't want me. Now the third time, you
6 know, they're using me like some....

7 Q. Take your time, sir.

8 A. I'm not no light switch. All these years
9 gone by. You think I'm supposed to -- I remember
10 Stephanie's not here.

11 Q. All right. But let me ask you this, sir.
12 I've met you one time before today, is that right,
13 when we took your statement?

14 A. Just like -- I don't remember.

15 Q. Okay.

16 A. In Berkeley County Jail, yeah, with that man
17 right there. But I don't -- I don't go around
18 remembering people.

19 Q. All right. And you don't want your testimony
20 to be used to help Mr. Rogers; is that fair to you?

21 A. You know what? It's not what I want, it's
22 what y'all want.

23 Q. Thank you, sir.

24 A. You see, that's what y'all trying to do, you
25 know.

Anthony Riley - Redirect Exam by Mr. Bloom

1 MR. BLOOM: I have no further questions
2 of Mr. Riley. Thank you, Your Honor.

3 MR. SALTER: Your Honor, if I could just
4 ask two questions.

5 THE COURT: Of course.

6 RECROSS-EXAMINATION

7 BY MR. SALTER:

8 Q. You were asked on re-direct examination about
9 whether or not you knew Mr. B [REDACTED] carried a weapon
10 and you said that you told him before you didn't want
11 to be around it?

12 A. Yes.

13 Q. Have you ever seen him be violent --

14 A. No.

15 Q. -- to anyone?

16 Thank you.

17 THE COURT: Okay. All right, counsel.

18 Is Mr. Riley free to go?

19 THE WITNESS: Please.

20 MR. BLOOM: Court's indulgence, Your
21 Honor.

22 MR. SALTER: No objection, Your Honor.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. BLOOM:

25 Q. Mr. Riley, I have one question then I'm going

Anthony Riley - Further Redirect by Mr. Bloom

1 to ask the judge to also release from you your
2 subpoena.

3 Mr. Salter just asked you you've never
4 seen Mr. B [REDACTED] be violent. You've previously
5 testified, though, that you knew Mike B [REDACTED] had a
6 temper; is that right?

7 A. Yeah. I know he got one, but never seen it.

8 Q. Thank you, sir. I have no further questions.

9 MR. BLOOM: I would ask Mr. Riley be
10 released from his subpoena.

11 THE WITNESS: Can I ask him something?
12 Will he stay out my life now?

13 THE COURT: Hold on one second.
14 Anything from Mr. Salter?

15 MR. SALTER: No objection.

16 THE COURT: Mr. Riley, listen. I got
17 real clearly that this has been in your life
18 for an awfully long time and it's obviously
19 been very difficult for you for a lot of
20 years with lawyers subpoenaing you for the
21 different proceedings, and I got that very
22 clearly and I got clearly that you want to be
23 left alone with these matters, right, is that
24 right?

25 THE WITNESS: Yes, ma'am.

Anthony Riley - Further Redirect by Mr. Bloom

1 THE COURT: I understand that. And I
2 also sense in just watching you that when you
3 talk about it you re-live it and it's very
4 hurtful to you and it's had some very
5 difficult -- apparently it's had some
6 difficult circumstances for you. And I guess
7 I'm about to release you from your subpoena,
8 but I'm kind of worried about you a little
9 bit because I don't want you -- I don't want
10 you to get on the road upset, you know what I
11 mean?

12 So if you want to just remain with
13 us, I don't want to hold you any longer
14 because I know you want to get out of here
15 and I understand that completely, but by the
16 same token I don't want you driving upset.
17 Is there anything I can do to help you with
18 that, Mr. Riley?

19 THE WITNESS: No.

20 THE COURT: Why don't you do that, come
21 on back, Mr. Taylor will walk you out this
22 way, it's a little bit shorter.

23 THE WITNESS: I can go?

24 THE COURT: You can go, Mr. Riley. Come
25 on, just go on that way.

Anthony Riley - Further Redirect by Mr. Bloom

1 (Whereupon, the witness steps down from the
2 witness stand.)

3 THE COURT: Call your next witness.

4 MR. BLOOM: Joseph Savitz.

5 THE COURT: I should ask whether or not
6 y'all need to put anything on the record
7 about my comments to Mr. Riley?

8 MR. BLOOM: We have no objections, Your
9 Honor. And again, just so the record's
10 clear, I know he has expressed that sentiment
11 to me before that he has felt harassed. I
12 want this record and the Court to be clear I
13 have subpoenaed him one time, that was to a
14 deposition while he was in the Berkeley
15 County Jail so he didn't have to go anywhere
16 and then secondly to today's hearing. We did
17 attempt to interview him in advance, but that
18 had nothing to do with subpoenas and those
19 sorts of things. So....

20 MS. HOLT: And, Your Honor, I've never
21 seen him before today in my life.

22 MR. BLOOM: Mr. Salter kindly reminds me
23 I tried to subpoena him one other time to a
24 deposition, and he failed to show. So when
25 he disregarded that subpoena that's when we

Anthony Riley - Further Redirect by Mr. Bloom

1 found him elsewhere.

2 THE COURT: Mr. Salter, anything
3 further, any objection to my comments --

4 MR. SALTER: No, Your Honor.

5 THE COURT: -- or observations?

6 I think that it is important that
7 the record reflect, and obviously at this
8 juncture I have no -- I don't know why it may
9 be relevant, although I believe that it is
10 important that the record reflect that his
11 demeanor -- when I tried to speak to him with
12 all candor to calm him down I did not want
13 him to get on the road in an automobile
14 obviously very upset. And my words were
15 spoken to him to try to help him, to calm
16 him. They were unsuccessful.

17 When he left the stand I don't know
18 that you all could see it, but he was A,
19 tearful; and B, shaky. I don't know why, but
20 he was tearful and shaking as he left the
21 stand, so the record will just reflect my
22 observations and we will move along.

23 Would you raise your right hand?
24 (Joseph Savitz, called as a witness, having
25 first been duly sworn, is examined and

Joseph Savitz - Direct Exam by Mr. Bloom

1 testified as follows:)

2 THE WITNESS: Joseph Savitz,

3 S-a-v-i-t-z.

4 DIRECT EXAMINATION

5 BY MR. BLOOM:

6 Q. Mr. Savitz, where are you currently employed?

7 A. At the Office of Appellate Defense.

8 Q. What is your role there?

9 A. I am the acting chief attorney.

10 Q. All right. And how long have you worked at
11 appellate defense?

12 A. This coming January will be 20 years.

13 Q. And before you were acting chief attorney,
14 what was your role there?

15 A. I was the deputy chief attorney.

16 Q. Roughly how many criminal appeals have you
17 handled in that time frame?

18 A. Thousands.

19 Q. All right, sir. Thank you. What was your
20 role in Timothy Rogers' case from his 1994 as well as
21 1996 trial and retrial?

22 A. I represented him twice. We got the
23 sentencing phase reversed in the first appeal and I
24 handled the resentencing in the second appeal --

25 Q. All right.

Joseph Savitz - Direct Exam by Mr. Bloom

1 A. -- unsuccessfully.

2 Q. Now, let me show you the 1994 transcript, and
3 I'm using the record on appeal, and let me direct
4 your attention to page 805 through 814, if I may. I
5 hand you the 1994 transcript in that regard, take
6 just a moment and review that.

7 A. Okay.

8 Q. And just let me know when you are through.

9 A. Yeah, I'm through.

10 Q. All right. Is there a hearsay objection
11 preserved in the record at those pages?

12 A. Yes, there is.

13 Q. All right. And that's regarding Anthony
14 Riley's testimony?

15 A. That's correct.

16 Q. All right. That hearsay objection though was
17 not included in the 1994 appeal?

18 A. No, it was not.

19 Q. All right. And does the transcript reflect
20 that that hearsay issue was objected to and preserved
21 during the guilt phase of the 1994 trial?

22 A. Yes, it was.

23 Q. Was that a legitimate issue for appeal based
24 on your experience?

25 A. I didn't raise it so at the time I obviously

Joseph Savitz - Direct Exam by Mr. Bloom

1 didn't think so. I always give the same testimony at
2 these PCR hearings. I know the attorney general's
3 office gets tired of hearing it, but if I have missed
4 a legitimate issue that would have resulted in either
5 a new trial or a new sentencing phase and there is no
6 strategic reason for abandoning a legitimate issue,
7 so if I missed an issue then, you know, at whatever
8 phrase he deserves whatever relief he is entitled to.
9 At the time, though, I did not feel that was a
10 legitimate issue.

11 Q. Let me next in the -- let me take that
12 transcript back, if I may, sir.

13 A. Okay.

14 Q. Let me next call your attention to the 1996
15 transcript.

16 A. Okay.

17 Q. Pages 257 through 272. And I particularly
18 call your attention to page 270 through 271 regarding
19 Juror Davies.

20 MR. BLOOM: And for Madam Court Reporter
21 that is D-a-v-i-e-s.

22 A. I'm familiar with this.

23 Q. The trial judge disqualified Juror Davies
24 during voir dire?

25 A. That's correct.

Joseph Savitz - Direct Exam by Mr. Bloom

1 Q. And in your view is there an objection from
2 the defense preserved in the record?

3 A. It seems like they feel she was qualified to
4 sit.

5 Q. In a capital case when a juror is
6 disqualified by the Court over defense objection, is
7 that a valid, usually a valid issue for appeal?

8 A. If a juror is excused because of opposition
9 to the death penalty that's a real good issue because
10 you don't have to prove any type of that it's a
11 harmful error, it can't be harmless error, so it's a
12 very good issue, yeah, when it occurs.

13 Q. And, in fact, what is the general case law
14 precedent if a trial court erroneously disqualifies a
15 juror who tends to be pro life but is otherwise
16 qualified?

17 A. That's what I say, it's the Witherspoon and
18 Witt cases, they basically say that, you know, to
19 exclude a juror their views would have been
20 substantially impaired, their ability to follow their
21 oath and the law. If the judge -- as I say, if the
22 judge erroneously excuses potential jurors under
23 Witherspoon and Witt the reversal's automatic, at
24 least with the sentencing phase.

25 Q. All right. But that issue was not raised on

Joseph Savitz - Direct Exam by Mr. Bloom

1 appeal?

2 A. No, it was not.

3 MR. JACOBS: Your Honor, I hate to
4 interrupt, but I'm having trouble hearing the
5 witness.

6 THE WITNESS: I'm sorry. I've got a
7 cold, I apologize.

8 Q. Do you remember how many issues were raised
9 in the 1996 resentencing appeal, was it just one?

10 A. I think it was just the one.

11 Q. And what one was that?

12 A. It was -- I'll be honest with you, I don't
13 remember. It was kind of the reverse of the one we
14 won on the first appeal, it had to do with the prior
15 guilty plea to the criminal sexual conduct with a
16 minor, I believe, I'm not sure.

17 Q. So the disqualification issue of this
18 particular juror in 1996 could have been included in
19 the 1996 appeal?

20 A. Yes, it could have. Well, she was not -- was
21 this juror in the first trial or the second trial?

22 Q. The second trial resentencing.

23 A. Yes, it could have, I'm sorry.

24 Q. Would not have cluttered the appeal up and
25 been issue number 20 or whatever?

Joseph Savitz - Direct Exam by Mr. Bloom

1 A. No, it would have been issue number two.

2 Q. All right. Lastly let me show you from the
3 original trial State's Exhibit Number 39 which is a
4 South Carolina Department of Corrections Incident
5 Report that was introduced at the 1996 resentencing.

6 A. Yeah, I'm familiar with this.

7 Q. All right. And that is reflected in page 760
8 of the 1996 transcript as well as testimony beyond
9 that?

10 A. Right.

11 Q. Let me show you the transcript, just to
12 familiarize yourself with it some more.

13 A. I'm familiar with it.

14 Q. The transcript reflects no objection from
15 defense counsel to that SCDC incident report?

16 A. That's correct.

17 Q. If the defense had interposed a basic hearsay
18 objection, would that have been a legitimate issue
19 for appeal assuming the trial judge would have
20 overruled it?

21 A. Yes, it would have. Because, as you pointed
22 out, we only had the one issue, so any other issues I
23 could have raised would have been good, any viable
24 issues. You know, the statement's clearly hearsay.

25 Q. That was my next question.

Joseph Savitz - Direct Exam by Mr. Bloom

1 A. Yeah.

2 Q. Can you look at State's Exhibit Number 39 --

3 A. Right.

4 Q. -- as well as the trial transcript from 1996,
5 page 760, and explain for me whether or not a hearsay
6 objection would have had merit?

7 A. Well, what you have basically is the report
8 of misconduct within the Department of Corrections,
9 which is one of the issues jurors are always
10 concerned about in capital cases is whether or not
11 the defendant is going to behave if he's given a life
12 sentence. Had a hearsay objection been raised to
13 this statement, I would have argued it on appeal
14 because it's clearly hearsay. Whether or not it had
15 been harmless or not would have been for the Supreme
16 Court to determine. I usually don't make a harmless
17 error analysis myself when deciding to raise an issue
18 or not. So I would have raised this probably had it
19 been objected to.

20 Q. All right.

21 A. As to whether or not it would have been
22 harmless or not, I don't know.

23 Q. And if a hearsay objection had been
24 interposed but the exhibit still came in you raised
25 it on appeal, if the 1996 closing argument by

Joseph Savitz - Direct Exam by Mr. Bloom

1 Solicitor Bailey shows that he refers back to this
2 exhibit.

3 A. Right.

4 Q. And testimony as a reason for jurors to vote
5 for death based on an inference of future
6 dangerousness.

7 A. Right.

8 Q. Would that have, that type of record have
9 bolstered your appeal on this issue?

10 A. Yes, it would have. That's one of the things
11 that the -- when there occurs an error at trial the
12 admission of hearsay or something like that, then the
13 solicitor exploits it in closing argument, that
14 always makes the error worse when the solicitor
15 relies on inadmissible testimony particularly as a
16 reason to give, say, a death sentence because in the
17 sentencing phase as the Court pointed out as recently
18 I guess as the McClure case, jurors can give a life
19 sentence for any reason, no reason at all, their
20 discretion's pretty much, once they find the two
21 aggravators or the aggravator, pretty much
22 unfettered. So when the solicitor exploits an error
23 in the closing argument it's hard for it to be
24 harmless.

25 Q. All right. And why did this issue which

Joseph Savitz - Direct Exam by Mr. Bloom

1 you've expounded on for us regarding the SCDC
2 incident report not get raised on appeal?

3 A. Because it was not objected to. Ever since
4 Mr. Salter won the Torrence case in 1991 we can't
5 raise unobjected to issues.

6 Q. So a defense objection would have been
7 required for you to raise that issue?

8 A. That's correct.

9 Q. If a defense objection would have been
10 interposed it would have been a meritorious issue in
11 your view?

12 A. It's clearly hearsay, yes.

13 Q. And coupled with Mr. Bailey's argument using
14 it?

15 A. I only had one issue. I would have raised it
16 if I had it.

17 Q. Please answer any questions Mr. Salter or
18 Mr. Jacobs may have.

19 THE COURT: Cross-examination.

20 MR. SALTER: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. SALTER:

23 Q. Mr. Savitz, how are you doing this morning?

24 A. Can't complain. How are you?

25 Q. I'm fine, thank you. I believe you testified

Joseph Savitz - Cross-Exam by Mr. Salter

1 on direct examination that over the course of the
2 years you've done thousands of appeals, correct?

3 A. Yes.

4 Q. Do you know roughly how many death penalty
5 appeals you may have done prior to representing
6 Mr. Rogers on appeal from the 1994?

7 A. Probably, and I am just guessing, somewhere
8 between 15 and 20, it may be more, it may be less,
9 I'm just not sure.

10 Q. Okay. Among others would you have
11 represented a Calvin Hawkins?

12 A. That's correct.

13 Q. How about Demetrius Gathers?

14 A. Yes, I did.

15 Q. Mr. Gathers' case went up to the United
16 States Supreme Court; did it not?

17 A. Yes, it did.

18 Q. William Keith Victor?

19 A. Yes.

20 Q. You represented him. Ricky Tim Caldwell?

21 A. Yes.

22 Q. Mitchell Carlton Sims?

23 A. Yes.

24 Q. Larry Eugene Hall?

25 A. Yes.

Joseph Savitz - Cross-Exam by Mr. Salter

1 Q. And Beau Southerland?

2 A. Yes.

3 Q. Okay. You did all those before?

4 A. That's correct.

5 Q. Now, do you set about preparing an appeal on
6 a death penalty case like you do in a non capital
7 case, or how do you go about preparing the appeal?

8 A. I handle, you know, death penalty cases with
9 the high profile cases that everybody's interested
10 in, and so they're a little bit more complex, but all
11 appeals I handle pretty much the same way. I get the
12 transcript, the exhibits, the paper exhibits and go
13 view the physical exhibits at the courthouse, read
14 the transcript, identify the issues that are
15 preserved for appeal and select the ones that I think
16 are most likely to win on appeal, do the research,
17 write the brief, and file the brief in the record,
18 and then go argue it.

19 Q. Is that what you did in this case?

20 A. Yes, sir.

21 Q. And I believe you raised two issues on appeal
22 from the 1994 conviction and sentence?

23 A. I'll be honest with you, I have no
24 recollection. I just know the one I won on, I don't
25 remember anything else.

Joseph Savitz - Cross-Exam by Mr. Salter

1 Q. Do you recall raising an argument related to
2 the failure of the trial judge to charge voluntary
3 manslaughter?

4 A. Yeah, that's right, I did raise that.

5 Q. All right. You raised that and a Simmons
6 issue, correct?

7 A. That's correct.

8 Q. Now, in the course of raising the argument on
9 the failure to charge voluntary manslaughter --

10 A. Right.

11 Q. -- you relied in part upon the State's
12 introduction of a statement by Mr. Rogers, correct?

13 A. I'll be honest with you, I don't know.

14 Q. If the opinion reflects that, would you agree
15 that you did?

16 A. If the record reflects that then that's the
17 way it was. I remember, you know, feeling that it
18 was a viable issue and we should have won.

19 Q. Do you recall why you felt it was a viable
20 issue?

21 A. I felt like there was some evidence of
22 provocation in the case.

23 Q. Do you recall what that evidence was?

24 A. That one of the parties was going for a gun
25 in the truck and that there were some racial slurs.

Joseph Savitz - Cross-Exam by Mr. Salter

1 Q. So there was evidence in the record of racial
2 slurs being used?

3 A. Yes.

4 Q. Okay. Now, you did not raise the testimony
5 by Mr. Riley concerning what he heard --

6 A. Right.

7 Q. -- after the second shot?

8 A. That's right.

9 Q. Now, if we go back through the record, isn't
10 it fair to say that the record from the first trial
11 reflects that what he heard occurred shortly after
12 the second shot, as opposed to five to ten minutes
13 later?

14 A. That's correct. I don't remember, I just
15 remember that there was some shooting and then he saw
16 two people run by and heard them. That's all I
17 remember. Now, I don't really remember the time
18 span, but it seems like it was fairly close to the
19 shooting itself.

20 Q. All right. Now, without repeating the vulgar
21 language he used, did it appear that the -- or did it
22 appear that the people involved in the discussion
23 were talking about a male or female?

24 A. A male.

25 Q. Okay. Now, you perceived that to be

Joseph Savitz - Cross-Exam by Mr. Salter

1 prejudicial?

2 A. You know, I didn't raise it. I obviously
3 thought it was admissible for whatever reason.

4 Q. All right.

5 A. And, you know, I can't remember -- I can't
6 remember giving that issue a lot of thought, ever
7 really thinking that that might have been
8 inadmissible, so it's not like I sat down, tried to
9 figure out reasons why it would be inadmissible. It
10 seems to me at the time that I just considered it was
11 inadmissible and that, you know, failure to identify
12 the two people running by would have gone to the
13 weight of the testimony, if anything.

14 Q. All right. Do you recall why you didn't
15 raise the dis-- on the second appeal, excuse me, do
16 you recall why you did not raise the disqualification
17 of Venireman Russell Davies?

18 A. I don't remember. Again that's an issue I
19 don't remember reading the transcript and saying --
20 you know, you always look at the jurors who are
21 disqualified because of their opposition to the death
22 penalty. Because like I say, it's an automatic win
23 if the judge is wrong. I don't recall reading this
24 juror's voir dire and saying that, you know, this
25 juror is even on the borderline. It seems to me I

Joseph Savitz - Cross-Exam by Mr. Salter

1 reviewed the testimony last week, and the juror, you
2 know, said I'm juror number two, the one that always
3 would give life, plus I got a business, I would be
4 thinking about it, I couldn't focus on the trial.

5 And the judge is allowed, you know,
6 fairly wide discretion in these matters. If I had to
7 do it over again I wouldn't raise it again which is
8 the ultimate test. If I had the appeal to do over
9 again, would I raise it? No.

10 Q. Okay. Because any issue that you have that's
11 a viable you don't raise could have served as a basis
12 for a relief?

13 A. That's correct.

14 Q. All right. And you didn't raise the issue
15 pertaining to State's Exhibit 39, the report from the
16 South Carolina Department of Corrections, because
17 there was no objection?

18 A. Right, that's correct.

19 Q. All right. Now, after the first appeal did
20 you receive Mr. Runyon's file?

21 A. I've looked for that file. I have a letter
22 in my files that say he sent them to me so I assume
23 that he did. What has happened to those files, I
24 have no idea. I assume that when we closed this case
25 out that they went to archives, but between budget

Joseph Savitz - Cross-Exam by Mr. Salter

1 cuts and us moving office space and it's just
2 everything that's gone on, if Mr. Runyon says he sent
3 us the files, I believe he sent us the files. Where
4 they are now, I have no idea.

5 Q. You made an effort to locate the files?

6 A. I looked in archives, I checked our storage,
7 I checked everywhere I could.

8 Q. That would have been both the file from the
9 '94 proceeding and the '96 proceeding as well?

10 A. That's correct.

11 Q. I don't believe I have anything further.
12 Thank you, Mr. Savitz.

13 THE COURT: Thank you. All right.
14 Redirect.

15 MR. BLOOM: Court's indulgence one
16 moment, Your Honor.

17 THE COURT: All right.

18 REDIRECT EXAMINATION

19 BY MR. BLOOM:

20 Q. Mr. Savitz, Mr. Salter went through a list of
21 appeals you did of some fairly prominent cases.
22 Would you agree that even good lawyers sometimes make
23 mistakes?

24 A. Oh, I've been ineffective in the past, yeah.

25 Q. Thank you very much, sir.

Joseph Savitz - Redirect Exam by Mr. Bloom

1 MR. BLOOM: I have no further questions.
2 I ask that Mr. Savitz be released from his
3 subpoena so he may attend the public defender
4 conference in correspondence to Mr. Robbins
5 attending the solicitor's conference.

6 THE COURT: Very well.
7 (Whereupon, the witness steps down from the
8 witness stand.)

9 THE COURT: All right. Next witness,
10 please.

11 MR. BLOOM: Your Honor, the next witness
12 would be Mr. Leiendecker, he's going to be
13 lengthy, I can get started with him. I think
14 he's in one of the back conference room
15 working on some files.

16 THE COURT: We'll go ahead and begin,
17 break about 1:00. Maybe do some preliminary
18 matters and then we'll take our break for
19 lunch.

20 MR. BLOOM: All right, Your Honor.
21 (Mark Leiendecker, called as a witness,
22 having first been duly sworn, is examined and
23 testified as follows:)

24 THE WITNESS: My name is Mark
25 Leiendecker, L-e-i-e-n-d-e-c-k-e-r.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 THE COURT: Your witness.

2 DIRECT EXAMINATION

3 BY MR. BLOOM:

4 Q. Mr. Leiendecker, what type of practice did
5 you have back in 1992, '93, '94, that time period?

6 A. In 1992 I was involved in in-house counsel
7 work for a sports promotion company that had been a
8 client of mine for seven or eight years prior to
9 that, and I was actually involved in contract work
10 and negotiation in the professional tennis circuit.

11 In 19 -- the end of '92 I got out of
12 that practice and was living in the Charleston area
13 and in the spring sometime that year in 1992 went to
14 work here in Summerville.

15 My practice was a general practice, it
16 involved domestic work, criminal work and civil work.
17 In 1993 I also began working late that year or the
18 beginning -- I'm sorry, late in '92, December, and
19 into '93 as a contract public defender for Dorchester
20 County.

21 Q. Okay. And let me -- are you absolutely sure
22 about that date or could that be the end of '93,
23 beginning of '94 when you took over the Dorchester
24 County Public Defender contract?

25 A. This is all so incredibly easy when you're

1 not sitting up here but, yeah, I think it was the end
2 of 1993 into '94.

3 Q. Okay. And that's where I was going next.
4 You were one of Mr. Rogers' trial counsel in both '94
5 and '96?

6 A. Yes.

7 Q. All right. And you took over the -- one of
8 the Dorchester County contract public defender
9 arrangements beginning January of 1994, is that fair
10 to say, just to orient you?

11 A. I actually started the beginning of
12 December 1993, and there was an overlap of -- the
13 outgoing public defender was Mr. Feeley, Charles
14 Feeley, and Charles and I sort of shared duties for
15 December and then I was on my own in January.

16 Q. Okay. So you would have picked up -- just to
17 help settle the record, you would have picked up
18 Timothy's case as a part-time contract public
19 defender near the end of December '92 or, excuse me,
20 near the end of December 1993 or January 1994?

21 A. Correct. All of Mr. Feeley's files were
22 transferred to me sometime in December of 1993, and
23 amongst those files one of them was Mr. Rogers' case.

24 Q. All right. When you got the public defender
25 file from Mr. Charles Feeley, near the end of

Mark Leiendecker - Direct Exam by Mr. Bloom

1 December 1993, do you recall generally what was in
2 the file, what kind of material, and if there had
3 been any work done on the case?

4 A. I don't. I don't have a specific
5 recollection as to what was in the file. I do not
6 remember there being any work product involved in or
7 with that file, because when I read through, casually
8 looked through all the files I had and tried to
9 prioritize what needed to be taken care of, I know
10 that one of my earliest responses to what I found or
11 didn't find in the Rogers' file, because to call Bill
12 Runyon, because I did find contained in there that he
13 was appointed as lead counsel. But I don't remember
14 finding anything contained in the file that
15 Mr. Feeley passed to me that was work that had been
16 done on his part at that time.

17 Q. All right. So it didn't appear to you
18 Mr. Feeley had done any substantive work on the case
19 when you got it?

20 A. The file didn't reflect anything as far as
21 that went. I have no knowledge what Mr. Feeley did
22 or did not do.

23 Q. Right. Next when you -- explain for us, if
24 you will, generally what a part-time contract public
25 defender was back in 1993 beginning of 1994 when you

Mark Leiendecker - Direct Exam by Mr. Bloom

1 assumed the contract.

2 A. I think it's -- I think it's a bit of a
3 misnomer to describe even today the public defenders
4 in our county as part-time contract public defenders.
5 We had a system in place prior to June of 1993 where
6 our county had one full-time government employed
7 public defender, much like other counties like
8 Charleston has a handful or more of full-time public
9 defenders where their only job or responsibility is
10 public defense work for the county.

11 And our public defender board in a move
12 to try to expand the ability of our county to provide
13 services in the public defender area looked at a
14 model that was being used in Greenville, I believe,
15 maybe Spratanburg, that had contract public defenders
16 and went to that. By doing that in the summer of '93
17 it allowed them to hire two attorneys where we had
18 had one before and they were -- they were both signed
19 to contracts. And by that they were full-time
20 responsible for the files that were the public
21 defender files for Dorchester County, but they were
22 also permitted to conduct private practices that
23 didn't compete with or conflict with their duties as
24 criminal representatives in Dorchester County.

25 In December of '93 when I came on, not

Mark Leiendecker - Direct Exam by Mr. Bloom

1 only did I come on but we expanded that even further
2 in that we added a juvenile public defender who was
3 responsible for family court juvenile cases and
4 provided third place coverage up here for conflict
5 cases for the public defenders.

6 So we were full-time public defenders in
7 that we were full-time responsible for a case load,
8 but we were also permitted to conduct a private
9 practice in areas like family law, which was where my
10 practice concentrated outside of the public defender
11 realm.

12 Q. All right. So when you took over the public
13 defender contract in December '93 you also had a
14 regular private practice?

15 A. Yes.

16 Q. All right. And again just briefly you may
17 have answered this earlier, generally what type of
18 practice was that?

19 A. That practice at that point had some civil
20 work that I was handling for another attorney or
21 attorneys in the office, but my practice that I was
22 generating was mostly in the domestic field, family
23 court work.

24 Q. All right. And approximately how many public
25 defender files did you inherit from Mr. Feeley in

Mark Leiendecker - Direct Exam by Mr. Bloom

1 December 1993?

2 A. I don't know the exact number. I -- there
3 were boxes of files and it seems, it seems like at
4 that time and for a period of time I maintained
5 probably approximately 150 open case files at any
6 given time.

7 Q. All right, sir. And at that point what
8 experience did you have with the trial of homicide
9 cases or other major felonies?

10 A. I had been in -- I had tried no murder cases.
11 I had been involved in a handful of felony cases and
12 some complex litigation in the civil area and had
13 been a practicing attorney for ten years.

14 Q. And so I take it you had also not been
15 involved in any death penalty cases at that point in
16 time?

17 A. No.

18 Q. Okay. And how long did you continue with one
19 of the Dorchester County Public Defender contracts
20 from December 1993 until approximately when?

21 A. January 1998.

22 Q. Now, when you took over Tim's case from
23 Mr. Feeley in December 1993, what type of office
24 staff or assistants did you have in your private
25 practice, if you can recall, generally?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. There was one other attorney in the office --
2 no, two other attorneys in the office, I'm sorry, a
3 support personnel secretary/paralegal, a
4 receptionist, and an office manager.

5 Q. All right. And were any of those people paid
6 for through the Dorchester County contract or were
7 they strictly your private practice employees?

8 A. No, they were strictly part of the private
9 practice I was in.

10 Q. All right. As part of the Dorchester County
11 Public Defender contract, were you awarded or given
12 any support staff at all, or was it just you?

13 A. It was just me. I didn't have any specific
14 support staff. There was a coordinator who was
15 responsible for interviewing and assigning the cases,
16 at that time I think Mary Crib was that individual.

17 Q. Okay. Did that coordinator -- where did she
18 work out of, what office?

19 A. I don't know.

20 Q. Okay. Let me ask -- I didn't ask that well,
21 let me ask it this way. She didn't work out of your
22 office?

23 A. No, she didn't work in my office.

24 Q. Okay. All right. So when you took over
25 Tim's case then in December 1993, is it fair to say

Mark Leiendecker - Direct Exam by Mr. Bloom

1 you didn't have a staff paralegal to work on the
2 case?

3 A. I had no staff paralegal.

4 Q. Okay. No staff investigator to work on the
5 case?

6 A. No, no investigator.

7 Q. Okay. Not even a staff secretary to work on
8 the case?

9 A. No.

10 Q. Okay. It was -- you were it kind of?

11 A. Yes, but in all fairness my contract, my
12 responsibility was to -- part of my contract was to
13 provide my own, you know, secretarial staff help and
14 work. And to say that I wasn't provided one is true,
15 but at the same time my secretary was responsible for
16 all of the -- whatever typing secretarial work I
17 needed on the public defender files and she did that
18 for all the years I was with the PD.

19 Q. Okay. Did you then contact -- I think you
20 referred in your earlier testimony that you saw some
21 information in the public defender file that William
22 Runyon had already been appointed to the case?

23 A. Yes.

24 (Entered into evidence was Petitioner's
25 Exhibit 5, Order of Appointment of Legal

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Counsel for Indigent Defendant.)

2 BY MR. BLOOM:

3 Q. Mr. Leiendecker, let me show you what is
4 marked Petitioner's Exhibit 5, and ask you if you can
5 identify that document, or if you're familiar with
6 documents like that during the course of your
7 contract as a public defender?

8 A. Yes.

9 Q. All right. And does Petitioner's Exhibit 5
10 reflect that Mr. Runyon was appointed December 11th,
11 of 1992 to Tim Rogers' case?

12 A. Yes, it does.

13 Q. All right. Let me next show you --

14 MR. BLOOM: Court's indulgence, let me
15 show this document to opposing counsel.

16 MR. SALTER: So the record will reflect,
17 there was no objection to the last exhibit
18 being entered in.

19 THE COURT: All right.

20 (Entered into evidence was Petitioner's
21 Exhibit 6, September 29, 1993 letter.)

22 BY MR. BLOOM:

23 Q. Next, Mr. Leiendecker, let me show you
24 Petitioner's Exhibit 6 which is now in the record of
25 this case without objection, and if you can identify

Mark Leiendecker - Direct Exam by Mr. Bloom

1 that document from your file.

2 A. This was a letter from Bill to Charles
3 Feeley, it's dated in September of '93, just
4 outlining to Charles what needed to be done in the
5 case and offering to share those responsibilities
6 with him.

7 Q. Okay. And we'll come back to that at a later
8 point. What I next want to ask you, did you have an
9 occasion then from some of the documents in your
10 file, I think you said you became aware Mr. Runyon
11 had previously been appointed to Tim's case?

12 A. Yes.

13 Q. All right. And I think you said you had some
14 contact with Mr. Runyon beginning around
15 January 1994?

16 A. Yes.

17 Q. Can you generally explain what type of
18 contact that would have been?

19 A. I know I called and spoke with him, and I'm
20 certain that I would have just sent him a letter
21 saying that I was substituting as counsel on all of
22 Mr. Feeley's cases and that this was one of them.
23 And since he was co-counsel wanting him to know that,
24 and also suggesting that I wanted him to let me know
25 what I can do in help or preparation of the case.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 MR. BLOOM: Judge, if it please Court,
2 I'm showing it's about one minute to 1:00,
3 I'm about to get in a some rather extensive
4 questions if this is a good stopping point.

5 THE COURT: It is a good stopping point
6 and we will take one hour for lunch, and 2
7 o'clock we will reconvene.

8 Mr. Leiendecker, of course you know
9 not to discuss your testimony over lunch.
10 And have a good lunch, everyone.

11 THE WITNESS: Yes, ma'am.
12 (Whereupon, lunch recess taken from 1:00 p.m.
13 to 2:15 p.m.)

14 THE COURT: Thank you so much, everyone,
15 and please be seated.

16 And you were about to shift topics.

17 MR. BLOOM: Yes, ma'am. If it please
18 Court.

19 THE COURT: Yes, sir.

20 BY MR. BLOOM:

21 Q. Mr. Leiendecker, start again, if you can,
22 since we've had a break and just tell me
23 approximately what or when did you talk to Bill
24 Runyon about Tim's case in January 1994, when did you
25 first have an occasion to talk to him, roughly?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. I don't know. It would have been towards the
2 beginning of the month I would anticipate because --
3 and it might even have been the end of December
4 because I got the file, like I say, sometime the
5 first week or two of December and I began going
6 through them and trying to organize them and
7 prioritize them. And this was one of those cases
8 that was important and appeared to be old and ready
9 for, or getting ready for trial.

10 Q. All right. And was Mr. Runyon, in your view,
11 the lead attorney on the case?

12 A. In everybody's view I hope, because he had
13 been appointed back in '92 and certainly, you know, I
14 deferred to Bill's experience and his position at
15 that time.

16 Q. All right. And so in your conversations with
17 Mr. Runyon, what was happening with the case in early
18 January 1994?

19 A. At the beginning of January 1994 my initial
20 conversations with Bill revealed that he was working
21 with the solicitor and discussions with Timothy about
22 a plea on the case or relative to the case.

23 Q. And what role did you have, if any, in that
24 process?

25 A. In the plea process?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. Yes, sir.

2 A. I didn't have any role in that other than
3 Bill kept me informed, I mean he -- I always knew
4 what was going on, but he and the solicitor were
5 dealing directly and I wasn't involved with that.

6 Q. Okay. Is it fair to say you were on standby
7 in your roll in the case?

8 A. Yes.

9 Q. There wasn't anything active for you to do?

10 A. I think that would be an accurate
11 description.

12 Q. Let's talk next then about the attempts to
13 plead guilty in that process. What do you recollect
14 about that?

15 A. From January on I was present whenever any of
16 the activity took place in the courtroom because I
17 was here involved with all of my other cases as well.

18 Q. But Mr. Runyon primarily was handling the
19 plea negotiation process up through that point?

20 A. Yes. He and Solicitor Bailey were dealing
21 with the judge; I wasn't involved at the bar doing
22 any of that work, I was just here.

23 Q. All right. And had you met with Tim up to
24 that point, up to the plea date? If we can orient in
25 time the attempted plea is February 2nd, 1994 and I

Mark Leiendecker - Direct Exam by Mr. Bloom

1 have a transcript here if that would help refresh
2 your recollection. If you indulge me one minute,
3 sir, I noticed the transcript is stapled together but
4 one of the pages is upside down, so if you have to
5 read it I want to make it easy for you.

6 Let me show you what is marked as
7 Petitioner's Exhibit Number 3 which has been
8 previously entered into the record of this case as
9 the aborted murder plea transcript of February 2nd,
10 1994. And I specifically call to your attention the
11 bottom of page 12 and the next page 13. And I'll
12 give you a minute to review that before I ask my next
13 question.

14 A. (The witness complies.) Yes.

15 Q. Okay. Were you in court with Tim and
16 Mr. Runyon that day as one of the appointed
17 attorneys?

18 A. I was in court that day but I wasn't -- I
19 don't believe I was standing up at the bar with them.

20 Q. All right. Tim didn't have a problem with
21 the plea negotiation that had been -- well, let me
22 back up and ask you this. What is your recollection
23 as to what the negotiation was?

24 A. By the time we arrived at this February 2nd
25 plea day, the part of the negotiation or what was

Mark Leiendecker - Direct Exam by Mr. Bloom

1 required for the plea had already taken place. At
2 that time in 1994 there was no conviction which
3 carried life without the possibility of parole in the
4 state without someone having some subsequent serious
5 felony convictions that then when added together,
6 totaled layman's term the three strikes you're out
7 kind of idea. And --

8 Q. So let me just stop you there. So your
9 understanding of the law at that period of time?

10 MR. SALTER: Objection, Your Honor, he's
11 leading.

12 THE COURT: Sustained.

13 MR. BLOOM: Yes, ma'am.

14 Q. Did Tim have any prior violent crime
15 conviction before this plea process? Let me ask it
16 that way.

17 A. No, before the process began. By the time
18 February 2nd came, yes.

19 Q. And what was that?

20 A. In January, and again at another subsequent
21 time before the bar, either later that week or the
22 next week Tim pled guilty to two counts of CSC with a
23 minor.

24 Q. And that involved who? If the transcript of
25 January 25th and 27th, 1994 which is Petitioner's

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Exhibit 2 --

2 A. It was his girlfriend, but I don't remember,
3 I'm sorry, I don't remember her name.

4 Q. Would **assault victim** be the name?

5 A. Yes, Miss~assault victim

6 Q. Those CSC with minor pleas were entered
7 January 25th and 27th of 1994 as reflected in
8 Petitioner's Exhibit Number 2?

9 A. Yes.

10 Q. Go ahead then, please.

11 A. Okay. As I said, Mr. Runyon in negotiation
12 with the solicitor it was my understanding had worked
13 out a deal that would allow Mr. Rogers to plead to
14 the murder count, and if he pled to the murder count
15 would be then ineligible for parole because of these
16 two prior felony convictions of CSC with a minor.
17 But to do that there wasn't any charging documents or
18 anything else when this whole plan was put together
19 or hatched. He had to be charged and he had to come
20 in and he pled guilty to those two underlying
21 felonies.

22 Q. By the two underlying felonies, you mean the
23 what?

24 A. The CSC with a minor related to Miss^{assault victim}.

25 Q. And Tim accepted that negotiation as far as

Mark Leiendecker - Direct Exam by Mr. Bloom

1 you were aware of?

2 A. Yes. I mean, as far as I was aware he came
3 in and he pled guilty to both of those counts.

4 Q. All right. So in your representation of Tim
5 he didn't have a problem with accepting the
6 negotiated plea to life without parole?

7 A. No.

8 Q. And he didn't have a problem with an actual
9 murder plea to the criminal sexual conduct with minor
10 offenses as a predicate violent crime offense as
11 you've explained it? I didn't ask that very well.

12 A. I'm not sure how to answer that he didn't
13 have a problem.

14 Q. Let me rephrase, I didn't ask the question
15 very well. Tim readily pled guilty to the prior
16 violent crimes that got him into the life without
17 parole position?

18 A. Yes, he did.

19 Q. And in your view, as one of his attorneys at
20 the time, what problem did Tim have admitting to as
21 reflected in the transcript and as you recall in
22 representing him which made the murder plea fall
23 apart?

24 A. From the time I began my involvement until
25 the day we finished the second trial or retrial of

Mark Leiendecker - Direct Exam by Mr. Bloom

1 the penalty phase, Timothy never had any problem
2 admitting his responsibility or that he fired the gun
3 or that his reckless conduct caused the death of
4 Miss~B [REDACTED]. He had a problem from the beginning
5 with the idea of the intentionality of that act, that
6 it was with malice aforethought as defined under the
7 murder statutes. And he expressed those concerns
8 from the beginning when I knew him until the final
9 time that I spoke with him, you know, with his
10 comments always being that, yes, I did it; yes, I
11 pulled the trigger; yes, I'm responsible, but I
12 didn't know and I didn't mean to. I think that's the
13 easiest way to describe it.

14 Q. And that's reflected in the plea transcript
15 you read as well?

16 A. That's what caused the plea to fall apart in
17 February. Judge Whetstone refused to accept it,
18 correctly refused to accept it.

19 Q. At that time on February 22nd, 1994 when the
20 plea fell apart to life without parole, you had been
21 a contract public defender for approximately how
22 long?

23 A. Eight weeks.

24 Q. Okay. And I think you've told us you hadn't
25 really done a lot of work on the case yet at that

1 time?

2 A. No.

3 Q. And Mr. Runyon was the lead attorney?

4 A. Yes.

5 Q. Since that time I think you've told us you've
6 had several more years' experience as a contract
7 public defender as well as a criminal defense
8 attorney?

9 A. Yes, I have.

10 Q. Would you just explain briefly those
11 subsequent years of experience you had in the area of
12 criminal defense, would it be as a private attorney
13 or public defender?

14 A. As both. Until January of '98 I continued in
15 my position as Dorchester County Public Defender in
16 general sessions court, and since January of 1998
17 I've had a private practice and my practice centers
18 exclusively in the criminal and domestic area.

19 Q. Have you then, over the course of your legal
20 career, had occasion to become familiar with what is
21 known as an Alford plea, pursuant to North Carolina
22 v. Alford? And for benefit of the court reporter
23 that is A-l-f-o-r-d. And please explain.

24 A. Yes. As part of the plea process in some of
25 my cases, obviously in the last eight or nine years

Mark Leiendecker - Direct Exam by Mr. Bloom

1 I've used the Alford plea for some of my defendants.

2 Q. All right. And have you used it for clients
3 while you were a public defender in Dorchester
4 County?

5 A. Yes.

6 Q. All right. And you found the circuit judges
7 in that circuit receptive to that when the occasion
8 was appropriate?

9 A. Based on circumstances on a case-by-case
10 basis, yes.

11 Q. All right. Would that include Judge
12 Whetstone, who was one of the resident circuit
13 judges, or visiting circuit judges or resident
14 circuit judges at the time?

15 A. I can't tell you that I have any present
16 recollection of Judge Whetstone saying yea. I know
17 he never told me no regarding an Alford plea. I'm
18 only guessing we did some in front of him, but he was
19 our resident judge for a number of years, so I'm sure
20 we did some, I just can't remember a specific case.

21 Q. All right. Looking back was there any
22 attempt to present Tim's situation as an Alford plea
23 by you or Mr. Runyon?

24 A. Not by myself and I don't -- Mr. Bloom, I
25 don't know. Again, I wasn't privy to all of the

Mark Leiendecker - Direct Exam by Mr. Bloom

1 negotiation between Bill and the solicitor. And I
2 don't -- I wasn't in any conference where it was ever
3 discussed.

4 Q. All right. From your representation of Tim
5 and what you knew about the process as well as your
6 review of the transcript of February 2nd, 1994, would
7 Tim's case have been appropriate to request the judge
8 to take it as an Alford plea?

9 A. Maybe the easiest way to answer that is if it
10 had been offered as an Alford plea and the judge had
11 agreed to accept it as such, it would have gone
12 through because all it would have required was Tim's
13 acknowledgement to the facts, and that the
14 possibility of the presentation of those facts in all
15 likelihood would lead to his conviction.

16 Q. And that was my next question. From your
17 representation of Tim at that time, would he have
18 been able to acknowledge that a jury would likely
19 convict him unanimously and beyond a reasonable
20 doubt?

21 A. Well, I think so. I think that's clearly the
22 reason why he entered into the negotiation process
23 and entered a plea to those other underlying felonies
24 with Miss assault victim.

25 Q. What was Tim's -- and, of course, I think you

Mark Leiendecker - Direct Exam by Mr. Bloom

1 told us earlier Tim accepted responsibility for this
2 act?

3 A. In my discussions with him he never denied
4 having shot the gun and that being the cause of
5 Miss B [REDACTED]'s death.

6 Q. So in your view would an Alford plea have
7 been appropriate for a defendant such as Tim who
8 simply had a problem acknowledging the legal elements
9 of malice aforethought and intent?

10 A. Yes, in hindsight obviously it would have
11 helped the process.

12 Q. All right. Now, once the plea on
13 February 2nd, 1994 fell apart, was there any
14 discussion, do you recall, as to moving -- well, let
15 me ask it this way, strike that.

16 What happened after the plea fell apart
17 on February 2nd, 1994 in terms of what was the next
18 step in the process?

19 A. Getting ready for trial. Trial was set for
20 March, I think. It was soon thereafter.

21 Q. If the transcript reflects the trial was set
22 and conducted beginning February 28th, 1994 that
23 would be correct?

24 A. Yes.

25 Q. Okay.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. It's almost March.

2 Q. Right. Was -- what did you do then, you and
3 Mr. Runyon?

4 A. At that point my definition of my duties were
5 defined in that Bill had done, as he explained to me,
6 the work on the facts in the case, he tried capital
7 cases before, he tried murder cases before, and when
8 I asked him if -- what he needed or wanted me to do I
9 was able to gather I could help best probably in the
10 voir dire and jury selection process.

11 And so for the next four weeks I focused
12 my attention on reviewing the already pulled venire
13 and comparing it to the county and helping prepare
14 for voir dire.

15 Q. Okay, sir. So your main assignment from
16 Mr. Runyon was to help prepare matters regarding jury
17 selection?

18 A. Yes.

19 Q. And if you would, generally tell us what
20 steps you did. I think you started to allude to
21 that, but in more detail generally tell us what you
22 did in that regard.

23 A. Well, in death penalty cases you get a lot
24 more information about jurors and the particular jury
25 pool than you do in any other kind of felony trial.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 And so we had those questionnaires or jury
2 information sheets or packets, whatever you want to
3 call them. And so that's where I began. I began
4 going through that and defining people by age,
5 defining them by race, defining them by education or
6 occupation, where they lived in the county, examining
7 all those kind of things.

8 Now, one of the things that jumped off
9 the page at me was that it seemed to be a very white
10 jury pool, 84 to 85 percent or greater, maybe even
11 less minority participation, so I had some idea that
12 there may be some constitutional ground to seek to
13 strike the venire if it wasn't representative of the
14 community, and so I focused some attention for a
15 while on that prospect and that project. My
16 examination of that actually reflected that the jury
17 panel was pretty representative of Dorchester County.
18 I guess I was somewhat surprised.

19 Q. In terms of racial composition, is that what
20 you mean?

21 A. Yes. And that was in my comparison with the
22 voter registration and records of the county.

23 Q. All right. Now, jury questionnaires you
24 refer to, these would be questionnaires that the
25 clerk of court sent out?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. Yes.

2 Q. They're about two pages in length?

3 A. Two, two and a half pages. They're not all
4 encompassing or very detailed, but they give you a
5 little more information than you have just listening
6 to people talk that morning when they come.

7 Q. All right. And so the information you're
8 talking about that you compiled in terms of race,
9 gender, age, that's all on the jury questionnaire
10 sheet?

11 A. As I remember, yes.

12 Q. But there's a whole lot more beyond that
13 general background?

14 A. No, not much beyond that.

15 Q. The jury questionnaire doesn't include any
16 information about their death penalty views?

17 A. I don't remember it including any
18 information --

19 Q. Okay.

20 A. -- regarding that.

21 Q. Doesn't include -- it does not include or did
22 not include any information about what they may know
23 about the case or any probing type questions of that
24 nature?

25 A. No, just general questions.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. Okay. Now, what else did you do in regards
2 to helping prepare any actual voir dire questions to
3 be used by you or Mr. Runyon at jury selection?

4 A. I worked on suggested voir dire questions.

5 Q. And what were some of the suggested voir dire
6 questions that you recall you came up with?

7 A. General questions regarding individual's
8 personal knowledge about the case, questions about
9 whether they had or members of their family had been
10 victims of violent crimes. You know, I don't
11 remember. I do remember things as -- I mean, I was
12 very interested in trying to help at this point and
13 things, as goofy as they may seem now, as like what
14 kind of magazines do you get at your house, what kind
15 of bumper stickers do you have on your cars, just
16 things that maybe probe their mind about whether they
17 were liberal or conservative in their views towards
18 the criminal justice system.

19 Q. All right. Were there any questions you came
20 up dealing with firearms since a firearm was involved
21 in this case?

22 A. Yeah. I think that we discussed, you know,
23 asking questions about firearms and experience with
24 firearms with the individuals.

25 Q. Were there any questions you came up

Mark Leiendecker - Direct Exam by Mr. Bloom

1 regarding their knowledge or contact with any
2 magistrate's office since Mr. B [REDACTED], the victim's
3 father, was a constable?

4 A. I'm sure that was discussed, because I knew
5 Mike then already, he'd helped me on some cases with
6 some civil seizure work, so I was acquainted with him
7 through the magistrate's court.

8 Q. Okay. And were there any questions regarding
9 jurors' possible connections to the elementary school
10 where Stephanie attended?

11 A. Area was obviously one of the things, and I
12 had been looking at the people who were from the
13 Knightsville area or may have at least just from
14 their location some connection with the Knightsville
15 Elementary or the community.

16 Q. All right. And were there any questions
17 dealing with jurors' opinions or views about the
18 death penalty?

19 A. Yes.

20 Q. All right. And once you compiled these
21 additional questions to ask jurors at voir dire, did
22 you have a discussion with Mr. Runyon about using
23 some of those questions?

24 A. Yeah, Bill and I discussed it. As I remember
25 he pretty much had his voir dire strategy in mind,

Mark Leiendecker - Direct Exam by Mr. Bloom

1 and really invited me to go along with him and then
2 help him when the meetings of minds came regarding
3 individual jurors. But he handled and conducted the
4 voir dire and asked the questions that he wanted
5 asked or not asked.

6 Q. Okay. So he did not use your -- the
7 questions you had designed in the task that he had
8 assigned to you regarding voir dire?

9 A. Not specifically that I remember, but he
10 certainly -- we discussed -- we discussed them.

11 Q. Let me ask you in that regard,
12 Mr. Leiendecker, was that the same strategy at the
13 1996 resentencing as well that was in terms of
14 Mr. Runyon asking what he wanted to ask?

15 A. To the best of my knowledge, yes. I mean,
16 Bill's very experienced and has had a lot of this
17 kind of work and I think if you ask him, I mean he
18 told me on several occasions that sometimes his
19 belief or view is that you'd be just as well taking
20 the first 12 people that are drawn, that your odds of
21 getting people who are going to be sincere, fair and
22 listen to the facts are just as good there as going
23 through the long arduous process.

24 And he certainly made it obvious that he
25 didn't want to go through a week-long voir dire and

Mark Leiendecker - Direct Exam by Mr. Bloom

1 get the jury to the point that they were agitated
2 with the process before the trial even started.

3 Q. So is what you're saying as part of
4 Mr. Runyon's voir dire strategy is he didn't want to
5 prolong defense questioning of potential jurors
6 because it might agitate the jurors?

7 A. Yes, he was for the most part very brief.

8 Q. So what ultimately was done or used by the
9 defense regarding the questions you had come up with
10 on voir dire to ask jurors about that wasn't on their
11 questionnaire forms to probe for possible bias or
12 knowledge about the case?

13 A. I don't remember anything being done with
14 those either time.

15 Q. Let me ask you next, if the 1996 sentencing
16 transcript in the voir dire section reflects that no
17 questions were asked at all by the defense of three
18 jurors who were seated, Mr. O'Neal on pages 42 to 49,
19 Ms. White on page 398 to 406 and Ms. Connelley from
20 page 513 to 521, of those three jurors, Mr. O'Neal,
21 Ms. White and Ms. Connelley, if the 1996 voir dire
22 transcript reflects the defense asked no questions of
23 those three jurors, that would have been whose
24 strategy on the defense team?

25 A. Bill was in charge of the -- that process.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. If those three jurors who were asked no voir
2 dire questions by the defense were ultimately seated
3 again, that was Mr. Runyon's strategy?

4 A. Yeah. No, I don't want to give any
5 misconception to the Court or to the record that we
6 weren't involved in discussions or consultation, but
7 Bill was lead counsel and ultimately the decision
8 making process was his.

9 Q. Okay.

10 A. You know, he didn't treat me as a second
11 class citizen or ignore me.

12 Q. Yes, sir.

13 A. I just wasn't making the decisions.

14 Q. Okay. Was there anything else that
15 Mr. Runyon assigned for you to do in the 1994 case
16 between the February 2nd date that the plea fell
17 through, and the February 28th date that the trial
18 began?

19 A. Not as I remember other than to familiarize
20 myself with the facts of the case and be prepared to
21 help as second chair.

22 Q. Okay. Do you recall if there was any
23 discussion after February 2nd, 1994 when the murder
24 plea fell through to -- for the defense to move to
25 withdraw the CSC pleas in any way?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. I do not remember that being discussed ever.

2 Q. Okay. Do you know if it was -- if there was
3 any attempt or effort made to discuss that with Tim?

4 A. I do not know. I don't remember being
5 involved in any such conversation, but I don't know
6 about he and Mr. Runyon.

7 Q. Do you know if there was any discussion that
8 the CSC with minor pleas might deprive Tim the
9 benefit of the statutory mitigating circumstance of
10 not having any prior violent crime convictions?

11 A. No.

12 Q. Did Mr. Runyon ask you to interview any
13 witnesses in the case or undertake anything of that
14 nature?

15 A. In preparation for '94?

16 Q. In preparation for '94. Thank you for
17 clarifying, sir.

18 A. No, I don't believe so.

19 Q. Okay. Would you have been glad to undertake
20 any such tasks?

21 A. Yes. I was willing to do whatever was
22 necessary.

23 Q. Okay. And just so I can be sure, I think you
24 said you had in your office -- at that time in '93
25 and '94 there were two other lawyers you shared a

Mark Leiendecker - Direct Exam by Mr. Bloom

1 firm with or shared space with?

2 A. Yes.

3 Q. But they did not assist you in any way with
4 public defender cases?

5 A. No.

6 Q. That was solely your contract?

7 A. Yes. Well, if I needed help one of the
8 lawyers was available on cases. She wasn't greatly
9 involved, but certainly she was available to help.
10 More likely she was available to take over my private
11 case load when I had conflicts with my public
12 defender work.

13 Q. Okay. But they did not assist you in any way
14 in this case?

15 A. No, they did not.

16 Q. All right. And was a private investigator or
17 any type of investigator hired by the defense for the
18 '94 case?

19 A. There was no investigator in '94 that I'm
20 aware of.

21 Q. You didn't have one on your office staff, is
22 that...?

23 A. I didn't have one and I don't remember there
24 being one that I dealt with involved in the case.

25 Q. Okay. Was that a -- do you remember any

Mark Leiendecker - Direct Exam by Mr. Bloom

1 discussion with Mr. Runyon on that as to whether it
2 would help the defense to get an investigator?

3 A. I do not remember that before the first trial
4 in '94, no.

5 Q. Was there any discussion that you remember
6 with Mr. Runyon to get any type of assistance for the
7 sentencing part of the case in 1994?

8 A. No, other than he had -- he had talked he
9 said to the family in preparation for that, but there
10 was no discussion of outside experts or anything like
11 that in the sentencing phase.

12 Q. Okay. And by the family you mean Tim Rogers'
13 family?

14 A. I'm sorry, yes, Mr. Rogers' family.

15 Q. Okay. In between your representation of Tim
16 in 1994 and the 1996 resentencing, did you attend any
17 special training as a public defender that helped in
18 regards to capital litigation?

19 A. Yeah, because of the nature of capital
20 litigation and the appointment of public defenders,
21 especially at least to the second chairs in those,
22 the board in Dorchester County sent me, and I believe
23 the other public defender as well, to one of the
24 national seminars on representing capital defendants.
25 They were held annually and they were always entitled

Mark Leiendecker - Direct Exam by Mr. Bloom

1 "Life in the Balance" was the name. It was the
2 national association or defense lawyers association.

3 Q. And how many of those seminars did you attend
4 between the 1994 trial and the 1996 resentencing, if
5 you know roughly?

6 A. At least one, maybe two. I know I went for
7 two or three years or three out of four years, I'm --
8 but I'm not certain if that started in '94 or '95.

9 Q. Okay. And what types of skills or things did
10 you learn from that type of special training?

11 A. There was a lot of emphasis, and I didn't
12 know a lot about the use of mitigation experts in the
13 penalty phase. Obviously a difficult area to deal
14 with, especially when you're representing a defendant
15 on the actual murder charge itself and they're
16 denying liability or at least responsibility legally
17 for it to -- and a lot of discussion was held about
18 that, you know, yeah, you got to work hard on the
19 guilt phase of it, but you've also got to be prepared
20 for presentation of mitigation evidence in all kinds
21 of variants, beginning from birth on, to see if there
22 were factors or influences that could or should be
23 presented to a jury that would mitigate the need for
24 a death sentence.

25 Q. Is one of the areas you learned about then, I

Mark Leiendecker - Direct Exam by Mr. Bloom

1 think you just alluded to getting an investigator or
2 mitigation investigator?

3 A. Yes, there are, and -- people and there were
4 people I saw or met or heard from at that time that
5 did that, that were involved in social work or
6 sociology regarding individual's medical
7 investigation or research, school records, health
8 records, things that may point to some issues of
9 mitigation in the penalty phase.

10 Q. Okay. And was that information and that
11 training something that you felt helped you and
12 benefitted you professionally?

13 A. Yeah. Yes, I think it opened my eyes as to
14 avenues in the zealous representation of your client
15 that should be investigated and followed.

16 Q. All right. And what types of ideas then did
17 you bring back that you thought might be helpful to
18 Tim's 1996 resentencing trial?

19 A. We didn't do any of that in the first trial
20 with Tim. And despite what I had gained there we
21 didn't do any of that in the second trial either. I
22 think it was discussed, or Bill and I at least ran it
23 by, but there was some disbelief that he had been
24 convicted and sentenced to death the first time, and
25 I don't think -- I don't think we thought he'd be

Mark Leiendecker - Direct Exam by Mr. Bloom

1 sentenced to death the second time. And we did not
2 ever seriously discuss hiring any expert.

3 Q. Okay. And let me -- you've given me a lot of
4 information there so I kind of just want to go back
5 and let you explain some pieces of it.

6 So was there any discussion with you and
7 Mr. Runyon as to getting a mitigation investigator
8 for the 1996 resentencing?

9 A. There was discussion about it.

10 Q. Okay.

11 A. Bill and I did discuss it.

12 Q. All right. And what do you recollect about
13 that discussion and what was decided?

14 A. That it was kicked around and ultimately
15 determined that we wouldn't do it or that we didn't
16 need to do it.

17 Q. Okay. And can you explain that for me or why
18 that was?

19 A. Because the facts of the case were fairly
20 simple. I think we thought Timothy is articulate and
21 intelligent and certainly had a good presence and
22 presentation. And we felt that his family and the
23 people that knew his family could provide some
24 history or background. We hadn't found anything in
25 initial reviews that suggested we had any of these

Mark Leiendecker - Direct Exam by Mr. Bloom

1 outstanding or interesting facts, like that he was a
2 victim of drugs before birth or he had been tested
3 and had mental retardation problems or he had some
4 traumatic accident in his youth or been the victim of
5 violence as a child. We just -- we didn't have any
6 information, and I think we decided not to follow up
7 on it.

8 Q. Do you think a mitigation investigator could
9 have helped your case at the '96 resentencing trial?

10 A. I'm not sitting up here with any great pride
11 saying we didn't hire someone to look into that. We
12 were charged with the responsibility of representing
13 someone in the most serious of all cases and we
14 dropped the balance to that. And I will apologize to
15 Mr. N[REDACTED] for that and I should apologize to Tim
16 for that.

17 Q. You've also mentioned a type of expert you
18 learned about in your training. Well, I'm sorry, let
19 me -- one last thing about a mitigation investigator.
20 You alluded in part of your earlier explanation to
21 the collection of records such as probation records,
22 health records, medical records, school records, are
23 those the types of things it was your understanding a
24 mitigation expert could help with?

25 A. Yes.

1 Q. Were any of those types of records, to your
2 recollection, collected in any substantive way in
3 Tim's case?

4 A. Not that I ever saw.

5 Q. Okay. And lastly on a mitigation
6 investigator, I think you've alluded in your training
7 that that's the type of person that can also
8 interview people and a defendant's background
9 in-depth?

10 A. Yes.

11 Q. And to your knowledge, were there any
12 in-depth interviews of people in Tim's background,
13 whether they be family members or other community
14 members?

15 A. I wasn't involved in any of that.

16 Q. Okay.

17 A. And I don't know what Mr. Runyon --

18 Q. Let me move on, next you also referenced in
19 your answer an expert social worker, I believe.

20 A. Yes.

21 Q. What was your understanding that a social
22 worker expert could help with in terms of a testimony
23 at a mitigation or penalty phase case?

24 A. There are a whole bunch of factors that
25 influence all of us, whether we're conscious or

Mark Leiendecker - Direct Exam by Mr. Bloom

1 unconscious or subject to, that are a result of our
2 environment, the way we grow up, the people we're
3 around, the communities that we live in, our
4 socioeconomic backgrounds, issues of race, things
5 that, you know, I don't understand because I'm not a
6 part of, and things that a jury would not understand
7 if they weren't from the same place and the same
8 community. And this individual would provide along
9 in conjunction with the investigator a view of the
10 salient facts regarding the individual defendant that
11 you represent and help you present, if there are any,
12 factors of mitigation that come from that person's
13 environment and their maturation process from the
14 time they're babies to the commission of the crime.

15 Q. And let me show you, it's not an exhibit yet,
16 give me one moment. Mr. Leiendecker, was there any
17 discussion that you recall with Mr. Runyon and
18 yourself regarding whether a social worker expert or
19 similar expert should be hired by the defense for the
20 1996 resentencing trial?

21 A. I don't remember or recollect specific
22 conversations other than I know I discussed what I
23 had seen in the seminar or seminars with Bill, and
24 that an ultimate decision was made that we didn't
25 think he'd be convicted and sentenced to death a

Mark Leiendecker - Direct Exam by Mr. Bloom

1 second time, and that we had what we needed. I don't
2 know if that answers your question or not.

3 Q. That's right, sir. And that belief by
4 defense counsel that Tim would not be sentenced to
5 death a second time was based again generally on
6 what?

7 A. Based on Mr. Runyon's surprise that the jury
8 sentenced him the first time to death, because the
9 facts were not overwhelmingly strong on the
10 aggravating circumstances. And also based on some
11 issues that Bill had raised from the beginning about
12 whether at least one of the aggravating circumstances
13 was even constitutional under the circumstance of the
14 tender years age of the child.

15 Q. So if I understand you correctly, the
16 strategic decision not to hire a social worker or
17 similar expert was based on the belief that because
18 of the facts of the case Tim would not be sentenced
19 to death a second time, is that a fair
20 characterization, or have I not got it quite right?

21 A. I don't know if that's exactly what it was
22 based on.

23 Q. Okay.

24 A. I know that it was discussed, I know that
25 fact existed between Mr. Runyon or at least myself

Mark Leiendecker - Direct Exam by Mr. Bloom

1 and I know that ultimately Bill controlled what we
2 were doing or not doing and I was doing whatever he
3 asked me to do. And that in preparation for the
4 second trial my ultimate only responsibilities
5 involve meeting with Mr. Rogers and discussing with
6 him the process and his upcoming testimony, and
7 beyond that I didn't have a whole lot other than I
8 went back and reread the transcript and helped get
9 ready for direct and cross on the anticipated
10 witnesses.

11 Q. Okay. One last question on a social worker
12 and then I'll move on. In your answer you stated
13 that you -- just to orient my next question if I may,
14 sir, in your previous answer you stated that you
15 learned from your training a social worker could
16 review records such as school records, probation
17 records, go over interviews with family members,
18 community members and then present that type of
19 mitigation testimony to a jury in terms of a person's
20 cultural background, medical history, adjustment to
21 prison history, other things like that.

22 A. Yes.

23 Q. Okay. And first, of course, that was not
24 done in this case; is that fair to say?

25 A. Yes.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 (Marked for identification was Petitioner's
2 Exhibit 7, report of Jeff Yungman.)

3 Q. Let me show you what's marked as Petitioner's
4 Exhibit 7 for identification only at this time. And
5 the record will reflect it is a report by forensic
6 social worker Jeff Yungman that he will testify to.
7 Let me just hand you that exhibit for identification
8 only and let you briefly look at it.

9 And my question to you, sir, will be is
10 that generally the type of information you're talking
11 about that you learned in your training and you gave
12 us in your answer?

13 A. This is generally the kind of work, yes, I
14 had seen or thought was involved with.

15 Q. And in your brief review of that document, is
16 that the type of information that you feel would have
17 been helpful to Tim at his 1996 resentencing phase?

18 MR. SALTER: Your Honor, I'll object at
19 this point. I think he's asking him to
20 speculate from hindsight.

21 MR. BLOOM: No, ma'am. He's alluded --
22 he's answered that there was a strategy
23 decision not to have this kind of expert
24 because defense counsel didn't believe they'd
25 get hit with the death penalty a second time.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 I think I'm entitled to probe and ask him if
2 this is the type of information he would like
3 to have had.

4 THE COURT: That you've already asked.
5 I think the objection came do you believe it
6 would have made a difference. Isn't that
7 right?

8 MR. SALTER: Correct, Your Honor.

9 THE COURT: And then the objection is
10 beyond that, do you think it would have made
11 a difference.

12 MR. BLOOM: He was trial counsel, he
13 certainly can answer I think if something he
14 did or did not do would make a difference.
15 Ultimately you, as the fact finder, have to
16 decide what weight to give to that answer,
17 but I think trial counsel certainly can
18 answer that type of question.

19 MR. SALTER: The problem I have, Your
20 Honor, is that under Strickland the judgment
21 has to be made what was going on in counsel's
22 mind at the time. It's not from hindsight,
23 hindsight's always 20/20, but what was
24 counsel's perspective at that time, and I
25 think that's already been covered.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 THE COURT: Okay. I'm uncomfortable
2 with the question "Do you believe that would
3 have made a difference?"

4 MR. BLOOM: I can rephrase it to, is
5 this the type of information you would have
6 used.

7 THE COURT: I don't object to you
8 probing that topic at all. That's not my
9 concern, it's that particular question.

10 MR. BLOOM: Right. Because it's a prong
11 for Strickland.

12 THE COURT: I don't know that that
13 particular question is -- I know this may
14 sound odd -- is all that helpful to me. The
15 other question that you just posed is
16 helpful.

17 MR. BLOOM: Yes, ma'am. I'll move to
18 the other question.

19 THE COURT: Okay. Okay.

20 Q. Mr. Leiendecker, in Petitioner's
21 Exhibit Number 7 for identification only, is that the
22 type of information that you would have used?

23 A. Yes.

24 Q. Let me show you, sir, a document after I've
25 shown it to opposing counsel.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 MR. BLOOM: Court's indulgence one
2 moment.

3 THE COURT: I wanted to ask this
4 question of you, Ms. Holt, you can answer
5 this even while you look, Mr. Bloom, just to
6 be sure you all know the transcript that I
7 have is the record on appeal. I was just
8 noticing I do not have at this point copies
9 of the plea on the CSC or the attempted plea
10 in February, and I would just ask of you is
11 that intended that I not have that transcript
12 at this point? I know it's been placed into
13 evidence, but -- and you very well may have
14 handed that to me this morning and gave it
15 back, but I just wanted you all to know that
16 what I have at this point is just the record
17 on appeal. I flipped through it and didn't
18 see where I had those --

19 MR. BLOOM: I have extra copies.

20 THE COURT: -- transcripts, okay.

21 MR. SALTER: Your Honor, with respect to
22 the Applicant's Exhibit 1, the August 17 and
23 19 transcript, that is in the first record on
24 appeal in the last volume as is the aborted
25 plea to murder. It's --

Mark Leiendecker - Direct Exam by Mr. Bloom

1 THE COURT: You know what, Mr. Salter,
2 it isn't listed in any other volume, because
3 normally they list what's in all the volumes,
4 it wasn't in I, II, III, but it is in IV,
5 it's listed in IV, thank you for pointing
6 that out to me. Everything else ends with a
7 pretrial hearing, but in Volume IV it does.

8 MR. SALTER: August 17th and 19th
9 hearing begins on page 1,288 of the first
10 record on appeal, and the aborted guilty plea
11 to the murder follows that.

12 THE COURT: Well, having said that --
13 and you're saying that -- oh, okay. The
14 Volume IV.

15 MR. SALTER: This is Volume III of III
16 referring to Judge Brown.

17 THE COURT: This is, I'm sorry, from the
18 first trial?

19 MR. SALTER: Yes, ma'am.

20 THE COURT: Okay.

21 MR. SALTER: Yes, ma'am, Your Honor and
22 there's apparently a thousand page
23 misnumbering because it jumps from 1,300
24 something to 2,300, it goes from 1,299 to
25 2,300, but it's at the very end of that

Mark Leiendecker - Direct Exam by Mr. Bloom

1 volume of the transcript. I did not have a
2 copy of the CSC transcript which is why I did
3 not provide it.

4 THE COURT: Let's see. Ah, here we go.

5 MR. BLOOM: I have extra copies of them,
6 Your Honor, at the next break I'll be glad to
7 hand them up to the Court.

8 THE COURT: That will be fine. That way
9 I don't have to deal with it. There it is.
10 Got it, pages 1,288 and 2,304. Got it,
11 thanks. Okay. Thank you.

12 MR. BLOOM: Thank you, ma'am. May it
13 please the Court.

14 BY MR. BLOOM:

15 Q. Mr. Leiendecker, in just wrapping up a few
16 more questions about a social worker, let me ask you
17 then as to whether there was any strategy discussion
18 between you and Mr. Runyon to the effect of hiring an
19 expert social worker or other expert would hurt Tim's
20 case?

21 A. I don't remember any strategic decision
22 either way regarding an expert for the mitigation.

23 Q. It's just something you felt you didn't think
24 you needed at the time?

25 A. I'm not even certain at this point ten and a

Mark Leiendecker - Direct Exam by Mr. Bloom

1 half years later that I can say that that discussion
2 was complete, that we just decided we didn't need it.

3 Q. Let me ask you next about State's Exhibit
4 from the original trial, State's Number 39, which has
5 been identified as an SCDC incident report. The --
6 and as soon as you have a chance to review that just
7 let me know.

8 A. Yes.

9 Q. Okay. The transcript reflects that there's
10 no objection to that report under hearsay or any
11 other grounds. Was that considered at the time by
12 you or Mr. Runyon, do you recall?

13 A. I don't remember discussing not objecting to
14 this document. I don't remember being involved in
15 handling that particular witness either. I don't
16 know whether Bill did or I did.

17 Q. Okay. In regards to SCDC records, do you
18 recall getting or reviewing or sharing with
19 Mr. Runyon or discussing with him in any way Tim's
20 SCDC records?

21 A. I don't.

22 Q. Okay. Do you recall whether or not there was
23 any discussion or review of Tim's SCDC medical
24 records particularly as they related to his eyesight?

25 A. No, I don't remember reviewing any records

Mark Leiendecker - Direct Exam by Mr. Bloom

1 that discussed his eyesight or discussing it.

2 Q. Okay. If the SCDC medical records reflected
3 that Tim had some poor eyesight or vision problems
4 that existed prior to the incident, is that the type
5 of information you would have used?

6 A. It could have been relevant to what happened.

7 Q. And explain that for me if you would, please.

8 A. The ultimate act involved people at distances
9 and a truck driving away, and what he saw or
10 perceived to have seen regarding Mr. B [REDACTED] on his
11 testimony and whether he could have actually been
12 able to see at a distance whether there was a weapon
13 or other things that he discussed or described in his
14 testimony.

15 Q. Okay.

16 A. He being Timothy Rogers.

17 Q. Let me move on next, Mr. Leiendecker, to some
18 of the underlying witnesses in the case, and
19 particularly as it went to the 1994 guilt phase
20 transcript. Do you recall whether or not you
21 interviewed Miss **assault victim**?

22 A. No, I did not.

23 Q. Do you know whether or not Mr. Runyon did, or
24 was there -- let me ask it this way: Do you recall
25 any discussion between yourself and Mr. Runyon as to

Mark Leiendecker - Direct Exam by Mr. Bloom

1 whether Miss assault victim should be interviewed or
2 contacted in any way?

3 A. No, I don't remember any specific discussion
4 regarding assault victim between Bill and myself.

5 Q. If she was not interviewed by you or
6 Mr. Runyon, would that have been a strategy decision,
7 do you know?

8 A. I am also not aware of Bill ever discussing
9 that there was any strategic reason not to speak to
10 her, I'm certain of that.

11 Q. Was she a friend of Mr. Rogers, Miss assault victim?

12 A. I think that's a fair description, yes.

13 Q. What is your recollection about
14 Miss assault victim's connection to Tim Rogers?

15 A. They had been romantically involved before
16 the commission of the crime, that she, Mr. Rogers and
17 Daxton Patterson were all at the scene the day that
18 the crime was committed.

19 Q. So Miss assault victim was an eyewitness?

20 A. Yes.

21 Q. And a friend of the defendant?

22 A. Yes.

23 Q. But your recollection is she was not
24 interviewed by you or Mr. Runyon?

25 A. She was not interviewed by me and I don't

1 believe by Bill.

2 Q. Okay. Let me move on to one of the other
3 names you just mentioned, Daxton Patterson.

4 A. Yes.

5 Q. He also was present at Spell's Grocery Store
6 that night?

7 A. Yes.

8 Q. All right. And what's your understanding of
9 his connection to the incident, if any, from your
10 reviewing of the materials or the recollection of the
11 materials in the case?

12 A. That he was there, he saw what happened, and
13 that he was, in fact, the first one involved in some
14 kind of verbal altercation or confrontation with Mike
15 B [REDACTED] that day at the store.

16 Q. Okay. And what was his connection, if any,
17 to Tim Rogers?

18 A. I understood that they were friends as well.

19 Q. All right. And did you interview Dax
20 Patterson?

21 A. Not at that time, no.

22 Q. At any time did you interview him about this
23 case?

24 A. No, I never interviewed him about this case.

25 Q. Okay. Do you know if there was a discussion

Mark Leiendecker - Direct Exam by Mr. Bloom

1 with Mr. Runyon as to whether or not Mr. Runyon would
2 or someone else might?

3 A. I don't recall him discussing Dax Patterson
4 or talking to him.

5 Q. Okay. Is that something, given the training
6 you've now had for these types of cases, that you
7 would like to have done is to interview ^{assault victim} and
8 Dax?

9 A. Yes, as well as anybody else that had
10 connections then or immediately after the crime.

11 Q. Is there any strategy reason you can think of
12 as to why ^{assault victim} or Dax were not interviewed by the
13 defense?

14 A. No.

15 Q. Next let me ask you about Stephanie Simmons.
16 Do you recall her connection to the case?

17 A. Miss Simmons was in Alabama.

18 Q. Yes, sir.

19 A. And that was -- she was in college I think at
20 Tuskegee maybe, and that is where Timothy went
21 subsequently, and where he was arrested at her
22 apartment, I guess.

23 Q. Okay. And from the training you've received
24 that you've talked about as well as your experience
25 in criminal cases up to this point, is she the type

Mark Leiendecker - Direct Exam by Mr. Bloom

1 of person it might be helpful to interview for the
2 defense?

3 A. Yes, she was someone who knew Tim for a
4 number of years before as well, so they had a
5 personal friendship or relationship that extended
6 before this ever happened.

7 Q. Okay. Do you know, do you recall whether you
8 interviewed Stephanie Simmons?

9 A. No, I didn't.

10 Q. Okay. Do you recall whether there was any
11 discussion with Mr. Runyon about interviewing
12 Miss Simmons?

13 A. I don't remember discussing it with him. I
14 know we had a statement or something, but I don't
15 remember anything beyond that.

16 Q. Okay. And can you tell me whether it was a
17 strategy decision by the defense not to interview
18 her?

19 A. No, it wasn't any trial strategy to not
20 interview her.

21 Q. Let me move next, Mr. Leiendecker, to Tim's
22 statement to the police shortly after the incident in
23 1992. Do you recall whether or not his statement
24 reflects whether or not a racial slur was used by
25 Mr. B [REDACTED] or Mr. Carver during the incident in

Mark Leiendecker - Direct Exam by Mr. Bloom

1 November 1992?

2 A. His written statement to the police?

3 Q. Yes, sir. And I have it here, I can show it
4 to you if you need it.

5 A. I've reviewed it in the last month, I think.

6 Q. Let me hand you what is marked as State's
7 Exhibit 18 from the original trial, and I call your
8 attention to page 1, approximately the fifth line
9 from the bottom. And does Tim make a reference in
10 his statement to law enforcement on December 2nd of
11 1992 to any racial epithets used in this case?

12 A. Yes.

13 Q. Do you remember whether or not there was a
14 discussion with you and Mr. Runyon whether to use
15 that type of information or that type of evidence or
16 not?

17 A. No, I don't remember any discussion not to
18 use it or to use it, except to the extent that when
19 we were working on the jury I remember specifically
20 Bill downplaying or wanting to downplay race or
21 racial elements of it for fear that might turn off
22 some of the potential jurors. Once the trial began,
23 I don't remember any trial strategy not to discuss
24 the use of any racial comment.

25 Q. Because that's evidence in the case, correct?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. Yes, sir.

2 Q. Is that fair to say?

3 A. Yes.

4 Q. How would that type of evidence have been
5 used by the defense regarding a manslaughter defense
6 or any other defense or mitigation presented?

7 A. In the penalty phase if evidence was
8 presented and it was sufficient or found sufficient
9 to cause someone to fly into a rage or heat of
10 passion to such extent that it would obviate the
11 malice involved with shooting a gun, it could move
12 you from a murder to an involuntary manslaughter at
13 best.

14 In the penalty phase, it could also have
15 impact in that it could, in a juror's mind, provide
16 some element of mitigation over what happened if they
17 were to have convicted him of murder but still
18 believed that this had an influence over his actions
19 that afternoon or evening.

20 Q. Right. And, of course, what we're talking
21 about here is the "N" word, correct?

22 A. That's what I understood in my discussions
23 with Mr. Rogers.

24 Q. And so the record reflects clearly the word
25 we're talking about, I will spell it for the record,

Mark Leiendecker - Direct Exam by Mr. Bloom

1 n-i-g-g-e-r, that is the word we're referring to?

2 A. Yes, sir.

3 Q. And the evidence that you had in the case was
4 generally what in terms of who used that word during
5 the incident?

6 A. As I remember my discussions with Mr. Rogers
7 he said that one or both of the men getting into
8 Mr. B [REDACTED]'s truck used that on more than one
9 occasion and I think he said at least specifically
10 one time it was directed at him when he had turned
11 his back and gotten on the telephone. So I'm not
12 certain at this point who he says or said it, but
13 also for the record I would point out that Tim is a
14 black man and Mr. Patterson is not, he's white. So
15 obviously Tim felt the comments directed at him were
16 directed at him.

17 Q. And just to clarify parts of your answer, the
18 information you had regarding the men in the truck,
19 that would be either Mr. Mike B [REDACTED] or Mr. James
20 Carver?

21 A. Yes, sir.

22 Q. And secondly, the information you had
23 regarding the use of "N" word is that it occurred
24 before shots were fired?

25 A. Yes, sir.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. Do you recall any further strategy discussion
2 with Mr. Runyon and yourself as to why that evidence
3 was not presented to the jury?

4 A. No, sir. I don't.

5 Q. If Tim's statement to the police in that
6 regard, which is State's Exhibit 18, could be
7 corroborated by another witness regarding the use of
8 the "N" word, would that be helpful information for
9 the defense?

10 A. Yes.

11 Q. And explain that for me, please.

12 A. If other individuals there had heard it
13 although they may have reacted differently to it, it
14 would certainly substantiate what Mr. Rogers had to
15 say happened because that was denied by -- that had
16 happened by Mr. B [REDACTED] or the other gentleman in the
17 truck.

18 Q. Let me ask you next a few questions regarding
19 specific sections in the transcript. First at the
20 1994 guilt phase --

21 THE COURT: Mr. Leiendecker just needs a
22 little break, just a small break, we have
23 been going for an hour half so it's certainly
24 time.

25 THE WITNESS: Thanks, Judge.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 MR. BLOOM: Thank you for calling my
2 attention to that.

3 THE COURT: Let's take about a 15-minute
4 break. Thank you.

5 MR. BLOOM: Thank you, ma'am.

6 (Recess, from 3:31 p.m. to 3:52 p.m.)

7 (Entered into evidence was Petitioner's
8 Exhibit 8, Supplementary Report.)

9 (Entered into evidence was Petitioner's
10 Exhibit 9, Incident Report.)

11 (Entered into evidence was Petitioner's
12 Exhibit 10, February 9, 1994 Letter.)

13 (Entered into evidence was Petitioner's
14 Exhibit 11, February 15, 1994 letter.)

15 (Entered into evidence was Petitioner's
16 Exhibit 12, February 27, 1994 letter.)

17 (Entered into evidence was Petitioner's
18 Exhibit 13, February 9, 1996 letter.)

19 (Entered into evidence was Petitioner's
20 Exhibit 14, April 18, 1996 letter.)

21 (Entered into evidence was Petitioner's
22 Exhibit 15, Order of Appointment of Legal
23 Counsel.)

24 (Entered into evidence was Petitioner's
25 Exhibit 16, Order of Appointment of Legal

Mark Leiendecker - Direct Exam by Mr. Bloom

1 counsel.)

2 (Entered into evidence was Petitioner's
3 Exhibit 17, Order of Appointment of Legal
4 Counsel.)

5 (Marked for identification was Petitioner's
6 Exhibit 18, photograph.)

7 THE COURT: Thank you all so much and
8 please be seated. Okay. Ready to go? Got
9 water? You're miked?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: You flunked volume.

12 THE WITNESS: Yes, ma'am. I understand.

13 THE COURT: Thank you. I know Ms. Holt
14 and some of the folks were having difficulty
15 hearing him so Major has fixed him up.

16 MR. BLOOM: They've done the same with
17 me, Your Honor.

18 THE COURT: Thank you. Listen, if you
19 all have, especially as we start, if you all
20 are having trouble hearing y'all are welcome
21 to raise your hand, sort of signify we need
22 more volume, that would be fine.

23 MR. BLOOM: If it please the Court.
24 Thank you, Your Honor.

25 THE COURT: Yes, sir.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 BY MR. BLOOM:

2 Q. Mr. Leiendecker, do you recall any testimony
3 in the record from Tim or elsewhere that Mr. B [REDACTED]
4 or Mr. Carver also had firearms in or around the
5 vehicle?

6 A. Yes.

7 Q. All right. And let me show you Petitioner's
8 Exhibit 8 without objection. Can you identify that
9 document as part of the discovery materials you and
10 Mr. Runyon would have been provided in the case?

11 A. Yes, it is.

12 Q. And what does that document reflect?

13 A. It has a copy of Mr. Carver's driver's
14 license or what appears to be a copy of his driver's
15 license, and states that these items were released to
16 Mr. Carver from the Dorchester County Sheriff's
17 Department and contained a .9-millimeter revolver and
18 an H & RH10, I'm not even certain what that is, which
19 also has a serial number so I assume it's a firearm
20 and a gray bag containing two knives and some
21 toiletries.

22 Q. All right. And if there had been testimony
23 from one of the other eyewitnesses corroborating the
24 presence of those firearms in and around the truck,
25 would that have been helpful to the defense?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. Yes.

2 Q. And how so? Please explain.

3 A. Part of --

4 MR. SALTER: Again, Your Honor, I
5 object. I would object. He's wanting him to
6 speculate how this could have been useful as
7 opposed to why he didn't do it.

8 THE COURT: I think he asked him would
9 it have been helpful.

10 MR. BLOOM: I think it was my question.

11 THE COURT: That's what I thought the
12 question was. I apologize if I heard that.

13 MR. BLOOM: Or useful, I think either
14 sentence is perfectly all right.

15 THE COURT: Okay.

16 MR. SALTER: My objection's speculation,
17 Your Honor, this is hindsight. The
18 question's asking -- it's not what we were
19 searching for in Strickland. Under
20 Strickland you're supposed to judge counsel's
21 performance from his perspective at the time
22 not, well, would this have been good later
23 on.

24 THE COURT: Well, maybe I'm
25 misunderstanding the evidence, so let me see

Mark Leiendecker - Direct Exam by Mr. Bloom

1 if I am or if I am not. It is my
2 understanding that at the time of these
3 events, that the time of these events and the
4 investigation by law enforcement that there
5 were certain seizures made, and that this
6 document reflects the return of those items
7 that had previously been in -- seizure can be
8 a legal -- that had been in the possession of
9 law enforcement and that this document is a
10 document that reflects the return of those
11 items that had been in police or law
12 enforcement possession at the time of these
13 events.

14 MR. BLOOM: That's correct.

15 THE COURT: Okay. So the question is,
16 is -- would it have been helpful for you to
17 have had this knowledge at the time of these
18 events.

19 MR. BLOOM: That's correct.

20 THE COURT: In other words -- and -- and
21 the document returning these items was dated
22 when, Mr. Bloom?

23 THE WITNESS: 12/15/92.

24 THE COURT: 12/15. So the question is,
25 I mean these events, these documents were in

Mark Leiendecker - Direct Exam by Mr. Bloom

1 the possession of law enforcement December of
2 '92, and the question as I understand it, the
3 question of counsel is, A, did you know this,
4 did you have this document, were you aware of
5 these items, and if the answer to that is no,
6 would that have been information that would
7 have been helpful to you. I don't think that
8 calls for speculation, I think it's
9 appropriate.

10 MR. BLOOM: Thank you, Your Honor.

11 THE COURT: I think maybe if we get to
12 the point would the outcome have been
13 different, then that might be a different
14 circumstance that might be calling for
15 speculation. But as you are preparing for
16 trial, if it was information that was
17 available at the time, you didn't have it,
18 the question is would it have been helpful.
19 I think that's an appropriate question, I
20 don't think that calls for speculation.

21 BY MR. BLOOM:

22 Q. Would that information have been helpful,
23 Mr. Leiendecker?

24 A. Yes.

25 Q. All right. And if this information could

Mark Leiendecker - Direct Exam by Mr. Bloom

1 also have been corroborated by one of the
2 eyewitnesses, would that have been helpful?

3 A. Yes. At trial there was testimony and in
4 Mr. Rogers' statement there was testimony regarding
5 his impression or belief that he saw a weapon at the
6 time of the events. And, in fact, Mr. Carver was
7 asked specifically about it and said that he did have
8 a .9-millimeter but said he had it for hunting deer,
9 I think, which was certainly called into question at
10 the time.

11 Q. And if there had been additional
12 corroborating testimony to support Mr. Rogers'
13 version of his perception of those firearms or their
14 intended use, would that have helped the defense?

15 A. Yes.

16 Q. In the same way you've just explained?

17 A. Yes.

18 Q. All right. Next let me ask you, there was
19 testimony in the record regarding Mr. Rogers that he
20 spit on Mr. B [REDACTED]. Do you recall that testimony
21 generally?

22 A. I generally recall testimony about spitting,
23 yes.

24 Q. All right. Let me show you Petitioner's
25 Exhibit Number 9 without objection from opposing

Mark Leiendecker - Direct Exam by Mr. Bloom

1 counsel, and is that a document that you can identify
2 or recall as having been provided to you or
3 Mr. Runyon in discovery?

4 A. Yes. I believe this was in discovery, yes.

5 Q. All right. And generally what is that
6 document, Petitioner's Number 9?

7 A. This is an incident or police report, it is
8 from T. P. Limehouse, who was one of the officers
9 that interviewed individuals at the scene, and it
10 details information he received regarding
11 Mr. Bu [REDACTED]'s stop at Spell's.

12 Q. All right. And, in fact, that information
13 was received the same night of the incident?

14 A. 11/25/92.

15 Q. Okay. And the information is received from
16 Mr. Bu [REDACTED] and Mr. Carver?

17 A. That's my understanding in reading the
18 report.

19 Q. And near the bottom of that report, who do
20 Mr. Bu [REDACTED] and Mr. Carver tell police officer
21 Limehouse spit on them, the white male or the black
22 male?

23 A. Words were exchanged it says and the white
24 male began spitting on him. And I think that's
25 Mr. Bu [REDACTED], that Mr. Bu [REDACTED] got in his truck and he

Mark Leiendecker - Direct Exam by Mr. Bloom

1 came to the window and spit on him again.

2 Q. Okay. And who, from your recollection of the
3 case, who was the white male among the various
4 people?

5 A. As I described Dax, that would have been Dax
6 Patterson.

7 Q. Okay. Who was the black male, just for the
8 record?

9 A. Mr. Rogers.

10 Q. All right. And if you recall, what race was
11 Miss assault victim, the female?

12 A. She was also black.

13 Q. All right. How harmful was it to Tim's case
14 at trial that the jury heard that allegedly he spit?

15 MR. SALTER: Objection. Again, Your
16 Honor, same kind of line of inquiry that Your
17 Honor sustained the objection.

18 MR. BLOOM: I'm not asking him if it
19 would make a difference at this stage, I'm
20 just asking him how harmful as defense
21 counsel he perceived a line of reference.

22 THE COURT: I'll allow how harmful he
23 perceived it.

24 Q. How harmful did you perceive as Tim's defense
25 counsel that Tim allegedly spit on Mr. B [REDACTED] ?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. Part of the approach of the prosecution was
2 to show Mr. Rogers as the aggressor and the escalator
3 of this argument and the suggestion that in the
4 middle of the argument he spit in Mr. Bu[REDACTED]'s face
5 only exacerbated or added to that portrayal and
6 wasn't helpful at all to the defense.

7 Q. Tim's testimony, of course the record
8 reflects, is that he, Tim, did not spit?

9 A. Correct.

10 Q. And if there had been corroborating testimony
11 for Tim on that point, would that have been helpful?

12 A. Yes.

13 Q. Let me ask you next, Mr. Leiendecker,
14 generally how did you and Mr. Runyon divide up who
15 would see Tim on a regular basis? I didn't ask that
16 very well.

17 A. We didn't divide it up. Mr. Runyon saw
18 Mr. Rogers almost exclusively.

19 Q. All right. Do you recall how often you saw
20 Tim prior to the 1994 trial, if at all, roughly?

21 A. Before the '94 trial?

22 Q. Yes, sir.

23 A. Probably in very limited basis and only to
24 introduce myself as one of the counsel at that time,
25 because in '94 the negotiations were ongoing and as I

Mark Leiendecker - Direct Exam by Mr. Bloom

1 said I really didn't have any part or involvement in
2 that. I didn't know or hadn't met his family and
3 wasn't involved in the plea negotiations with
4 Mr. Rogers. I know I did sit in the grand jury room
5 once or twice with he and Bill while he and Bill were
6 discussing it, but I don't remember being actively
7 involved in that discussion.

8 Q. When you say sitting in the grand jury room,
9 that would have been the day of aborted murder plea?

10 A. Yes. I believe that would have been the
11 February 2nd date.

12 Q. All right. And then between the February 2nd
13 date and the February 26th, 1994 trial date do you
14 recall roughly how often you saw Tim, if at all, in
15 those three weeks leading up to trial, three or four?

16 A. I don't recall seeing him at all.

17 Q. Okay.

18 A. I'm not saying that I didn't on occasion, but
19 it would have only been to follow up on something
20 that Bill would have asked me to pass on to him.

21 Q. Okay. Let me ask you next, I want to show
22 you three letters from Solicitor Bailey to the
23 defense identified as Petitioner's Exhibits 10,
24 Exhibit 11 and Exhibit 12 now in the record of this
25 case without objection and they are dated

Mark Leiendecker - Direct Exam by Mr. Bloom

1 February 9th, 1994; February 15th, 1994; and February
2 22nd, 1994. And my question is, do you ever remember
3 seeing those letters that are from Mr. Bailey to
4 Mr. Runyon? I guess my question is this, I didn't
5 ask that very well. Did you ever see those letters?

6 A. Number 10 regarding the videotapes I do not
7 remember seeing those, I mean seeing this --

8 Q. Letter?

9 A. -- letter. I do remember the videotapes.
10 February 15th letter regarding Miss assault victim and
11 Mr. Patterson, I don't remember seeing that either.
12 And the February 22nd letter I do not remember seeing
13 which discusses Miss assault victim's potential testimony.

14 Q. All right. Is it fair to characterize those
15 three letters as generally exculpatory information
16 that Mr. Bailey had that he's communicating to the
17 defense or to Mr. Runyon specifically?

18 A. Specifically Number 11 and Number 12 are.
19 I'm not sure that Number 10 falls in the definition
20 of exculpatory other than to identify the videotapes
21 which he says are consistent with the written
22 statements or statements that Mr. Rogers made
23 previously. But he uses the word exculpatory
24 specifically in Number 12 and I'm not sure if he
25 didn't use it also in Number 11.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. All right. You don't recall Mr. Runyon
2 sharing this information with you that's reflected in
3 Petitioner's Exhibits 10, 11 and 12?

4 A. No, I do not.

5 THE COURT: Are those in evidence?

6 MR. BLOOM: Yes, Your Honor.

7 THE COURT: Let me see them. Let me
8 look at them, give me just a moment.

9 MR. BLOOM: Yes, ma'am.

10 THE COURT: Thank you.

11 MR. BLOOM: Yes, ma'am.

12 Q. Mr. Leiendecker, if Mr. Runyon had asked you
13 to interview some of the witnesses referenced in
14 Petitioner Exhibits 10, 11 and 12, such as assault victim
15 [REDACTED], you would have been glad to do so?

16 A. Yes, sir.

17 Q. Would you have had -- let me ask you next if
18 Mr. Runyon had asked you to interview Dax Patterson,
19 would you have done so?

20 A. Yes.

21 Q. If Mr. Runyon had asked you to interview
22 Stephanie Simmons, would you have done so?

23 A. Yes.

24 Q. At the 1994 trial the record reflects the
25 trial judge gave an involuntary manslaughter charge

Mark Leiendecker - Direct Exam by Mr. Bloom

1 but there was no King charge or what was known as a
2 King charge regarding a jury instruction on lesser
3 offenses. Do you recall why there was not a defense
4 request for a King charge in 1994?

5 A. No.

6 Q. Would that have been a strategy decision?

7 A. It was never discussed.

8 Q. Next in 1996 there is repeated page
9 references to the use of the word "parole,"
10 particularly on pages 756 and 757, page 902 through
11 904, page 947 and 948, and page 955. The record
12 reflects Mr. Rogers received a life without parole
13 instruction but there was no other limiting
14 instruction to the jury regarding the repeated
15 testimony and references to earlier paroles. Was
16 there any discussion among the defense to request
17 such a limiting instruction or clarifying
18 instruction?

19 A. No, not that I remember.

20 Q. Next in the 1996 transcript on pages 767
21 through 790, there is testimony regarding prison
22 conditions such as inmates having TV's, basketball
23 courts, soccer matches. Do you recall whether there
24 was any strategy discussion among the defense to
25 object or to allow that type of testimony?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. No, I don't remember any discussion regarding
2 how to handle that testimony.

3 Q. All right. In that regard Tim Rogers himself
4 was cross-examined on those type of prison
5 conditions, the record reflects, regarding TV and
6 canteen basketball on pages 907 to 909. Do you
7 recall if Tim was prepared to handle those types of
8 questions? And by prepared, I mean by defense
9 counsel.

10 A. Not by this defense counsel. He and I in
11 preparation for his testimony didn't discuss the
12 amenities associated with his life in prison.

13 Q. So is it fair to say that was not a strategy
14 decision by defense counsel regarding that type of
15 evidence or cross-examination?

16 A. Yes.

17 Q. Lastly in the 1996 transcript regarding the
18 solicitor's closing argument, whose responsibility
19 was it among defense counsel to object to Solicitor
20 Bailey's closing argument if there was a belief that
21 he had exceeded proper argument, was that yours or
22 Mr. Runyon's?

23 A. I don't remember. Whoever was doing our
24 close I assume should have handled that.

25 Q. If the record reflects both you and

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Mr. Runyon did a partial closing, would you have
2 deferred to Mr. Runyon as lead counsel to object to
3 Solicitor Bailey?

4 A. Yes.

5 Q. I believe I have just a few more questions,
6 Mr. Leiendecker, and I mean this when I say it, I
7 truly appreciate your patience and cooperation today
8 in appearing.

9 In the 1994 trial the record reflects
10 it's 26 days between the aborted murder plea of
11 February 2nd and the trial of February 28th. Was
12 there any discussion -- let me rephrase that. Do you
13 recall, as defense counsel, that you and Mr. Runyon
14 were prepared to go forward on February 28, 26 days
15 after the aborted murder plea?

16 A. With the limited scope of what I had to do I
17 was ready by that time. Having not prepared any
18 sincere or serious mitigation case I don't believe we
19 were ready, and I believe that Mr. Runyon was mad at
20 Mr. Rogers for blowing the plea on the 2nd of
21 February.

22 Q. Can you explain that a little further?

23 A. He was -- when we went back into the room
24 after Judge Whetstone refused to accept the plea he
25 was very upset with Tim and, you know, just yelling

Mark Leiendecker - Direct Exam by Mr. Bloom

1 at him and telling him, you know, that --

2 MR. SALTER: I'm going to object, Your
3 Honor. Hearsay.

4 A. -- he screwed it up.

5 Q. Were you present? I'm sorry.

6 A. Yes.

7 Q. Were you present during that?

8 A. Yes.

9 MR. BLOOM: Your Honor, I think it goes
10 to attorney/client communications and his
11 observations. I don't think it's hearsay at
12 all. It goes to present sense impression,
13 Mr. Runyon's a subpoenaed witness in this
14 case, he'll be testifying. It's clearly a
15 present sense impression. And
16 attorney/client communications are by statute
17 in these types of cases admissible, both on
18 the part of Mr. Rogers.

19 THE COURT: Oh, I do know the
20 attorney/client privilege, that part of it
21 doesn't bother me and the present sense
22 impression that he was angry with him, I
23 think is certainly admissible as well.

24 THE WITNESS: I don't remember specific
25 words or conversations.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 THE COURT: Yeah, that's right. I don't
2 think the words would be, but I don't
3 think -- his impression of his demeanor is
4 certainly what he observed. I think the
5 words would certainly be hearsay, but he can
6 certainly testify to his demeanor and I'll
7 allow it insofar as the demeanor is
8 concerned.

9 Q. If you could please explain, Mr. Leiendecker?

10 MR. SALTER: Your Honor, thank you.

11 THE COURT: Thank you.

12 Q. Please explain, sir.

13 A. He was -- he was angry and he was angry at
14 him because he had worked hard to put together this
15 plea and he felt or -- you know, he felt Tim had
16 failed to follow through with what he had set up or
17 promised to do for him. And, therefore, we were
18 going to go to a trial, you know, there we are, we're
19 going to start the trial in four weeks.

20 Q. From your perspective did that adversely
21 impact on defense counsel's preparation or role in
22 any way?

23 A. I wasn't in Bill's office or involved with
24 his preparation and I'm certainly not trying to give
25 the impression that Bill didn't buckle down and go to



Mark Leiendecker - Direct Exam by Mr. Bloom

1 work, because he's a professional and dedicated to
2 what he did. But there was -- I remember no
3 discussion about a continuance or needing additional
4 time to get ready. And this, you know, was after
5 that February 2nd aborted plea.

6 Q. Right. In 1996 you and Mr. Runyon were
7 reappointed to Tim's case?

8 A. (Nodding.)

9 Q. And let me just -- I'm sorry, you nodded.

10 A. It's sort of an if you say so, yes. I mean,
11 I have seen those documents since, but I never really
12 knew I was reappointed when the case was sent back
13 after it being reversed, I just always worked under
14 the impression that I was still on the case.

15 Q. Okay. So you continued to work on Tim's case
16 in 1996 when it got reversed and came back?

17 A. Yes.

18 Q. And to that end, briefly though, let me just
19 ask you if you can identify Petitioner's Exhibits 13,
20 14, 15 and 16 that are entered without objection.

21 A. Thirteen is a letter to Mr. Tally of the
22 South Carolina Court administration office.

23 Q. Is that by Solicitor Bailey?

24 A. Yes, by Solicitor Bailey.

25 Q. And it references a February 1996 hearing

Mark Leiendecker - Direct Exam by Mr. Bloom

1 date where you and Mr. Runyon were reappointed; is
2 that fair to say?

3 A. It says on February '96 he re-served the
4 death penalty notices and lists Mr. Runyon and I as
5 the attorneys representing Mr. Rogers and copied us
6 with that correspondence. The next is a letter from
7 my office on April the 18th to Judge Whetstone where
8 I informed the judge I do not believe at that point I
9 had received any formal assignment under the death
10 penalty provisions to represent Mr. Rogers again and
11 asking the judge to do that.

12 Q. And what is that Exhibit Number?

13 A. Fourteen.

14 Q. Thank you, sir.

15 A. That was copied to Mr. Runyon and to
16 Mr. Bailey. Fifteen is a July 10th document from the
17 clerk appointing me as counsel to Mr. Rogers, and 16
18 is a duplicate assignment for Mr. Runyon on the same
19 date.

20 Q. All right. Thank you, sir. Do you recall
21 roughly when you were reappointed to the case, how
22 many times you saw Mr. Rogers in 1996?

23 A. Limited times. I remember going to Lieber
24 and meeting with him on one or two occasions, and I
25 remember discussing matters with him when he was here

Mark Leiendecker - Direct Exam by Mr. Bloom

1 at the courthouse, but I don't -- beyond that I don't
2 remember any regular meetings with him on a weekly or
3 monthly basis.

4 Q. Okay. And during 1996, during that year --
5 I'm sorry, strike that. Let me rephrase.

6 After the 1994 trial but before the 1996
7 trial when you say you were continuing to work on
8 Tim's case, did there come a time you ended up
9 representing one of the eyewitnesses in the case that
10 you referred to?

11 A. Yes. And to clarify, when the case came back
12 after it was reversed I felt that we were still
13 counsel, that's why we appeared at the service of the
14 notice of intent to seek the death penalty the second
15 time. I don't want to give the Court or anybody else
16 the impression that from March of 1995 until we
17 started work on the case again in '96 that I was
18 involved in any active work on the case. It was
19 turned over to the appellate defense group in
20 Columbia and they were pursuing that appeal through
21 the Supreme Court.

22 Q. All right. Let me show you Petitioner's
23 Exhibit Number 17. And did there come a point in
24 time in 1994 when you were appointed to represent Dax
25 Patterson?

Mark Leiendecker - Direct Exam by Mr. Bloom

1 A. Yes. As part of my duties as public defender
2 I was later that year appointed to represent
3 Mr. Patterson on a driving offense.

4 Q. All right. And are some of the documents, or
5 all the documents, any of the documents in
6 Petitioner's Exhibit 17, would you have had copies of
7 those types of documents in your file regarding that
8 offense?

9 A. I would have had a file for Mr. Patterson
10 just like I open for any of the other clients. This
11 front page of the Exhibit is the assignment sheet
12 that came to us from the criminal justice coordinator
13 of the public defender group, at that time a Patricia
14 Miller. And Patty assigned the case to you by
15 preparing this multiform document and that's what you
16 got along with whatever copies of warrants she had.

17 Q. Okay.

18 A. And then the other documents that are
19 contained in there are discovery information or other
20 things that were given me by the solicitor.

21 Q. And has contact information though there on
22 Dax Patterson, correct?

23 A. It gives me a time and address and it
24 references that that home is the home of his mother,
25 Julie Hostetter.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. Okay.

2 A. And that was where he lived as well.

3 Q. And at any time prior to the 1996 trial did
4 Mr. Runyon ask you to interview Dax Patterson in
5 preparation of the 1996 resentencing?

6 A. No.

7 Q. Okay. But if he had, you could have used
8 documents like that to locate Mr. Patterson?

9 A. If he had I had a file that said where Dax
10 lived in 1994, yes.

11 Q. Does that file also refer to Dax's Social
12 Security number, date of birth and other identifying
13 information so he could be located?

14 A. Age, date of birth, race and the date of his
15 arrest. It does not have a Social Security number,
16 not on the assignment sheet. There is on the bond
17 sheet, there is a Social Security number designation
18 and a telephone number.

19 Q. So if Mr. -- let me ask you this: What was
20 your -- what were your general duties that Mr. Runyon
21 had asked you to handle for the 1996 resentencing, if
22 any different from the 1994 duties?

23 A. I was given some specific responsibility
24 concerning witnesses and I think that my
25 responsibilities, I don't remember the witnesses, but

Mark Leiendecker - Direct Exam by Mr. Bloom

1 it's reflected in the transcript, those were decided
2 ahead of time and I was to work with some of the
3 presentation of Timothy Rogers' testimony.

4 Q. Okay. And for the 1996 resentencing did you
5 or Mr. Runyon interview Dax Patterson, if you know?

6 A. I did not.

7 Q. Okay. And how about assault victim for 1996?

8 A. No.

9 Q. And how about Stephanie Simmons for 1996?

10 A. No.

11 Q. Lastly let me show you a photograph,
12 Petitioner's Exhibit 18 for identification only at
13 this time, which the record will reflect is a
14 photograph provided to Ms. Holt and I today. Have
15 you ever seen that photograph before in this case?

16 THE COURT: Did you identify the number
17 for the record?

18 MR. BLOOM: I believe it's Number 18 for
19 identification.

20 THE COURT: Number 18 for
21 identification, thank you.

22 A. I don't know. I don't have any specific
23 recollection of this photograph. I know there were a
24 lot of photographs that were taken by the sheriff's
25 office.

Mark Leiendecker - Direct Exam by Mr. Bloom

1 Q. But you don't recall that photograph?

2 A. No.

3 MR. BLOOM: Court's indulgence one
4 minute.

5 THE COURT: All right.

6 Q. Mr. Leiendecker, lastly you stated in one of
7 your earlier responses I believe that you've
8 apologized to Mr. Tim Rogers' mother. Did I
9 understand that answer correctly earlier?

10 A. I've spoken with Ms. Applicant's Mother and told her
11 that part of this process involves investigation of
12 what the attorneys did and that, you know, I think we
13 were remiss.

14 Q. Can you explain that further for me? In what
15 way from your perspective do you believe you were
16 remiss?

17 A. In the full preparation of the case, for its
18 presentation, especially in the area of the
19 mitigation during the penalty phase. And I, you
20 know, I've run into Tim's mom a few times since then
21 and I think that, you know, she's very gracious and
22 polite to me always, and I try to be the same.

23 MR. BLOOM: Court's indulgence.

24 Q. Thank you very much, Mr. Leiendecker. Please
25 answer any questions opposing counsel or Her Honor

1 may have.

2 THE COURT: Cross-examination.

3 CROSS-EXAMINATION

4 BY MR. SALTER:

5 Q. Good afternoon, Mr. Leiendecker. How are you
6 doing?

7 A. Fine, thank you.

8 Q. Thank you for being so patient in staying
9 with us this afternoon.

10 Now, going back through your testimony
11 on direct examination I believe you indicated that
12 prior to beginning a criminal practice that you'd had
13 a civil practice; had you not?

14 A. Mostly, yes.

15 Q. And you had done some complex litigation?

16 A. Yes.

17 Q. What kind of complex litigation are we
18 talking about?

19 A. I was one of the attorneys for the Columbus
20 Public School Board in Columbus, Ohio, and we were
21 involved in handling their property tax appeals and
22 issues and I had done a lot of that. I'd handled a
23 search and seizure on a civil side by the State of
24 Ohio from a fireworks manufacturer and tried that
25 case before the Court of Claims. I've tried a couple

Mark Leiendecker - Cross-Exam by Mr. Salter

1 different jury trials and had been involved in second
2 chair representation of a defendant on a federal drug
3 charge. So as far as complex cases that probably --
4 and I guess I forgot to mention we were involved in
5 the representation of the company that made the
6 drivers licenses for the State of Ohio in a big
7 dispute when it was awarded to a different
8 corporation.

9 Q. All right. Now, by the time you became
10 involved in this case I believe that Mr. Runyon had
11 already worked out the deal that Mr. Rogers was
12 pleaded to two counts of criminal sexual conduct with
13 a minor and thereafter plead to murder and receive an
14 LWOP sentence?

15 A. Yes.

16 Q. Okay. Now, you did not have any involvement
17 in that other than just being an observer?

18 A. Other than being apprised of it and observing
19 it as it took place.

20 Q. You never voiced any objection to it?

21 A. No.

22 Q. Okay. You testified on direct examination
23 that your primary responsibility in '94 was to your
24 jury investigation?

25 A. Yes.

Mark Leiendecker - Cross-Exam by Mr. Salter

1 Q. And you testified also just a few minutes ago
2 that Mr. Runyon basically exclusively communicated
3 with Mr. Rogers; is that correct?

4 A. Yes.

5 Q. Now, you previously testified at a
6 deposition; did you not?

7 A. Yes, I did.

8 Q. Do you recall your testimony at that time?
9 If not, I will gladly hand you a copy of your
10 deposition.

11 A. Do I recall what I said specifically at that
12 time?

13 Q. Yes.

14 A. No, I do not.

15 THE COURT: Do you have the original
16 depo? Have you got the original?

17 MR. SALTER: I do not, Your Honor.

18 THE COURT: There you go. Let's unseal
19 it, if you would be so kind as to get the
20 paper cut for me and that way we'll make that
21 the Court's Exhibit. I think there's another
22 deposition we likewise need to do that,
23 because I think you were using a copy earlier
24 and I think it's appropriate that we unseal
25 them and just mark them as a Court's Exhibit.

Mark Leiendecker - Cross-Exam by Mr. Salter

1 MR. SALTER: All right, Your Honor, I
2 guess this will be Court's Exhibit 1.

3 THE COURT: Well, that's correct at this
4 point. You come on show it to him, we'll
5 mark it when we're done.

6 MR. SALTER: All right.

7 Q. I show you page 28 of your deposition.

8 A. Yes, sir.

9 Q. If you would begin looking at line 4 and go
10 through, please, line 13.

11 A. Okay.

12 MR. BLOOM: What page are you at? I'm
13 sorry.

14 MR. SALTER: Page 28.

15 MR. BLOOM: Thank you.

16 Q. I believe I'd asked you earlier about your
17 involvement in '94, this was with respect to '96.

18 A. Correct.

19 Q. Okay. You met with him in '96?

20 A. Yes, sir. As I testified then and now I met
21 with him in '96.

22 Q. All right. You did that because, because
23 where you were located geographically, correct?

24 A. I'm certain that it was easier for me to meet
25 with him, yes, with Tim or his family or his mother.

Mark Leiendecker - Cross-Exam by Mr. Salter

1 Q. Okay. Now, because Mr. Runyon was lead
2 counsel and had experience in death penalty cases you
3 deferred to him?

4 A. Absolutely.

5 Q. Okay. He was obviously more involved in the
6 case at that point than you?

7 A. Had been for 12 months prior.

8 Q. Now, in your limited role you still went
9 ahead and reviewed all the discovery information
10 provided by the State; did you not?

11 A. I looked at everything that was in the file
12 that I had, yes.

13 Q. All right. And that file obviously is the
14 one that was not sent back by appellate defense, when
15 y'all went back to retrial in '96 you did not have
16 the '94 trial file; is that correct?

17 A. I don't remember that.

18 Q. Okay.

19 A. I'm sorry.

20 Q. All right. Before the first trial do you
21 have any idea how many times you may have met with
22 Mr. Rogers?

23 A. Before the '94 trial?

24 Q. Yes. I'm going back to '94.

25 A. No. As I think I testified if I met with him

Mark Leiendecker - Cross-Exam by Mr. Salter

1 at all it was in a very limited role of
2 responsibility and usually was with Bill just sort of
3 as an observer.

4 Q. All right. Do you recall what he may have
5 said about what had happened on the night of
6 November 25, 1992?

7 A. I recall that his explanation was always the
8 same or similar to what he told Judge Whetstone when
9 he stood in front of the bar in February of '94.

10 Q. Now, regarding your jury investigation I
11 believe you've indicated previously that you were not
12 happy with the venire as it stood, correct, the
13 racial composition of it?

14 A. I was concerned based on my experience in
15 working in Dorchester County for a year or year and a
16 half that it didn't reflect the racial balance of the
17 county.

18 Q. All right, sir. But your investigation
19 revealed that, in fact, it did?

20 A. It did reveal that, yes. I was surprised to
21 learn it.

22 Q. All right. Now, in the course of doing your
23 investigation on the venire, do you recall whether or
24 not you would have had rap sheets provided to you by
25 the solicitor's office for those veniremen?

Mark Leiendecker - Cross-Exam by Mr. Salter

1 A. I don't remember specifically having the rap
2 sheets for the venire, but that was at that time a
3 common practice of the solicitor's office.

4 Q. Okay.

5 MR. SALTER: Court's indulgence.

6 THE COURT: Sure.

7 (Marked for identification were Respondent's
8 Exhibits 1, 2 and 3.)

9 Q. All right, sir. I hand you now a
10 February 14, 1994 letter addressed to you from
11 Solicitor Bailey, ask you if you recognize that?

12 A. Yes, sir. I mean, I recognize this letter
13 being from Walter and I have specific recollection of
14 receiving it, but certainly believe I did.

15 Q. That provided you with information about
16 juror rap sheets?

17 A. It says enclosed with it were copies of the
18 rap sheets for all the jurors in the Rogers trial.

19 Q. All right.

20 MR. SALTER: Your Honor, we would move
21 that as Respondent's Exhibit 1.

22 MR. BLOOM: No objection.

23 THE COURT: Very well.

24 (Entered into evidence was Respondent's
25 Exhibit 1, February 14, 1994 letter.)

Mark Leiendecker - Cross-Exam by Mr. Salter

1 Q. I'll show you a similar letter from Solicitor
2 Bailey dated the 17th of February, 1994, ask you if
3 you can identify that.

4 A. It says the same thing enclosed are the rap
5 sheets, this one is actually signed by Walter, the
6 first one was signed by somebody in his office.

7 MR. SALTER: We would move that, Your
8 Honor, as Respondent's Exhibit 2.

9 MR. BLOOM: No objection.

10 THE COURT: Very well.

11 (Entered into evidence was Respondent's
12 Exhibit 2, February 17, 1994 letter.)

13 Q. Finally I show you a February 22nd, 1994
14 letter addressed to you from Solicitor Bailey.

15 A. It's an update showing an additional rap
16 sheet for one of the jurors again signed by Walter
17 addressed to my office.

18 MR. SALTER: Your Honor, we would move
19 that into evidence as Respondent's Exhibit 3.

20 MR. BLOOM: No objection.

21 THE COURT: Very well.

22 (Entered into evidence was Respondent's
23 Exhibit 3, February 22, 1994 letter.)

24 Q. So, in fact, the State did provide rap sheets
25 to you in accordance with their practice?

Mark Leiendecker - Cross-Exam by Mr. Salter

1 A. Certainly that reflects that they did provide
2 them just as they had in the other cases I'd handled.

3 Q. Now, the strategy in the guilt phase in '94
4 was what, the defense strategy?

5 A. The guilt phase presentation and strategy was
6 not to deny that Timothy was there, not to deny that
7 the act happened, but to present evidence that would
8 allow or permit the jury to determine it was not
9 murder but a manslaughter.

10 Q. And the penalty phase strategy was not to
11 belittle the grief of the victim's family, correct,
12 but to show there was simply a tragedy?

13 A. I think that would be accurate, although I
14 was not nearly as intimately involved with knowing
15 what that strategy was for the guilt phase having
16 never been through anything like that before.

17 Q. You indicated earlier you thought that there
18 was always -- I'm sorry, you felt that there was a
19 recognition that Mr. Rogers may not go through with
20 the plea to murder because of his reluctance to admit
21 malice and intent with respect to the shooting of
22 Stephanie B [REDACTED] ?

23 A. I believe Timothy's presentation regarding
24 how the shooting took place was consistent from the
25 time he was arrested until he tried to put the plea

Mark Leiendecker - Cross-Exam by Mr. Salter

1 on the record and that he always had trouble saying
2 that what he did was with malice or the reckless
3 intent with murder. I think the word he always used
4 was it was a mistake, I didn't mean to kill anybody,
5 it was a mistake.

6 Q. Okay. So he's saying he fired the gun in the
7 air?

8 A. Yes, that's what he said. I believe that's
9 what he said.

10 Q. Was it explained to him that he would have to
11 admit his guilt to the charge of murder?

12 A. I didn't sit in on all the conversations he
13 and Bill had before the plea but, yes, to my
14 understanding it was explained to him that the way we
15 got him through this in the plea was, one, to plead
16 to the two underlying felonies in February -- in
17 January, come back in February and he would have to
18 plea to the murder and admit the elements of the
19 murder, yes.

20 Q. All right. And he appeared to understand
21 your explanations and go along with it until he
22 backed out of the plea?

23 A. Not my explanations. I wasn't involved in
24 making those explanations.

25 Q. Co-counsel's explanations, excuse me.

Mark Leiendecker - Cross-Exam by Mr. Salter

1 A. But, yes, he did the steps necessary to put
2 the plea in place until he failed to just agree with
3 the solicitor's facts in the murder plea.

4 Q. Okay. You were asked in questions about
5 whether or not an Alford plea would have been
6 considered. The State would have to agree to allow
7 an Alford plea; would they not?

8 A. I wasn't involved in the thought at that time
9 and I don't -- again, all Alford pleas that I've ever
10 been involved in there was discussion between the
11 solicitor and it was also run by the presiding judge
12 of the desire to present it as an Alford plea.

13 Q. That's because a defendant doesn't have a
14 constitutional right to plead guilty in any form,
15 correct?

16 A. Correct.

17 Q. You testified on direct that you and
18 Mr. Runyon never discussed making a motion to
19 withdraw the criminal sexual conduct with a minor
20 pleas after the murder plea fell through.

21 A. No. I don't have any remembrance that we
22 ever looked into that, no.

23 Q. Are you aware of any basis for making such a
24 motion other than the fact that he subsequently
25 changed his mind about the strategy that was --

Mark Leiendecker - Cross-Exam by Mr. Salter

1 A. Today am I aware of any basis for withdrawing
2 that?

3 Q. No. Were you aware at the time, sir?

4 A. No, I hadn't done any investigation into it.
5 I am aware today.

6 Q. This is some years after the fact that you're
7 aware?

8 A. Yes, sir. But if we had looked into it it's
9 something that would have been known at that time.

10 Q. Did Mr. Rogers ever tell you or co-counsel in
11 your presence that the acts that resulted in the
12 pleas to criminal sexual conduct with a minor in the
13 second degree, that those acts didn't occur in
14 Dorchester County?

15 A. I never heard that from Mr. Rogers.

16 Q. All right. Did prior to the '94 trial or
17 prior to the '96 resentencing proceeding, did
18 Mr. Rogers ever indicate that he had problems with
19 his eyesight?

20 A. I don't remember that, having that
21 information or hearing that from him.

22 Q. Do you remember him ever saying that somehow
23 faulty eyesight played a part in what happened on the
24 night of November 25th, 1992?

25 A. No.

Mark Leiendecker - Cross-Exam by Mr. Salter

1 Q. All right. Do you recall whether or not he
2 wore glasses during the course of the '94 proceeding
3 or the '96 resentencing proceeding?

4 A. I do not believe he did.

5 Q. Turning to Daxton Patterson, you indicated I
6 believe that you did not interview him?

7 A. Correct.

8 Q. Okay. And he was a codefendant, wasn't he?

9 A. Yes, he was. I think he was charged with
10 misprision, I don't remember exactly what he was
11 charged with.

12 Q. You had the problem of trying to represent
13 someone that was charged with an offense represented
14 by counsel; is that correct?

15 A. I'm not sure what you mean by problem. In
16 the course of my representation of defendants I
17 interviewed codefendants on numerous times, but
18 obviously you would have to give his counsel notice
19 that you wanted and you would meet with he and
20 counsel.

21 Q. Correct. So you'd have to get counsel to
22 agree to the interview?

23 A. Correct.

24 Q. And there are problems from his perspective
25 with respect to anything he tells you may be used

Mark Leiendecker - Cross-Exam by Mr. Salter

1 against him by the prosecution, correct?

2 A. Certainly my communications with him wouldn't
3 be privileged.

4 Q. Correct. You were asked about State's
5 Exhibit 18. That was before the jury; was it not?

6 A. The picture of Mr. Bu [REDACTED]'s truck?

7 Q. I'm sorry, no, sir. The statement your
8 client gave to the Alabama authorities.

9 A. Oh, I'm sorry, they're both numbered 18.

10 Q. I'm sorry, that was State's Exhibit 18 from
11 both the original trial and the resentencing
12 proceeding.

13 A. Yes.

14 Q. Okay. So that information concerning racial
15 slur that's contained in that statement was before
16 the jury?

17 A. That statement was presented to the jury and
18 marked as an exhibit, yes. I think that turned out
19 to be the sole reason Judge Brown gave us an
20 instruction on involuntary manslaughter, we basically
21 lucked into that.

22 Q. You were asked about the failure to hire an
23 investigator.

24 A. Yes.

25 Q. All right. Despite the fact this is a

Mark Leiendecker - Cross-Exam by Mr. Salter

1 capital case the facts were relatively simple, were
2 they not, in terms of guilt or innocence, what
3 happened at the scene?

4 A. The actual forensic facts weren't incredibly
5 complicated.

6 Q. All right, sir. What you basically had was a
7 swearing contest between several people?

8 A. Yes, sir. I'm not sure I would characterize
9 it so much that way, I mean, people remember things
10 differently. What we had were the facts as they were
11 and the forensics were fairly clear.

12 Q. All right. Earlier you testified that prior
13 to the resentencing proceeding that Mr. Runyon didn't
14 feel that death would be imposed, isn't it correct,
15 that you also felt that your client would not receive
16 the death penalty?

17 A. I didn't mean to give the impression that
18 Bill was alone in that belief. That was our belief
19 or at least that's what I felt. Maybe I'm imposing
20 my thoughts on Bill today, I don't know.

21 Q. All right. And the strategy adopted both --
22 I'm sorry. The strategy adopted in '96 was that of
23 both of you, correct? I mean, you didn't object to
24 his strategy that he proposed, did you?

25 A. I never stood up and objected to Bill's

Mark Leiendecker - Cross-Exam by Mr. Salter

1 presentation, no. I deferred to Bill's presentation.

2 Q. And there weren't really any changes in the
3 defense strategy, were there, between the '94 and '96
4 proceedings?

5 A. No.

6 Q. And what you were trying to show is
7 Mr. Rogers was basically a decent person, this was
8 just a tragic accident, horrible occurrence, it just
9 kind of got out of hand all of a sudden, correct?

10 A. Yes, sir.

11 Q. All right. And you were trying to show his
12 adaptability to prison life, correct?

13 A. Yes.

14 Q. And that if sentenced -- obviously if
15 sentenced to life imprisonment he would receive a
16 sentence of life without parole?

17 A. Correct.

18 Q. All right. With respect to the failure to
19 develop evidence of the racial slur, in your
20 experience as an attorney both civilly and in
21 criminal practice, isn't it true that it's not always
22 best to try to put in every piece of evidence you
23 can?

24 A. There are certainly trial strategies
25 regarding the admission or the omission of the

Mark Leiendecker - Cross-Exam by Mr. Salter

1 presentation of evidence to a jury.

2 Q. And might a racial slur play better with a
3 predominantly black jury as opposed to one that's
4 predominantly white, such as the one that we had
5 here?

6 A. I think that certainly minimizes the
7 sensitivity of the white jurors to the use of racial
8 slurs. I personally feel a lot of non black people
9 are as offended by the use of that word as anyone.
10 So I'm not sure how to answer that question. Would
11 it play better to an all black jury, yes. Was there
12 a black person on the jury? Yes. Did we need more
13 than one vote to avoid his conviction or his sentence
14 to death? No.

15 Q. Now, had you developed this evidence and
16 presented further evidence along those lines, both
17 Mr. Bu [REDACTED] and Mr. Carver were available to testify
18 that it never occurred, correct?

19 A. Yes.

20 Q. All right.

21 A. I'm assuming they both would have testified
22 to that.

23 Q. So what you would have done is you would have
24 developed a situation where you pit the credibility
25 of a constable in the magistrate's court against

Mark Leiendecker - Cross-Exam by Mr. Salter

1 that, against someone who's admitted to shooting a
2 little nine-year-old girl?

3 A. I think we were faced with that dilemma from
4 the beginning.

5 Q. You were asked about interviewing and
6 presenting testimony from assault victim. She
7 testified in both proceedings; did she not?

8 A. I know she testified in the first proceeding
9 and, yes, I think she testified in both proceedings.

10 Q. You also testified that if Mr. Runyon had
11 asked you, you would have been available to interview
12 either assault victim, Mr. Patterson or Stephanie
13 Simmons; is that correct?

14 A. Yes. I mean --

15 Q. But you didn't make any effort to do it on
16 your own?

17 A. No, I did not. I was following whatever he
18 asked me to do or determined that he needed me to do.

19 Q. Okay. And you were asked about in the 1996
20 resentencing proceeding about whether or not there
21 was any strategic reason for not objecting to
22 discussion or evidence concerning prior paroles. The
23 defense was able to get the life without parole jury
24 instruction, correct?

25 A. Yes. The Supreme Court had ordered it sent

Mark Leiendecker - Cross-Exam by Mr. Salter

1 back on Simmons for that reason, that the jury had to
2 be told in this case life meant no possibility of
3 parole.

4 Q. So that if the jury had any concern about
5 that those concerns were satisfied because the judge
6 instructed them that it would be life without parole,
7 that was just not a possibility?

8 A. The jury was told that.

9 Q. All right, sir.

10 MR. SALTER: Beg the Court's indulgence
11 one second.

12 THE COURT: Yes, sir.

13 MR. SALTER: Nothing further, Your
14 Honor.

15 THE COURT: Redirect?

16 MR. BLOOM: Briefly.

17 REDIRECT EXAMINATION

18 BY MR. BLOOM:

19 Q. Mr. Leiendecker, Mr. Salter asked you about
20 the defense strategy in 1994 and I believe one of
21 your answers involved a manslaughter defense that was
22 part of the defense strategy for 1994 at the guilt
23 phase, manslaughter?

24 A. I think that, yes, in the opening statement I
25 think Mr. Runyon sets out that a tragic event

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 occurred here but that it was not the intention or
2 desire of Mr. Rogers to kill Stephanie B [REDACTED]

3 Q. And, in fact, y'all got an involuntary
4 manslaughter jury charge, right, the record reflects
5 that?

6 A. Yes, we did.

7 Q. And I believe you referenced in your
8 explanation to Mr. Salter that ~~part of the reason you~~
9 ~~think you got an involuntary manslaughter instruction~~
10 ~~from your perspective as defense counsel in 1994, was~~
11 ~~Tim's statement, State's Exhibit Number 18, in the~~
12 original trial?

13 A. ~~Yes, because I don't believe the videotape or~~
14 ~~any of those other statements came in until the~~
15 ~~penalty phase.~~

16 Q. And what is it --

17 A. So his statement did come in there.

18 Q. I'm sorry. And what it did, his statement,
19 from your perspective, you got an involuntary
20 manslaughter charge?

21 A. Talked about the altercation, the
22 aggravation, and the fight that ensued, and it
23 mentioned the cursing, the yelling, the calling him a
24 racial slur.

25 Q. By racial slur again we're talking about the

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 "N" word, correct?

2 A. Yes, but in this -- in this statement it says
3 just that, racist remark, it doesn't -- it does not
4 specify the remark.

5 Q. So in his statement that the jury gets in the
6 record, the only evidence in the record in 1994 is
7 "racist remark"?

8 A. From the statement given to the Tuskegee
9 police, sir, yes.

10 Q. So the jury is not given the full context of
11 the information?

12 A. No.

13 Q. ~~From your perspective as defense counsel in~~
14 ~~1994, would it have been helpful to have evidence of~~
15 ~~what the actual remark was in evidence before the~~
16 ~~jury to consider regarding a manslaughter defense?~~

17 A. Yes.

18 Q. ~~And if that information could have been~~
19 ~~corroborated by another witness, would that also have~~
20 ~~been helpful to defense?~~

21 A. Yes.

22 Q. And just explain that briefly for me.

23 A. It would have been helpful in that as I think
24 I said before ~~it may have given the jurors something~~
25 ~~to believe overcame the malicious intent of the act~~

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 of Mr. Rogers from a legal standpoint putting him in
2 a state of agitation or rage in response in acting
3 without clearly thinking regarding his acts at that
4 time.

5 Q. All right, sir.

6 A. Which may put him again, as I think I
7 described, in an act of involuntary manslaughter
8 versus potential murder.

9 Q. All right, sir. And moving next, Mr. Salter
10 asked you about your strategy, defense strategy in
11 1996 regarding the resentencing phase. Let me show
12 you again Petitioner's Exhibit Number 7 for
13 identification only. From your perspective as
14 defense counsel in 1996, would the type of
15 information in that exhibit have been helpful in
16 support of defense strategy at the 1996 resentencing?

17 A. Yes.

18 Q. And let me call your attention to a few items
19 in Petitioner's Exhibit Number 7 for identification
20 only. If you turn to the second page and the second
21 one down where it says event 1970, where it starts
22 out event 1970, Applicant's Mother rents an apartment. Can you
23 read that section out loud?

24 A. Applicant's Mother rents an apartment in a three-story
25 house owned by the Middletons. Applicant's Mother determined

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 her children would not be straight kids, raises her
2 children with Ruth Middleton and their bond grows
3 stronger. However, over the years through
4 babysitters Timothy and his brothers learn about
5 alcohol and marijuana.

6 Q. How might that information have been helpful
7 from your perspective as defense counsel in 1996 at
8 resentencing?

9 A. In mitigation the continued use of and abuse
10 of illegal drugs and in this case alcohol which would
11 have been illegal at that young age for Tim could go
12 to forms of mitigation and certainly would give --
13 could be presented as explanations to the jury about
14 problems in his youth growing up that contributed to
15 his perspective of the world at the time of the
16 commission of the crime. And probably in a lot of
17 ways I don't know without sitting down and talking to
18 an expert in this field that he could have -- that's
19 why you hire experts to explain stuff you don't have
20 in your common knowledge.

21 Q. And let me ask you next if you would turn to
22 the second to last page, I know they're not numbered,
23 it would actually be page 4 near the bottom of the
24 second to last page or page 4 where it says event
25 July 5th, 1989 Timothy enters the Reception and

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 Evaluation Center. Did you find it?

2 A. Yes.

3 Q. Can you read that entry out loud?

4 A. July 5, 1989 Timothy enters the Reception and
5 Evaluation Center at Lieber Correctional Institution.
6 His physical exam states that his uncorrected vision
7 is 20/67. There is no record that he had eyeglasses.
8 Timothy has hated wearing eyeglasses since childhood.
9 As an adult he did not think glasses were cool and
10 should not be part -- and not part of his lifestyle.

11 Q. All right. And how might that, from your
12 perspective as defense counsel in 1996 at the
13 resentencing, have been helpful?

14 A. Again, as I discussed health issues including
15 the inability to see at distances could play an
16 impact on what he saw or perceived that he saw on the
17 date of the crime.

18 Q. All right. And I'm going to have you read
19 just one third and final entry in this regard, the
20 last page, it's the third event from the bottom,
21 May 1992 Joyce reveals....

22 A. May 1992 Joyce reveals to Timothy that she
23 had an affair while he was incarcerated and is now
24 pregnant. Timothy is crushed to find out about the
25 pregnancy. He feels betrayed and leaves Joyce. He

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 went to Applicant's Mothers where he cried like a baby
2 believing his life was over.

3 Q. Let me just stop you there. If you want to
4 read on, you can to complete your answer, but just
5 that part there, how might that have been helpful in
6 mitigation from your perspective as defense counsel
7 in 1996?

8 A. This was -- Joyce was his wife and they had
9 children together and it certainly would have
10 impacted his current and future perspective on
11 things. I mean, it says back in '92 he said that he
12 didn't really care about life anymore, he wished it
13 was over. Now, that I need to speak with whoever
14 wrote this and what their impression was because
15 that's a number of years before or at least a number
16 of months, I'm sorry, before the actual crime
17 involved in this case which took place in November I
18 think of that year.

19 Q. That's right. And that is the type of
20 information that if the defense had had a mitigation
21 investigator, social worker, as you've testified
22 would have been helpful to find out?

23 A. Yes.

24 Q. ~~Next Mr. Salter asked you if Tim was wearing~~
25 ~~glasses at the 1994 trial. Are you absolutely sure~~

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 of that or if there's evidence in the record that he
2 may have been wearing glasses, is that something?

3 A. ~~Tomorrow I wouldn't be able to say if you~~
4 ~~were wearing glasses today.~~

5 Q. All right, fair enough.

6 A. ~~It's just not something that I remember per~~
7 ~~se.~~

8 Q. Fair enough. Just a few remaining questions.
9 Mr. Salter asked you some questions about the
10 investigation and what you and Tim talked about. Do
11 you recall if Tim ever asked you, or in your
12 presence, for defense counsel to subpoena the phone
13 records from the pay phone at Spell's Grocery, do you
14 remember if that was ever --

15 A. Yes. ~~I don't remember if that came~~
16 ~~specifically from Tim, but I do remember discussions~~
17 ~~or requests about phone records from the pay phone~~
18 ~~outside Spell's Grocery Store we're talking about,~~
19 right?

20 Q. Yes, sir. And do you know if that was done?

21 A. ~~I don't remember it ever being done.~~

22 Q. All right.

23 A. ~~But I do remember that being discussed.~~

24 Q. And lastly, sir, Mr. Salter asked you about
25 interviewing assault victim or Mr. Patterson and the

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 fact that they may have had defense counsel of their
2 own. If the record reflected that Solicitor Bailey
3 had access to interview assault victim prior to the
4 1994 trial, what would you might have done if you had
5 wanted access to that same witness?

6 A. Well, I think -- I think the letters we get
7 that you had me identify clearly say that Walter was
8 having some difficulty meeting with assault victim
9 because he was coordinating with her counsel, and
10 then discussed what he learned from her counsel. And
11 I'm confident that if they had then not wanted or
12 refused to talk to us, which I don't know that they
13 would have, that the judge would have helped us get
14 the same information or speak to her at least
15 specifically about the same things that she spoke to
16 Walter about, she waived and spoke with him, she
17 certainly would have spoken with us.

18 Q. And same thing as to Dax Patterson, would
19 your answer be the same?

20 A. Yes.

21 Q. All right. So ~~if Solicitor Bailey had access~~
22 ~~to a witness you could -- you might have gone to the~~
23 ~~judge to get access to the witness?~~

24 A. ~~Yeah.~~ And let me say on the record I've
25 never in all my years of practice on the opposite

Mark Leiendecker - Redirect Exam by Mr. Bloom

1 side of the aisle from Walter Bailey, ~~I never had a~~
2 ~~problem with Walter making witnesses available or his~~
3 ~~file open~~ or -- I mean, he was a very organized and
4 difficult person to try a case against but ~~he was~~
5 ~~fair, he gave you everything he had.~~

6 Q. And that was my next question, I guess you
7 may have answered it. If -- if from your dealings
8 with Solicitor Bailey, if he had had access to
9 interview a witness and you were Mr. Runyon and had
10 asked for that same access, from your experience with
11 Mr. Bailey would you have been given that access to
12 that witness?

13 A. Yes. In fact, the January before the month
14 before this case went to trial in March, I had tried
15 a felony case with one of the deputies in Walter's
16 office and over that deputy solicitor's objection
17 they made one of the primary witnesses to an armed
18 robbery and kidnapping come to my office and sit down
19 with me. So my experience had been they let me get
20 what I needed to get ready for trial.

21 Q. All right. Thank you very much,
22 Mr. Leiendecker.

23 THE COURT: Recross?

24 MR. SALTER: Just very briefly, Your
25 Honor.

1 THE COURT: Sure.

2 RECROSS-EXAMINATION

3 BY MR. SALTER:

4 Q. You were asked a couple questions, I believe
5 it's Applicant's Exhibit 7 for identification,
6 Mr. Yungman's report?

7 A. Yes, sir.

8 Q. Now, prior to the '96 resentencing proceeding
9 you had a little bit more involvement, correct?

10 A. Yes, sir.

11 Q. You spoke with Mr. Rogers and his family
12 members, correct?

13 A. At least his mother, yes.

14 Q. All right. And you and/or Mr. Runyon were
15 able to get information from them concerning his
16 background, like a social history if you will; were
17 you not?

18 A. I don't remember them not answering any
19 questions that we asked, no.

20 Q. Okay. That's where I was headed with that.
21 They were truthful with you, correct?

22 A. Oh, yes.

23 Q. You explained to them what you were looking
24 for; did you not?

25 A. Now you're asking me a more pointed or

Mark Leiendecker - Recross-Exam by Mr. Salter

1 difficult question. I don't -- I don't remember
2 specifically what I asked Ms. Applicant's Mother or Timothy, and
3 I don't have specific recollection as to what, you
4 know, what information I was trying to get together
5 at that time other than to just review his education
6 and his history.

7 Q. But after attending the seminar Life in the
8 Balance at least once, if not twice, you were aware
9 of like types of mitigating evidence that you would
10 need for a capital case; were you not?

11 A. I was better at that time, yes.

12 Q. And the information you had from Mr. Rogers
13 and his family was essentially that the family was a
14 good family, mother was a church-going lady, correct?

15 A. Yes.

16 Q. And that Mr. -- the essence as being that
17 Mr. Rogers simply fell in with the wrong crowd?

18 A. Yes.

19 Q. And used drugs and alcohol and then his
20 problems resulted after that, correct?

21 A. Yes.

22 Q. All right. And you were -- you've indicated
23 that on redirect examination that Mr. Rogers had
24 asked you about subpoenaing the pay phone records at
25 Spell's Grocery?

Mark Leiendecker - Recross-Exam by Mr. Salter

1 A. I do remember specific requests regarding
2 that. I think I said I'm not -- I can't say a
3 hundred percent today that came from Timothy, but I
4 can't imagine who else would have asked us.

5 Q. All right.

6 A. Unless he passed the information through his
7 mother to ask us for it.

8 Q. But there was never any dispute that he was,
9 in fact, using the telephone, was there?

10 A. Not that I know of.

11 Q. I mean, the State -- none of the State's
12 witnesses ever suggested he wasn't using the
13 telephone?

14 A. Not that I know of.

15 Q. Okay. Nothing further.

16 THE COURT: All right.

17 MR. BLOOM: Just a few follow-up.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. BLOOM:

20 Q. Mr. Leiendecker, regarding Mr. Salter's
21 questions about meeting with Timothy's family in
22 1996, how many times did you meet with them, do you
23 recall?

24 A. No, sir. Not a lot, if more than once.

25 Q. And how substantive were those meetings or

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 discussions in terms of obtaining a thorough
2 background and social history from Tim's family?

3 A. ~~I don't have anything that compares to~~
4 ~~Exhibit 7 regarding a history of Timothy from birth~~
5 to the day before the crime.

6 Q. The 1996 resentencing transcript reflects 13
7 pages of family and community member testimony. Is
8 that something -- well, what's your perspective of
9 that as defense counsel in 1996?

10 A. Woefully inadequate.

11 Q. Thank you, sir. No further questions.

12 THE COURT: Let me see the plea
13 transcript on the CSC.

14 MR. BLOOM: Do you want your own
15 independent copy, Your Honor?

16 THE COURT: I do. You tentatively
17 offered that about three times and now, yes,
18 that's what I want. Thank you.

19 Mr. Bloom?

20 MR. BLOOM: Yes, ma'am.

21 THE COURT: Mr. Salter?

22 MR. SALTER: Yes, ma'am.

23 THE COURT: If I may, I would prefer
24 that you all do the examination, but I need a
25 little bit more information to be sure that I

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 know everything that it is you need me to
2 know from Mr. Leiendecker about this plea
3 that occurred on January 25th and 27th.

4 MR. BLOOM: I'll be glad to lay some
5 foundation questions with this witness, Your
6 Honor, but I have no objection when I'm
7 through if I have not asked the specific
8 questions Your Honor wants, I have --
9 obviously under the rules Your Honor's
10 entitled to ask a witness a question and I
11 certainly have no --

12 THE COURT: I just hate like --

13 MR. SALTER: We have no objection to
14 Your Honor asking questions either.

15 MR. BLOOM: I'll go to the heart of
16 that. I didn't do it much with this witness,
17 but I will.

18 BY MR. BLOOM:

19 Q. Let me proceed. Mr. Leiendecker, regarding
20 ~~the criminal sexual conduct with minor pleas~~ that
21 occurred in ~~January of 1994~~, and I have a transcript
22 here if you need to see it as a defense exhibit, how
23 involved were you, I know you've testified some about
24 your involvement in the plea process. ~~How were you~~
25 ~~involved specifically~~, if at all, regarding the CSC

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 with minor pleas?

2 A. ~~I knew what was going on and I knew that~~
3 ~~these underlying felonies had been found or at least~~
4 ~~created and that they were there and necessary for~~
5 ~~Tim to plead to life without the possibility of~~
6 ~~parole. I know the solicitor wasn't willing to let~~
7 ~~him plea and take the penalty off the table unless he~~
8 ~~was unable to get out of prison, it would be life~~
9 without parole.

10 And at that point those negotiations had
11 already been ongoing by the time I got involved in
12 the case. And for lack of a better word or phrase,
13 ~~there was lots of work going back and forth between~~
14 ~~Mr. Runyon and the solicitor to find something that~~
15 ~~they felt would qualify~~ under these -- because just a
16 felony isn't enough, it has to rise above the level
17 of most serious or serious level to qualify.

18 Q. Back then in order to get life without parole
19 you had to have a prior violent crime conviction; is
20 that fair to say?

21 A. Yes, or two.

22 Q. Or two, all right.

23 A. Yes.

24 Q. And --

25 A. I'm not certain how these got here and you'll

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 have to ask Mr. Runyon. I'm not certain that he
2 didn't take this information to the solicitor, I
3 don't know.

4 Q. Okay. And criminal sexual conduct with a
5 minor is a violent crime conviction under South
6 Carolina law and was back then?

7 A. Oh, yes. Yes.

8 Q. So the ~~January CSC with minor pleas were set~~
9 ~~up in order to make the murder a life without parole~~
10 ~~situation under Simmons?~~

11 A. ~~Correct.~~

12 Q. Okay.

13 MR. BLOOM: And I appreciate the Court's
14 indulgence with me allowing a few leading
15 questions.

16 Q. Mr. Leiendecker, you said in your answer that
17 the CSC with minor pleas were found or created. Can
18 you explain that a little bit what you mean by that?

19 A. There had not -- this is what I know, okay?

20 Q. Yes, sir. That's all I'm asking.

21 A. And I can only go with what I know and what I
22 remember, and the fact that when ~~I got on I was told~~
23 ~~there may not be a whole lot I need to do because~~
24 ~~they were working on a plea.~~

25 Q. Yes, sir.

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 A. Or trying to find a way to facilitate a plea.
2 ~~There was never any outstanding warrant or indictment~~
3 ~~on these charges before the discussion regarding a~~
4 ~~negotiation of this plea began.~~ assault victim had not
5 spoken with or filed a complaint with any police
6 agency or solicitor's office. That after this
7 process began, ~~defense and the prosecution worked to~~
8 ~~bring these charges to indictment in Dorchester~~
9 ~~County, and that Judge Whetstone, although involved~~
10 ~~with the process, was not totally comfortable with it,~~
11 ~~because he required it to be done at different times~~
12 ~~and that the underlying felony charges be done at~~
13 ~~different terms or in distance from the murder plea.~~

14 Q. You referenced assault victim, is Miss [REDACTED]
15 assault victim, the alleged victim of the criminal sexual
16 conduct with minor pleas?

17 A. Yes.

18 Q. And assault victim was approximately 15 years
19 of age at the time of the accident?

20 A. That was the allegation. She was at the time
21 of these two incidents, she was under the age of 16,
22 I believe 15, yes.

23 Q. All right. So she was under the age of
24 consent of 16 at the time?

25 A. Yes, sir.

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 Q. ~~And your information~~ in representing Tim
2 during this time frame was that Tim had had an
3 intimate relationship with assault victim?

4 A. Yes, sir.

5 Q. ~~While she was under 16 years of age?~~

6 A. Yes.

7 Q. Would it help for you to see the criminal
8 sexual conduct with minor indictments, would that
9 help in any way in elaborating in this regard?

10 MR. BLOOM: I can have them marked as an
11 exhibit, Your Honor, and if it would help the
12 Court as well.

13 (Entered into evidence was Petitioner's
14 Exhibit 19, indictments of CSC with a minor.)

15 Q. I know you said these may not refresh your
16 recollection, but let me draw your attention to them,
17 I'm going to ask you specifically --

18 MS. HOLT: Court's indulgence?

19 THE COURT: Sure.

20 MR. BLOOM: Court's indulgence one
21 moment, Your Honor.

22 THE COURT: Sure.

23 Q. Mr. Leiendecker, ~~let me show you what's~~
24 ~~marked as Petitioner's Exhibit Number 19~~ and is now
25 in the record of this case without objection. Are

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 those the ~~criminal sexual conduct with minor~~
2 ~~indictments that we're referring to~~ in this case, or
3 do they appear to be?

4 A. Yes, they do.

5 Q. Okay. assault victim is named in those
6 ~~indictments as well~~, the alleged victim of those two
7 indictments?

8 A. Yes, she is.

9 Q. Of course what county is reflected in those
10 indictments as to the alleged crime occurring in?

11 A. ~~Did it~~ Dorchester County ~~during the month of~~
12 ~~August 1992~~, so it alleges that the criminal conduct
13 occurred in Dorchester County August 1992.

14 Q. All right.

15 A. ~~And the second one alleges that it took place~~
16 ~~in Dorchester County September of 1992.~~

17 Q. All right. And do you have any independent
18 evidence or recollection of where assault victim lived
19 ~~during the time frame~~ of those indictments?

20 A. She lived in Charleston County.

21 Q. And to your recollection did you or
22 Mr. Runyon ever interview assault victim to ascertain
23 ~~whether the allegations in those indictments occurred~~
24 ~~in Dorchester or at her residence in Charleston~~
25 ~~County?~~

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 A. ~~I did not.~~ And as I reflected, I don't think
2 I've ever spoken to assault victim.

3 Q. And after the aborted murder plea fell
4 through, was there any discussion among you or Tim
5 Rogers or Mr. Runyon to ~~move to withdraw those CSC~~
6 ~~with minor pleas either on the grounds of lack of~~
7 ~~jurisdiction or on the grounds that they were part~~
8 ~~and parcel of a plea negotiation with the murder that~~
9 ~~fell through on either of those grounds?~~ If that
10 question's, clear it's a long question.

11 A. ~~No,~~ I don't remember specific discussions. I
12 ~~do remember being and specifically being upset when~~
13 ~~they were introduced in the penalty phase for~~
14 Mr. Rogers' sentencing as ~~a reflection of his~~
15 ~~propensity to criminal conduct~~ and I don't -- the
16 record will reflect that there were objections at
17 that time on the record. But I know in 1994 it was
18 upsetting and when it came back around in '96 it was
19 equally upsetting that those were used in a -- in an
20 exhibit by the State showing his criminal propensity.

21 Q. And Mr. Bailey used it in his closing
22 argument at the '96 resentencing?

23 A. Yes. Yes.

24 Q. So let me ask, and let me break my question
25 down because it may not have been clear. First was

Mark Leiendecker - Further Redirect Exam by Mr. Bloom

1 there any discussion among you and/or Mr. Runyon
2 and/or Tim Rogers to move to withdraw his pleas to
3 the CSC with minor under any theory that since the
4 murder plea had fallen through then the whole plea
5 negotiation had fallen through?

6 A. I don't remember there ever being such
7 discussion.

8 Q. Okay. ~~And was there any discussion among~~
9 ~~you, Mr. Runyon or Mr. Rogers to move to withdraw the~~
10 ~~plea based on lack of jurisdiction?~~

11 A. ~~I know that never happened.~~

12 Q. All right, sir. Thank you very much.

13 MR. BLOOM: Your Honor, I don't know if
14 those questions helped illuminate the
15 applicant's argument in this regard, but
16 those would be my questions of
17 Mr. Leiendecker on that point.

18 THE COURT: Thank you. Mr. Salter.

19 THE APPLICANT: Thank you, Your Honor.

20 FURTHER RECROSS-EXAMINATION

21 BY MR. SALTER:

22 Q. I covered some of this briefly earlier, but
23 do you recall where your client was living at the
24 time covered in those two indictments?

25 A. No.

Mark Leiendecker - Further Recross-Exam by Mr. Salter

1 Q. You don't recall whether or not he was living
2 in Dorchester County or Charleston County?

3 A. No, I don't.

4 Q. Okay. And he never told you that the acts
5 never occurred in Dorchester County, did he?

6 A. No. As I said, I don't remember there ever
7 being discussion about that with anybody.

8 Q. I don't believe I have anything further.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. BLOOM:

11 Q. Just briefly, Mark, I don't know if I asked
12 this any other way or not, did you conduct any
13 independent investigation as to the underlying
14 allegations as to those indictments?

15 A. No.

16 Q. Please answer any other questions Her Honor
17 may have in this regard.

18 EXAMINATION

19 BY THE COURT:

20 Q. I guess my question, Mr. Leiendecker, is
21 whether or not you have any memory or any information
22 regarding whether or not there was any attempt to
23 withdraw the plea on the two CSC with a minor
24 indictments?

25 A. Your Honor, I have absolutely no information

Mark Leiendecker - Examination by the Court

1 regarding anything that we did as the defense team to
2 try to remove those convictions either in '94 during
3 the full trial or in '96 during the retrial of the
4 penalty phase.

5 Q. And to your memory was the, or were the
6 convictions entered into evidence in the guilt or
7 penalty phase?

8 A. In the penalty phase.

9 Q. Only in the penalty phase both times?

10 A. Yes, because Mr. Rogers didn't testify in the
11 guilt phase. But both times in the penalty phase and
12 they were on a board used in closing argument.

13 THE COURT: Does that prompt any
14 additional questions on behalf of the
15 applicant or the respondent?

16 FURTHER REDIRECT EXAMINATION

17 BY MR. BLOOM:

18 Q. Mr. Leiendecker, but for these convictions,
19 would your advice to Tim have been any different to
20 testify at the guilt phase in 1994? Did I ask that
21 well?

22 A. I understand what you're saying. I don't
23 know even without these convictions if I would have
24 advised him to take the stand in the guilt phase.

25 Q. Because he testified at sentencing in 1994,

Mark Leiendecker Further Redirect Exam by Mr. Bloom

1 right?

2 A. Yes.

3 Q. And again at sentencing in 1996?

4 A. Yes.

5 Q. But did not testify at the guilt phase in
6 1994?

7 A. No.

8 Q. Can you recall if it was part of defense
9 counsels' advice in 1994 to him to not testify at
10 guilt because he now had CSC convictions he could
11 have been asked about in guilt?

12 A. That would have been part of the counsel to
13 him, prior convictions would then be used for
14 impeachment purposes obviously.

15 Q. And his testimony -- was his testimony in
16 your perspective as defense counsel both his 1994 and
17 1996 testimony at both sentencing phases consistent
18 with manslaughter defense?

19 A. Yes.

20 Q. Thank you, sir.

21 FURTHER RECROSS-EXAMINATION

22 BY MR. SALTER:

23 Q. Mr. Leiendecker, I apologize for asking you
24 this but just one or two more questions. Part of the
25 other reason you -- to advise him not to testify in

Mark Leiendecker - Further Recross-Exam by Mr. Salter

1 the guilt phase, was that based on the fact his
2 statement indicated that he'd only fired one shot and
3 the physical evidence revealed that there were two?

4 A. Yes. But obviously I wasn't the one who made
5 that advice or decision to him and it's not uncommon,
6 no matter what the facts are in a defense case, to
7 advise your client not to take the stand, but it's
8 even more a reason not to let him take the stand if
9 there are things out there on impeachment that are
10 just going to hurt the case.

11 Q. And that's what y'all were faced with; was it
12 not?

13 A. Yes.

14 Q. Thank you.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. BLOOM:

17 Q. By impeachment, do you mean his CSC offenses?

18 A. Prior convictions, yes.

19 Q. Thank you, sir.

20 THE COURT: All right. Is
21 Mr. Leiendecker free to go?

22 MR. BLOOM: Defense would request he be
23 excused from his subpoena. He's been most
24 patient with us and I thank him.

25 MR. SALTER: Without objection.

1 THE COURT: Thank you. And he's not far
2 away if you all need him further. We've come
3 to Dorchester County which is his county too,
4 so if you need him he'll be around.

5 THE WITNESS: Through Thursday, Judge,
6 I'm protected Thursday and Friday.

7 (Whereupon, the witness steps down from the
8 witness stand.)

9 THE COURT: All right. Mr. Leiendecker
10 is sharing with me that he will be leaving to
11 go to the football game come Thursday
12 afternoon so you need to call him Thursday
13 afternoon when we reconvene because he's
14 going to be footballing, doing the football
15 thing I gather, he says in Alabama on
16 Saturday, that's what he was sharing with me,
17 so you all just be mindful should you need
18 him, but I think there may be time and an
19 opportunity to do that. All right. I think
20 unless y'all tell me otherwise that's a good
21 first day's work.

22 MR. BLOOM: Thank you, ma'am.

23 THE COURT: And we will recess until in
24 the morning.

25 MR. BLOOM: Thank you, Judge. Judge, I

1 have just a couple housekeeping. I do have
2 the Von Dohlen and Wiggins cases for you. I
3 also have the original deposition transcript
4 of Anthony Riley.

5 THE COURT: Wonderful. We'll just mark
6 that.

7 MR. BLOOM: If we mark that. I did want
8 the record to reflect during that last direct
9 examination of Mr. Leiendecker when we had
10 that pause in my direct questions of him,
11 Ms. Holt left the courtroom for a purpose
12 consistent with our case and she was absent
13 for the latter part of Mr. Leiendecker's
14 testimony but that was with Mr. Rogers'
15 consent and our advice.

16 THE COURT: Very well.

17 (Marked for purposes of the record was
18 Court's Exhibit 1, Mark A. Leiendecker's
19 deposition.)

20 (Marked for purposes of the record was
21 Court's Exhibit 2, Anthony Riley's
22 deposition.)

23 - - - o0o - -
24
25

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 :
 COUNTY OF DORCHESTER) CASE NO. 2000-CP-18-0575

TIMOTHY DION ROGERS,) VOLUME II, Pages 219 - 464
 Applicant,)
) TRANSCRIPT OF RECORD
 -versus-)
) POST-CONVICTION RELIEF

JON E. OZMINT, DIRECTOR,)
 SOUTH CAROLINA DEPARTMENT) September 28, 2004
 of CORRECTIONS,)
 Respondent.) St. George, South Carolina

B E F O R E:
 The Honorable Diane S. Goodstein

A P P E A R A N C E S:
 Jeffrey P. Bloom, Esquire
 Law Office of Jeffrey P. Bloom
 1911 Pickens Street
 Columbia, SC 29201
 -and-
 Diana Holt, Esquire
 Diana Holt, LLC
 P. O. Box 6454
 Columbia, SC 29260-6454
 For the Applicant

Edward Salter, Esquire
 - Jeffrey Jacobs, Esquire
 Office of the Attorney General
 P. O. Box 11549
 Columbia, SC 29211-1549
 For the Respondent

Robin L. Keil, RMR
Resident Court Reporter
First Judicial Circuit
Post Office Box 3335
Summerville, SC 29484-3335

I N D E X

	<u>Page</u>	<u>Line</u>
DAXTON "A" PATTERSON		
Direct Exam By Mr. Bloom	223	8
Cross-Exam By Mr. Salter	239	2
STEPHANIE D. SIMMONS		
Direct Exam By Mr. Bloom	258	19
Cross-Exam By Mr. Salter	274	13
JAMES L. ROBINSON		
Direct Exam By Ms. Holt	282	20
Cross-Exam By Mr. Salter	287	1
GEORGE H. SCHARF		
Direct Exam By Ms. Holt	290	10
Cross-Exam By Mr. Salter	298	19
Redirect Exam By Ms. Holt	300	4
assault victim		
Direct Exam By Mr. Bloom	303	3
Cross-Exam By Mr. Salter	332	18
Redirect Exam By Mr. Bloom	348	22
Recross-Exam By Mr. Salter	356	12
applicant's mother		
Direct Exam By Ms. Holt	360	8
Cross-Exam By Mr. Salter	418	16
Redirect Exam By Ms. Holt	422	15
CHARLES E. FEELEY		
Direct Exam By Mr. Bloom	428	6
Cross-Exam By Mr. Jacobs	433	19
EARL ASBELL		
Direct Exam By Ms. Holt	436	6
Cross-Exam By Mr. Salter	453	5
Examination By The Court	457	3
Redirect Exam By Ms. Holt	459	6
TIMEKA L. R		
Direct Exam By Ms. Holt	461	10
Cross-Exam By Mr. Jacobs	462	24

PETITIONER'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
P-18	Photograph		442
P-20	Physician Attestation Form		294
P-21	Statement of Assault Victim		305
P-22	Map		325
P-23	Affidavit of Assault Victim	353	355
P-24	Photograph	359	409
P-25	Photograph	359	409
P-26	Photograph	359	409
P-27	Extension Cord	359	394
P-28	Broom	359	397
P-29	Busch Beer Can with Blood Stains and a Plastic Bag	436	450
P-30	Wanted Poster	450	451

RESPONDENT'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
R-04	Authorization for Release of Confidential Information		240

1 (September 28, 2004.)

2 THE COURT: Thank you, everyone, and
3 please be seated.

4 Counsel, let me see you if I may
5 just a second.

6 (Whereupon, a bench conference was held off
7 the record.)

8 THE COURT: Okay. Very well. Thank
9 you. And if you all would call your next
10 witness.

11 MR. BLOOM: We call Daxton Patterson.

12 THE COURT: All right. Yes.

13 (Daxton "A" Patterson, called as a witness,
14 having first been duly sworn, is examined and
15 testified as follows:)

16 THE COURT: Very well. Please be
17 seated. And when you're seated,
18 Mr. Patterson, if you would state your full
19 name for the record for us.

20 ~~THE WITNESS: Daxton "A" Patterson,~~

21 THE COURT: Would you spell your first
22 name?

23 THE WITNESS: D-a-x-t-o-n.

24 THE COURT: Tell me what the quotation
25 marks are.

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 THE WITNESS: "A" quotation marks.

2 THE COURT: Over the A?

3 THE WITNESS: Quotation marks "A" in the
4 middle.

5 THE COURT: Got it. Your witness.

6 MR. BLOOM: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. BLOOM:

9 Q. Mr. Patterson, ~~where do you live?~~

10 A. ~~125 Shenandoah, in Summerville.~~

11 Q. All right. ~~And how long have you lived there~~
12 ~~roughly?~~

13 A. ~~At that address?~~

14 Q. Yes, sir.

15 A. ~~Probably about eight years now.~~

16 Q. All right. And how long have you been a
17 resident of I guess -- well, what county is that?

18 A. ~~It's Berkeley County.~~

19 Q. Okay. ~~And at the time of this incident in~~
20 ~~1992 where were you a resident of, what county were~~
21 ~~you living in?~~

22 A. ~~Berkeley County.~~

23 Q. Okay. ~~And at the time of the first trial in~~
24 ~~1994 what county were you living in?~~

25 A. ~~Berkeley County.~~

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 Q. Okay. And how about at the -- Tim's
2 resentencing in 1996?

3 A. I didn't know any of that.

4 Q. Okay. Were you still living in the area?

5 A. Same, same, same area.

6 Q. Okay. So the whole time this case has been
7 going on you've been close to --

8 A. Not notified of anything, right.

9 Q. Okay. ~~Did Tim's lawyers in 19 -- before the~~
10 ~~1994 trial ever contact you in any way?~~

11 A. No, never.

12 Q. Okay. ~~And how about before the 1996~~
13 ~~resentencing case?~~

14 A. Never.

15 Q. Tim's lawyers?

16 A. (Shaking head.)

17 Q. No? ~~If they had, would you have talked to~~
18 ~~them?~~

19 A. ~~Of course.~~

20 Q. ~~Was Tim your friend back in November 1992?~~

21 A. ~~Yeah,~~ of course.

22 Q. All right. What I'd like to do next, Mr.
23 Patterson, is if you would in your own words just
24 relate what happened that night in November 1992.
25 And with my first question let's just start who did

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 you arrive at Spell's Grocery Store with, who was
2 with you?

3 A. ~~Who was with me?~~

4 Q. Yes, sir.

5 A. ~~Tim and~~ Assault Victim

6 Q. Okay. That would be Assault Victim?

7 A. ~~Yeah.~~

8 Q. And, of course, Tim is Tim Rogers, right?

9 A. Yes, sir.

10 Q. Okay. And what happened when you arrived at
11 Spell's?

12 A. What do you mean what happened?

13 Q. What did you and Tim -- ~~what were you going~~
14 ~~to Spell's to do?~~

15 A. ~~Use the telephone.~~

16 Q. Okay. The pay phone out front?

17 A. Yes, sir.

18 Q. All right. ~~And did you or Tim then get on~~
19 ~~the pay phone?~~

20 A. ~~I did.~~

21 Q. Okay. And then what happened next while you
22 were on the pay phone?

23 A. What happened next?

24 Q. Yes, sir. ~~After you were on the pay phone.~~

25 A. I was on the pay phone. I mean, where are

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 you going?

2 Q. Well, what I want to ask next is ~~did Mr. Mike~~
3 ~~Burditt and James Carver~~, two white men, ~~pull up in a~~
4 ~~pickup truck at some point?~~

5 A. Yes, sir.

6 Q. And what happened then, was there some type
7 of discussion with them?

8 A. To be honest with you, ~~I didn't see the man,~~
9 ~~I saw the vehicle when they pulled up.~~ I didn't see
10 the man actually get out of the vehicle or who was in
11 the vehicle.

12 Q. Okay.

13 A. ~~But I remember the man when he confronted me~~
14 ~~over the telephone booth itself.~~

15 Q. Okay. ~~And was something said to you by the~~
16 ~~man?~~

17 A. Yeah. ~~"Well, how long are you going to be on~~
18 ~~the pay phone?"~~ Well, I'm going to have to curse.

19 Q. No, you don't have to do that. If you want
20 to spell the word you can spell the word into the
21 record or you can just say it was a cuss word,
22 whatever you're comfortable with.

23 A. Okay. "How long you going to be on the pay
24 phone?" And ~~I said, "Well, this is a public phone"~~
25 ~~and an altercation came from that right there.~~

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 Q. Okay. So some kind of an altercation or an
2 argument started over the use of the pay phone?

3 A. Over the pay phone itself.

4 Q. All right. What happened next?

5 A. You jump so fast. You want me to just tell
6 the whole story how it went down?

7 Q. I want you to use your own words. That's a
8 good way to put it, Mr. Patterson, you go right
9 ahead.

10 A. This is how it went down. ~~I was on the~~
11 ~~phone, a man I guess pulled up, I don't know what he~~
12 ~~did, I was talking on the phone to Tim's brother.~~
13 ~~All of a sudden a man came out of the store, said --~~
14 I want to use the words what the man said to me which
15 I'll never forget in my whole life, I can look at you
16 dead in your eyes. ~~The man said, "How long you going~~
17 ~~to be on the f-ing phone?" I said, "Sir, this is a~~
18 ~~pay phone, so you can left up down the street."~~

19 ~~Next thing you know, man, his little~~
20 ~~partner jumps out the door, bam, that quick,~~
21 ~~Mr. Carver, little short dude.~~

22 Q. Yes, sir.

23 A. Jumps out, took that at he. ~~Everything moved~~
24 ~~so fast. Little man jumped on my back off the rep,~~
25 ~~dude went around the damn truck. See, I'm cursing.~~

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 Q. You mean Mr. B [REDACTED]'s the taller man?

2 A. Yeah. ~~Went around the truck and tried to get~~
3 ~~inside of his truck. And behind that seat was two~~
4 ~~weapons.~~

5 Q. ~~Were you able to get close enough to the~~
6 ~~truck to --~~

7 A. ~~Visually see the weapons?~~

8 Q. Yes, sir.

9 A. ~~Of course, because I snatched them out the~~
10 ~~truck.~~

11 Q. When you say snatched them, you mean the
12 gentleman?

13 A. ~~The man.~~

14 Q. ~~Mr. B [REDACTED]?~~

15 A. ~~Yes.~~

16 Q. ~~What kind of weapons were they? Can you~~
17 ~~describe them?~~

18 A. ~~It was a shotgun and a pistol.~~

19 Q. Okay.

20 A. And I'm going to say it's a .9 millimeter.

21 Q. Okay.

22 A. ~~Don't quote me on that, but I believe that's~~
23 ~~what it was.~~

24 Q. That's the best of your memory. Did you see
25 anything else in the truck specifically? Let me ask

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 this: Did you see any beer cans in the truck?

2 A. See no cans, I saw a Busch box.

3 Q. A Busch box, okay. And by Busch you mean
4 Busch beer?

5 A. (Nodding head.)

6 Q. All right. In fact, let me show you a
7 photograph that is Petitioner's Exhibit Number 18 for
8 identification at this time. Can you point on that
9 photograph first where you saw the Busch beer can?

10 A. Right there bo, it's plain and simple.

11 Q. Where did you see the shotgun?

12 A. Right behind the seat because he tried to
13 lift the thing up right here and get to it right
14 behind here.

15 Q. So behind the driver's seat?

16 A. Yeah, bingo.

17 Q. The Busch beer can, beer, so that -- since
18 you pointed, are on the passenger floorboard about
19 there?

20 A. That was plain and simple, man.

21 Q. Where's the pistol, the .9 millimeter you
22 identified?

23 A. Both was back here. Matter of fact, that
24 right there was behind here.

25 Q. So the pistol's been moved?

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 A. This little thing right here was behind
2 there.

3 Q. Okay.

4 THE COURT: Let me see. I'm sorry.

5 Q. Mr. Patterson, you did some pointing there,
6 and I just want to clarify for the court reporter
7 because she can't record pointing. Just to clarify,
8 in ~~Petitioner's Exhibit 18~~ for identification you
9 identified a ~~Busch~~ box?

10 A. Box.

11 Q. On the ~~passenger floorboard~~ of the truck
12 roughly?

13 A. ~~I can't tell you exact spot where it was at~~
14 ~~at that time when I looked in there.~~

15 Q. Okay.

16 A. I saw that was visual as soon as I looked in
17 there and ~~that laundry basket was behind that seat~~
18 ~~with the shotgun and the gun plain and simple like~~
19 yesterday, I'll never forget that.

20 Q. Thank you, sir. And, Mr. Patterson, I'm
21 sorry I didn't ask this question very well, but when
22 used the word "Busch" you meant Busch beer; is that
23 right?

24 A. Yes, sir.

25 Q. Yes, sir, okay. Thank you.

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 A. Sure.

2 Q. Now, I kind of interrupted your story there
3 and I apologize for that, Mr. Patterson. I think you
4 were telling me you -- we left off where you were up
5 at the doorway of the truck with Mr. B [REDACTED] and you
6 saw those items that you've identified in the truck.

7 A. And I snatched them.

8 Q. Okay. And then what happened at that point,
9 if you can go ahead and tell the rest of your
10 recollection?

11 A. My recollection?

12 Q. What you remember. What happened next?

13 A. Oh, boy, look here. ~~After that happened my~~
14 ~~partner fired two shots in the air and he -- Tim came~~
15 ~~around the back of the truck, fired two in the air~~
16 ~~bam, bam, after I snatched the man, pulled him up~~
17 ~~from the door, snatched him out of there, fired two~~
18 ~~in the air.~~ My man almost (...) his britches and I
19 told him put that up, put that up.

20 Q. All right. By the man again you mean
21 Mr. B [REDACTED]

22 A. Yeah. Yeah.

23 Q. All right. And go ahead.

24 A. As that happened right there, fired two in
25 the air, but things moved so fast.

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 Q. Take your time, I'm not trying to rush you.
2 Go ahead. Is it hard for you to remember these
3 events?

4 A. No, it's not hard, it's like yesterday, man.

5 Q. I didn't ask that well. I didn't ask that
6 well. Is it kind of painful for you to remember
7 these events?

8 A. Well, of course it is, man, two lives are
9 being taken at one time.

10 Q. Go ahead then take your time, Dax.

11 A. ~~Two shots was fired, snatched the man.~~
12 ~~Meanwhile, I don't know where the smaller man went~~
13 ~~at. I don't even know where the young girl came into~~
14 ~~the scenario ever, ever. I didn't see her one time~~
15 ~~until she was gone.~~

16 Q. By the young girl you mean Stephanie B [REDACTED]?

17 A. Yeah.

18 Q. All right, sir.

19 A. So all that moved fast. I know ~~Tim had fired~~
20 ~~two shots in the air. I told him put the thing up,~~
21 Bam, bam. Hold on, I'm getting to this real fast
22 partner. ~~So there had been confrontation with me and~~
23 ~~Mr. B [REDACTED] again.~~

24 Q. Did any of you ever see the little girl that
25 evening before the incident?

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 A. No, I never saw her and I know my partner
2 never seen her either. Never been released.

3 Q. When you used the word "my partner," you're
4 referring to Tim Rogers?

5 A. Tim, yeah.

6 Q. What happened after those warning shots were
7 fired? Well, let me ask it this way. If there was
8 testimony in 1994 by Mike B [REDACTED] on page 733 and 734
9 of the transcript and again in 1996 on Page 618 that
10 Mike B [REDACTED] did nothing to provoke or antagonize
11 this incident, what could you have testified to about
12 that?

13 A. No, definitely not. The man said, "I need to
14 be myself." That's when he kind of giddy-upped.

15 Q. And was that when the confrontation?

16 A. Referring to me as being, I need to be white,
17 not black, to be plain and simple about the whole
18 situation, yeah.

19 Q. Is that when the confrontation at the pay
20 phone started?

21 A. Yeah, that's when it all really got funky.

22 Q. All right. And if in the trial transcript at
23 page -- 1994 -- 734 and again in 1996 on page 620, if
24 Mike B [REDACTED] testified that Tim is the one who go in
25 the driver's door and wouldn't let Mike B [REDACTED] close

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 the door?

2 A. ~~No, no, no that was me.~~

3 Q. What could you have said?

4 A. Wasn't Tim.

5 Q. ~~On those same pages if Mike B [REDACTED] testified~~
6 ~~that Tim put a gun to his head while Mike B [REDACTED] was~~
7 ~~at the driver's side door and Tim looked right in the~~
8 ~~car and saw Stephanie B [REDACTED] in the car, what could~~
9 you...?

10 A. ~~No, wouldn't have been neither, never.~~

11 Q. ~~Tim was never up by the driver's door?~~

12 A. ~~I was by the driver's door period. Tim~~
13 ~~wasn't never up by the door.~~

14 Q. All right. ~~And again in the 1994 transcript~~
15 ~~page 735 and the 1996 transcript page 621 if Mike~~
16 ~~B [REDACTED] testified that Tim stood in the driver's~~
17 ~~doorway and looked right in and saw Stephanie, what~~
18 ~~could you have said, Dax?~~

19 A. ~~That's incorrect. Wasn't possible because I~~
20 ~~was the one in between the door.~~

21 Q. You were the one having the confrontation
22 with Mike B [REDACTED]?

23 A. I was the one snatched him out the door, ~~I~~
24 ~~was the one trying to get Mr. B [REDACTED] from getting~~
25 ~~pistols. Yeah, of course, that's incorrect.~~

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 Q. All right. And in the 1994 transcript
2 page 735 and 1996 transcript page 621, if Mike
3 B [REDACTED] testified that Tim spit in B [REDACTED]'s face,
4 what could you have said about that?

5 A. That's incorrect, too. I did that.

6 Q. And lastly in the 1994 transcript page 738
7 and 1996 transcript page 623, if Mike B [REDACTED]
8 testified that after the shots were fired and
9 Stephanie was hit that you and Tim were laughing
10 about it, what could you have testified to?

11 A. Definitely. Come on. Oh. No, sir. Never.
12 Never, ever.

13 Q. Would you have ever laughed about something
14 like that?

15 A. Come on, man, my brother was seven years at
16 the same time and Tim had four children at the same
17 time at the time. Come on, man, that's....

18 Q. That's incorrect?

19 A. Yeah. Yes, sir. Definitely. Laughing,
20 that's insane.

21 Q. Since this incident happened, have you talked
22 to Tim at all about the incident?

23 A. I haven't seen Tim till today.

24 Q. To the day it happened. So you've not tried
25 to compare your testimony today to anything else in

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 the case?

2 A. To no one's.

3 Q. And is today the first time you've been asked
4 to testify in this case?

5 A. Yes, sir.

6 Q. All right. ~~From your perspective~~ in what you
7 saw and heard and experienced that day, ~~did Tim~~
8 ~~intend to shoot little Stephanie Burditt?~~

9 A. ~~No, definitely not.~~ Definitely not.

10 Q. And why do you say that?

11 A. ~~Because it was an accident.~~

12 Q. From your perspective from what you saw and
13 experienced that day, ~~did you or Tim ever even see~~
14 ~~the little girl before the shooting?~~

15 A. ~~No. I saw my son, I never saw her.~~

16 Q. I think you made a comment that you knew Tim
17 had children?

18 A. Yeah.

19 Q. How did Tim feel about his children?

20 A. He loved his kids. He was there every day
21 with his children.

22 Q. Is there anything about the incident that
23 night, Dax, that I haven't asked you that it's my
24 fault I've left out that you recall and think is
25 important about anything at all during the incident?

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 A. A lot of testimonies and a lot of things that
2 went on in the first trial which, you know, they
3 didn't want to let me testify during that time, but
4 now it's 13 years later I can't remember everything
5 down to the last detail. But there was a lot of
6 things in there I do recall.

7 They said we ran to a cemetery and
8 something and me and Tim were discussing did you get
9 a bow or something like that, which was definitely
10 insane at that time, too, that was in the first
11 testimony I heard that. There was plenty of other
12 people out there to testify but, you know, you know,
13 I ~~didn't never get one chance to look at anybody's~~
14 ~~testimony, see anything the first trial Tim had,~~
15 ~~because they seclude me, both defense and solicitor,~~
16 so, you know, they just put -- put me away and hid me
17 until 13 years later.

18 So it's not like I can recall everything
19 to the last "t" how it went down, but I know one
20 thing, man, that man did not mean to shoot that young
21 lady. Not one day in his life would he ever had done
22 that regardless whether we were drinking or my man
23 had made a remark. If we could take it all back and
24 do it all over again, we have a child living and a
25 man that's not on death row because everybody loses

Daxton "A" Patterson - Direct Exam by Mr. Bloom

1 in this situation. I don't want to tell you how I
2 feel about the situation. What question do you want
3 next?

4 Q. All right. And everything you've testified
5 to today you could have testified to in 1994?

6 A. Oh, yeah. It would have been -- yes, sir.

7 Q. And again in 1996 if you'd been asked?

8 A. Anytime.

9 Q. ~~And since Tim was your friend, you would have~~
10 ~~been willing to talk to Tim's lawyers back in 1994?~~

11 A. ~~Of course.~~ Of course. Of course. Of
12 course.

13 Q. ~~And again in 1996?~~

14 A. ~~You know that.~~

15 Q. But none of Tim's lawyers back then in '94,
16 '96 ever contacted you?

17 A. That's the dude. That was his lawyer back
18 then.

19 Q. It was Bill Runyon and Mark Leiendecker, and
20 neither of them ever contacted you?

21 A. Never.

22 Q. Please answer any questions opposing counsel
23 or Her Honor may have. Thank you, Mr. Patterson.

24 A. All right.

25 THE COURT: Cross-examination.

CROSS-EXAMINATION

1

2 BY MR. SALTER:

3 Q. Good morning, Mr. Patterson, my name's Ed
4 Salter. I won't have too terribly many questions for
5 you I don't think.

6 You testified earlier that you and
7 Mr. Rogers were good friends back in '92; is that
8 right?

9 A. That's correct.

10 Q. You all are still good friends, aren't you?

11 A. I haven't spoke. He's my partner until I
12 leave this earth or him, either/or.

13 Q. All right. You haven't spoken to him?

14 A. Never.

15 Q. You've spoken to his lawyers, haven't you?

16 A. What lawyers?

17 Q. These lawyers right here, Mr. Bloom and
18 Ms. Holt, you've spoken to one of them, haven't you?

19 A. I've spoken to Mr. Bloom.

20 Q. All right. Mr. Patterson, I show you a
21 one-page document that's signed and notarized by you
22 ask you if you can identify that, sir?

23 A. Yeah, this is the thing right there, yeah, I
24 remember, because the young lady, where's the little
25 white-haired lady at, she's in here, I remember when

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 I signed this here.

2 Q. All right. That's an authorization, is it
3 not, to disclose --

4 A. Consent. Release any and all my records,
5 reports, yeah, of course. All right, yes, sir, go
6 ahead.

7 MR. SALTER: I move to introduce this as
8 Respondent's Exhibit 4, Your Honor.

9 THE COURT: All right. Any objection?

10 MR. BLOOM: No objection.

11 THE COURT: All right. Very well.

12 (Entered into evidence was Respondent's
13 Exhibit 4, Authorization for Release of
14 Confidential Information.)

15 A. That's for me?

16 Q. Yes, sir. That's for you to look at. Now,
17 you signed that release back on September 24th of
18 2002?

19 A. Yes, sir.

20 Q. And that allows access to any hospital,
21 medical, mental health, probation and/or parole,
22 juvenile, school, employment and legal records?

23 A. All right.

24 Q. Doesn't that permit that?

25 A. Yeah, I see it.

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 Q. Even attorney notes, right?

2 A. Yes, sir. I see it.

3 Q. And you spoke -- and you also spoke to

4 Mr. Bloom about the substance of what you testified
5 to this morning?

6 A. Excuse me now?

7 Q. You spoke to Mr. Bloom about the case, what
8 you were going to testify to this morning; did you
9 not?

10 A. No, I didn't.

11 Q. You didn't talk anything about the case?

12 A. No, I didn't. We didn't discuss anything.

13 Q. You didn't discuss anything at all just --

14 A. Not a one piece of the pipe, no.

15 Q. All right, sir. You've been doing everything
16 by signing that release you obviously -- and coming
17 in here this morning, you're doing everything you can
18 to get your friends out from underneath a murder
19 conviction?

20 MR. BLOOM: Judge, I object. If I can
21 object, the question was did Mr. Patterson
22 discuss anything about this case this
23 morning.

24 MR. SALTER: No.

25 MR. BLOOM: And I just wanted to object



Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 that Mr. Salter is at this point badgering
2 the witness about that. He's answered the
3 question, there was no discussion this
4 morning.

5 MR. SALTER: No, the question was not
6 this morning. I'm sorry.

7 MR. BLOOM: And I think that's where the
8 misunderstanding may come in and I didn't
9 want the witness badgered over
10 misunderstanding of terms.

11 THE COURT: Okay.

12 BY MR. SALTER:

13 Q. Prior to this morning.

14 A. We ain't never discussed any statements or
15 anything. Nothing. I just told him when my day came
16 I'd get up on the stand and tell the truth, nothing
17 but the truth, so help me God. That's it, you know,
18 that's where we're going from there.

19 Q. Now, you were originally charged as a result
20 of what happened on November 25th, 1992; were you
21 not?

22 A. Yes, sir.

23 Q. All right. You had a lawyer; did you not?

24 A. (Nodding head.)

25 Q. And who was that lawyer?

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 A. Jim Bell.

2 Q. So Jim Bell or Robby Robbins?

3 A. Robby Robbins.

4 Q. All right. You didn't want to cooperate with
5 Mr. Rogers back then, did you?

6 A. With who?

7 Q. With Mr. Rogers and his attorneys, you didn't
8 want to cooperate with them back in '93 through '94,
9 did you?

10 A. What do you mean I didn't want to cooperate
11 with them?

12 Q. Isn't it true you wanted to cooperate with
13 the solicitor's office?

14 A. I didn't want to cooperate with anybody, why
15 they didn't want to cooperate with me, why didn't
16 they put me on the stand back then?

17 Q. You didn't sign a fancy release, did you, for
18 Mr. Rogers' trial attorneys, did you, you didn't give
19 them a release like that?

20 A. I signed a thing to Mr. Robbins for \$200,000
21 bond. After I did six and a half months said I would
22 testify in the case on behalf to tell the truth, the
23 whole truth, and nothing but the truth. They didn't
24 want me to testify either/or.

25 Q. All right, sir. And you were --

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 A. So I bonded out on that saying I would
2 testify in the State's behalf.

3 Q. All right.

4 A. All right. Keep going.

5 Q. You did do that. Ultimately what happened to
6 the charges against you?

7 A. What happened to me?

8 Q. What happened to the charges against you in
9 connection with this case?

10 A. They got lowered to -- you know the charge,
11 right?

12 Q. Misprision of a felony; is that right?

13 A. That's correct.

14 Q. Did you get time served?

15 A. Actually I didn't, you know it.

16 Q. So what did you get, sir?

17 A. Two years suspended on what?

18 Q. And in the past 10 years have you been
19 convicted of any other crimes --

20 A. No, sir.

21 Q. -- which carried more than a year penalty?

22 A. No, sir.

23 Q. Isn't it true that back in '92 through '94
24 your story was that Mr. Rogers produced a gun and
25 unnecessarily shot Stephanie B [REDACTED]

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 A. Accidentally shot.

2 Q. Accidentally shot. So you didn't tell -- is
3 that what you told your lawyer?

4 A. Hold on, man.

5 THE WITNESS: I'm doing my best.

6 A. Why don't you tell me what I told my lawyer
7 then.

8 Q. Did you tell your lawyer that you didn't want
9 any part of the gun being pulled out, that you didn't
10 think that was necessary?

11 A. I told Tim to pull it up. You didn't hear my
12 first testimony?

13 Q. I heard you earlier, sir. I'm asking you
14 what you told your lawyer.

15 A. So we based on back then or based on now?

16 Q. I'm asking you what you told your lawyer back
17 when he was representing you on the charges that you
18 faced.

19 A. You have my statement?

20 Q. I don't have a copy of the statement for you,
21 sir.

22 A. I don't have one either, so I can't remember.

23 Q. You can't remember what you told your lawyer?

24 A. I sure can't, because they wouldn't even send
25 me a copy of the statement, they said there is not

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 one. So if there's a statement, could you please
2 show it to me? Because I'm ready to see it.

3 Q. Now, turning to the events of November 25th,
4 I believe prior to going down to Spell's Grocery you
5 had been drinking a little bit?

6 A. We drank a tad bit.

7 Q. What were y'all drinking?

8 A. Beer.

9 Q. A tad. You said a tad bit. How much is a
10 tad bit?

11 A. A little bit. I mean --

12 Q. One?

13 A. No, no. We drank a little bit more than one.
14 To be honest with you, I had been drinking all day.

15 Q. You had been drinking all day?

16 A. Yeah, I had been drinking all day before me
17 and Tim even got up.

18 Q. Did you use drugs back then?

19 A. No, smoked reefer.

20 Q. You smoked reefer. Did you smoke any reefer
21 that day?

22 A. To be honest with you, no, we didn't.

23 Q. All right. So what did you do, did you drink
24 any liquor that day?

25 A. Yeah.

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 Q. So you drank beer. Did you drink -- did
2 y'all drink a case of beer?

3 A. We weren't drinking cases of beer during that
4 day, we were drinking Red Bull.

5 Q. All right. Drinking Red Bull. And please
6 tell the Court what Red Bull is.

7 A. Malt liquor.

8 Q. All right. And you were drinking some
9 liquor, too; were you not?

10 A. Yes, sir.

11 Q. Okay. You recall approximately how much?

12 A. No.

13 Q. Do you recall what kind of liquor you were
14 drinking?

15 A. Sure.

16 Q. What kind?

17 A. Vodka.

18 Q. Drank, what, maybe a fifth, half of it?

19 A. No, we didn't drink no fifth. Not me and Tim
20 together, no.

21 Q. All right. Back when you and Tim -- back in
22 1992 was he wearing glasses back then?

23 A. Sometimes.

24 Q. Sometimes?

25 A. No, actually, basically, no, not back then,

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 bubba.

2 Q. Okay. Not back then he didn't wear them?

3 A. Every now and then, man. It wasn't an
4 everyday thing, partner.

5 Q. All right. Was he wearing them on
6 November 25th, 1992?

7 A. No, sir.

8 Q. No?

9 A. No.

10 Q. Now, did you help him and his cousin work on
11 a car that afternoon?

12 A. I was there, but I didn't work on cars, man.

13 Q. You just watched them work, helped them
14 drink?

15 A. No. Don't put words in my mouth, no. Helped
16 them drink, I helped myself drink.

17 Q. All right. He was drinking too though,
18 wasn't he, Mr. Rogers being him?

19 A. I don't know.

20 Q. You don't remember?

21 A. No.

22 Q. You remember what kind of work they were
23 doing on the car?

24 A. No. I can tell you what color the car was.
25 You keep saying it was a car. Was it a car?

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 Q. I just asked you, sir, and you said they were
2 working on a car.

3 A. I didn't say anything; you said that.

4 Q. You said they were working on a car, you were
5 watching them.

6 A. You said that. First of all, they wasn't
7 working on a car anyway, man, they were working on a
8 truck.

9 Q. What were they doing?

10 A. They were working on a truck.

11 Q. Okay. They were working on a truck. How
12 long were they working on a truck?

13 A. To be honest with you, that's -- oh, man,
14 that's irrelevant, man, to this whole case I believe.

15 Q. How long were they working on the truck, sir,
16 do you recall?

17 A. Oh, man, you paying me for this? Let's say
18 about maybe two hours then, if that amount.

19 Q. All right. And do you recall what kind --
20 you don't recall what kind of work they were doing on
21 the truck?

22 A. No, sir.

23 Q. All right. But apparently even without
24 glasses Mr. Rogers could see well enough to work on
25 the truck?

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 A. I didn't never say he was working on the
2 truck.

3 Q. You didn't?

4 A. No.

5 Q. He wasn't working on the truck then?

6 A. You said that.

7 Q. So he wasn't working on the truck? Was he or
8 wasn't he?

9 A. The man wasn't working on the truck, all
10 right?

11 Q. What was he doing?

12 A. He was sitting there with me.

13 Q. Drinking?

14 A. Yes, sir.

15 Q. All right. Later on y'all went down to
16 Spell's, all right. Now, did -- who got on the pay
17 phone, you or Mr. Rogers?

18 A. I did.

19 Q. You got on the pay phone?

20 A. Yes, sir.

21 Q. So Mr. Rogers didn't get on the pay phone?

22 A. No, sir.

23 Q. All right. Do you recall what the lighting
24 was like that night?

25 A. What was the lighting like?

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 Q. Yeah.

2 A. The sun was going down.

3 Q. All right. The sun was going down, but were
4 there any lights out there, streetlights?

5 A. To be honest with you let me think about the
6 situation now, it's been a while now. Yeah, there
7 was one light out there.

8 Q. You could see though, could you not?

9 A. Could I see it? I'm going to visualize it,
10 hold on here. It would have been on the left side of
11 the building there.

12 Q. All right. Now, I believe you testified on
13 direct examination that Mr. Carver got out of the
14 truck, right?

15 A. (Nodding head.)

16 Q. And came around. Did he jump on your back,
17 is that what you said?

18 A. Yeah, he got on my back.

19 Q. He got on your back?

20 A. He did something to me. He got slammed on
21 the ground.

22 Q. All right. You slammed him down on the
23 ground, huh?

24 A. Yeah. Yeah, he went somewhere.

25 Q. Do you recall seeing a black gentleman out

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 there that day by the name of Anthony Riley?

2 A. Sure don't.

3 Q. You don't?

4 A. You talking about behind the building, in
5 front of the building, beside the building? Just one
6 black guy?

7 Q. Just one black guy. The only black guy there
8 was Tim Rogers?

9 A. Only the one other black guy out there.

10 Q. So there was one other black guy out there?

11 A. Just one out there.

12 Q. And where was he?

13 A. That's what I'm asking you, where was he at,
14 the back or the front or the side?

15 Q. I'm asking you, sir. You're testifying, sir.

16 A. I didn't see him.

17 Q. You didn't see him?

18 A. (Shaking head.)

19 Q. You didn't have -- didn't say anything to him
20 or do anything with respect to this other person?

21 You didn't see him.

22 A. I didn't see him.

23 Q. All right. Now, I believe you testified
24 earlier that you never saw Stephanie B [REDACTED] in the
25 truck; is that correct?

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 A. Never saw her.

2 Q. Never saw her. But you saw Mr. B [REDACTED]
3 reaching behind his seat to get what you thought was
4 a weapon?

5 A. I know it was. I already saw all that. His
6 daughter was nowhere in the picture during that,
7 ever.

8 Q. She wasn't even in the truck?

9 A. Nowhere near the truck, partner.

10 Q. She was nowhere near the truck?

11 A. She had to either been in the store or
12 somewhere with the little dude, had to been, there's
13 no way possible.

14 Q. And this is the little dude who got out of
15 the truck, got on your back, got slammed to the
16 ground?

17 A. Yeah.

18 Q. So he took her inside the --

19 A. I don't know. I never saw the young girl
20 period. That's why I couldn't understand when the
21 man -- after I spit in his face and I slammed the
22 door and told the man to get the hell on, he pulled
23 back up and jumped out and screamed, he said, "You
24 shot my young daughter in the head." I never seen
25 her in there. She looked like a dead deer. That's

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 the first time I ever saw it. When I looked at her
2 dead eyes that's when I threw my hands up and looked
3 at Tim, that's when I broke down.

4 Q. Now, you testified Mr. Rogers fired two shots
5 in the air?

6 A. Yes, sir. How many shells was found on the
7 ground?

8 Q. All right, sir. Two shots in the air. Would
9 you agree with me -- have you fired a weapon before?

10 A. No. I was in the Army, man, I was a cook.
11 Yeah, of course I did.

12 Q. All right. And if you fire a gun generally
13 it goes in a straight line; does it not?

14 A. Depending on -- come on, man, generally?

15 Q. Yes, sir.

16 A. Yeah, okay. Yeah, usually.

17 Q. All right. So how does a bullet that's fired
18 in the air wind up in the back of a little girl's
19 head?

20 ~~MR. BLOOM:~~ Judge, I would object. That
21 calls for speculation, it calls for expert
22 opinion. Mr. Salter made his point and I
23 object.

24 THE WITNESS: Can I ask him a question?

25 THE COURT: No.

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 THE WITNESS: I can't ask him anything?

2 MR. BLOOM: It calls for speculation, it
3 calls for opinion. This witness is not an
4 expert witness.

5 MR. SALTER: I don't think it calls for
6 any expertise whatsoever, Your Honor. He's
7 saying that the shots were fired in the air.
8 The physical evidence which I'm about to go
9 into is different.

10 THE WITNESS: Keep going, that's where I
11 was at. Let's go. Let's go.

12 THE COURT: Mr. Patterson.

13 THE WITNESS: Yes, ma'am. I'll back
14 down, all right.

15 THE COURT: I'm going to sustain the
16 objection.

17 MR. SALTER: Thank you, Your Honor.

18 BY MR. SALTER:

19 Q. Just a couple, few more questions and I think
20 I'll be through.

21 A. Sure.

22 Q. So if Mr. Rogers gave a statement on
23 December 2nd, 1992 saying that he was the one using
24 the phone on November 25th, that would be incorrect?

25 A. I don't have anything to do with what he had

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 on the statement now. I can't -- I mean, that's --
2 how am I supposed to say something that's incorrect
3 if he already stated it? That was his statement.

4 Q. All right.

5 A. That's why my testimony is different than
6 whatever statement had been then, so I don't know
7 what his statement said or what he stated, or....

8 Q. And if he said that -- in that same statement
9 that he told Mr. B [REDACTED] that he would be off the
10 phone in a minute, that was also incorrect?

11 A. No. No, he didn't. I was on the phone.

12 Q. All right. And you said earlier that
13 Stephanie was not in the truck when you pulled
14 Mr. B [REDACTED] away from it, correct?

15 A. That's correct.

16 Q. All right. But she was in the truck when she
17 was shot, right?

18 A. That's correct. That is correct.

19 Q. All right. How did she -- this all happened
20 very quickly, didn't it?

21 A. Very fast, sir.

22 Q. Then how did she get back into the truck?

23 A. Could you explain it to me?

24 Q. Sir, I'm asking you to explain to the Court.

25 MR. BLOOM: I would object again. That

Daxton "A" Patterson - Cross-Exam by Mr. Salter

1 calls for speculation, asks this witness to
2 project what he knows about the actions of
3 another person.

4 THE COURT: Just ask him if he knows.

5 BY MR. SALTER:

6 Q. Do you know how she got back in the truck,
7 sir?

8 A. I do not know, sir.

9 Q. All right. I don't believe I have anything
10 further.

11 THE COURT: All right. Thank you. Yes,
12 sir.

13 MR. BLOOM: Thank you, ma'am. I have no
14 further questions of Mr. Patterson, I ask
15 that he be excused and released from his
16 subpoena.

17 THE COURT: Any objection?

18 MR. SALTER: Without objection.

19 THE COURT: Very well. Thank you,
20 Mr. Patterson, you are free to go.

21 (Whereupon, the witness steps down from the
22 witness stand.)

23 THE COURT: Call your next witness,
24 please.

25 MR. BLOOM: Stephanie Simmons.

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 THE COURT: Raise your right hand for
2 me.

3 (Stephanie D. Simmons, called as a witness,
4 having first been duly sworn, is examined and
5 testified as follows:)

6 THE COURT: Very well. If you would
7 please be seated, and when you are seated
8 please state your full name for the record
9 and spell your last name.

10 THE WITNESS: My name is ~~Stephanie~~
11 ~~Denise Simmons~~, S-i-m-m-o-n-s.

12 THE COURT: Your witness. Ms. Simmons,
13 our amplification system is -- it could be
14 better. I just need to remind you to keep
15 your voice up because everyone wants to be
16 able to hear you.

17 Your witness, Mr. Bloom.

18 DIRECT EXAMINATION

19 BY MR. BLOOM:

20 Q. ~~Ms. Simmons, where do you reside?~~

21 A. ~~Atlanta, Georgia,~~ [REDACTED].

22 Q. And is that where were you living in 1994
23 when you testified?

24 A. 1994, no.

25 Q. Okay. ~~Where were you living in 1994~~ when you

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 testified? Roughly, I don't need a street address,
2 just generally.

3 A. ~~I was probably back in South Carolina.~~

4 Q. Okay. Do you have family here in South
5 Carolina?

6 A. Yes, I do.

7 Q. In what area of the state or county?

8 A. ~~My mother lives in Summerville and Berkeley~~
9 ~~County.~~

10 Q. Okay. And you're the same Stephanie Simmons
11 who testified at the 1994 trial?

12 A. Correct.

13 Q. Right?

14 A. Yes.

15 Q. Okay. ~~And in 1992, November 1992,~~ where were
16 you residing when this incident happened?

17 A. ~~I lived in Tuskegee, Alabama, I was a senior~~
18 ~~in college there.~~

19 Q. Can you tell us a little bit about your
20 background, your work experience, educational
21 experience, those types of things?

22 A. I have my MBA from the College of Charleston,
23 I did my undergraduate at Tuskegee as I just stated,
24 biology and math, minor in computer science. I
25 currently am a vice president of a small trucking

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 company out of Atlanta, Georgia. I do real estate
2 investment, real busy, do a lot of volunteer work in
3 the community. My roots are back here in South
4 Carolina; however, I am active in Atlanta.

5 Q. All right. And I may have asked this, but
6 what family did you have in the Berkeley, Dorchester
7 County area?

8 A. My mother is from South Carolina, Charleston,
9 Moncks Corner area and it's a large family, eight
10 girls, two boys, grandparents lived there. So a lot
11 of my family is in Charleston.

12 Q. Okay. Did Tim's attorneys in 1994,
13 Mr. William Runyon or Mark Leiendecker, ever attempt
14 to contact you after this incident in '92 up through
15 your testimony in 1994?

16 MR. SALTER: Your Honor, I'm going to
17 object to just the word "attempt." I think
18 that --

19 MR. BLOOM: I'll take the word "attempt"
20 out, that was probably inadvertent on my
21 part.

22 Q. Let me rephrase, ma'am. ~~Did Tim's attorneys,~~
23 ~~William Runyon and Mark Leiendecker, ever contact you~~
24 ~~in -- between 1992 up until your testimony in 1994?~~

25 A. ~~No,~~ not to my knowledge.

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 Q. Okay. Did they ever contact you prior to the
2 1996 trial?

3 A. I can't remember. I remember something was
4 going on in 1996. I was in Texas, but I know the
5 bottom line was I didn't have to come. So who was
6 contacting me, I don't know, but I was never
7 subpoenaed.

8 Q. Okay. In 1994 did -- or sometime before the
9 1994 trial, did Solicitor Walter Bailey's office
10 contact you?

11 A. Yes, they did.

12 Q. And was there some type of interview or
13 information gathering from you through his office?

14 A. Solicitor Bailey did contact me via phone.
15 He asked me a few questions. Our conversation
16 probably lasted maybe about 10, 15 minutes at the
17 most.

18 Q. All right.

19 A. Just pretty much background and what happened
20 and that was pretty much it.

21 Q. Okay. And in 1996 I think you just said that
22 someone tried to contact you. Could that also have
23 been Solicitor Bailey's office in 1996?

24 A. I don't remember.

25 Q. All right, ma'am. Let me show you an

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 exhibit. ~~Let me show you Petitioner's Exhibit 10,~~
2 which is in the record of this case, and I call your
3 attention to the last sentence of the second
4 paragraph where it begins "I have also talked..."
5 Can you just read that sentence out loud?

6 A. "I have also talked with Stephanie Simmons
7 who saw Rogers in Alabama, and he relayed to her the
8 shooting was an accident."

9 Q. Okay. Would that information that's included
10 in Solicitor Bailey's letter, would that be some of
11 the information you relayed to Solicitor Bailey in
12 the telephone interview you've just told us about?

13 A. That is correct.

14 Q. Let me ask you a few questions about that
15 then, let's go to that. Again to start where were
16 you living in November and December 1992 when this
17 incident happened?

18 A. I was living on off-campus housing at
19 Tuskegee.

20 Q. All right. In Alabama?

21 A. Uh-huh.

22 Q. All right. And you were a college student
23 there?

24 A. Correct.

25 Q. All right. Did there come an occasion that

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 ~~Tim Rogers contacted you in that time frame of~~
2 ~~November, December 1992?~~

3 A. Yes, he did.

4 Q. All right. And what happened? Can you
5 relate that information for us?

6 A. Before the incident?

7 Q. After the incident, after the incident had
8 occurred.

9 A. ~~After the incident occurred I got a phone~~
10 ~~call that evening saying that something really bad~~
11 ~~had happened.~~

12 Q. And who was the phone call from?

13 A. ~~It was from Tim.~~

14 Q. Okay.

15 A. ~~Tim Rogers. And it wasn't really coherent,~~
16 ~~he was upset, he had been crying. It was just out of~~
17 ~~control, you could tell on the other end something~~
18 ~~was going on but specifically what at that time I did~~
19 ~~not know. He said he was coming to Alabama. And~~
20 ~~that was the extent of the conversation. He just~~
21 ~~kept saying it was a bad accident that had happened.~~

22 Q. A bad accident had happened?

23 A. Uh-huh.

24 Q. All right. And he was upset and crying about
25 it?

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 A. Uh-huh.

2 Q. How long had you known Tim up to that point
3 roughly?

4 A. ~~I've known Tim since I was 12.~~

5 Q. Since you were 12 years old?

6 A. Uh-huh.

7 Q. And I think you said you were -- what year
8 were you in at Tuskegee that year?

9 A. ~~My senior year and I was 21.~~

10 Q. ~~Twenty-one. So you considered Tim a close~~
11 ~~friend?~~

12 A. ~~Uh-huh.~~

13 Q. All right. Go ahead. What happened next?

14 A. ~~The next day he did arrive in Alabama and he~~
15 ~~did proceed to tell me what had actually happened.~~
16 ~~He said that they were at a pay phone in Summerville~~
17 ~~and they had gotten into an altercation. And when I~~
18 ~~say "they," I'm talking about him and Dax. I know~~
19 ~~that Dax was with him. They had gotten in an~~
20 ~~altercation with some gentlemen and they were going~~
21 ~~back and forth, back and forth, and it was some~~
22 ~~racial slurs that were thrown.~~

23 Q. Tim specifically told you about that?

24 A. Uh-huh.

25 Q. Did he identify what the exact words were

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 that were used?

2 A. Basically like this nigger needs to get off
3 the phone.

4 Q. I'm sorry, I couldn't hear you. And if you
5 prefer to spell the word, I personally do, I leave
6 that in your judgment, ma'am.

7 A. ~~That the n-i-g-g-a needs to get off the~~
8 ~~phone.~~

9 Q. All right.

10 A. And --

11 Q. ~~Tim related that someone at the scene had~~
12 ~~told him that?~~

13 A. ~~Correct.~~

14 Q. All right. Go ahead.

15 A. ~~That someone had gone back to the vehicle~~
16 ~~that they were in which he specified was a truck, and~~
17 ~~that they felt there was going to be some altercation~~
18 ~~with weapons. There was a shot fired more or less to~~
19 ~~say back off, and the little girl had been shot. And~~
20 ~~it was an accident that the bullet hit the little~~
21 ~~girl.~~

22 Q. All right. Now, ~~after Tim was arrested in~~
23 ~~Alabama, did he also call you from the detention~~
24 ~~center he was in?~~

25 A. ~~Yeah. We talked maybe once or twice~~

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 afterwards.

2 Q. All right.

3 A. And we didn't speak on the subject a lot, it
4 was more how you doing, how's things going versus the
5 incident, but it pretty much was repeated the same
6 way every time.

7 Q. ~~But you're absolutely certain Tim related~~
8 ~~facts to you where this was an accident,~~ that was a
9 word he used?

10 A. Uh-huh?

11 Q. And you're absolutely certain Tim related to
12 you that one of the men in the truck used the "N"
13 word?

14 A. Uh-huh.

15 Q. I'm sorry, you have to answer yes or no.

16 A. Yes. I'm sorry.

17 Q. ~~And you're absolutely certain Tim related to~~
18 ~~you that guns were involved?~~

19 A. ~~Yeah.~~ Yes.

20 Q. Including guns with the men in the truck?

21 A. Yes.

22 Q. ~~Do you know Dax Patterson, too?~~

23 A. Yes.

24 Q. How long had you known him at that point in
25 time?

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 A. ~~I knew Dax through Tim~~, you know, he was one
2 to hang out with him.

3 Q. Okay.

4 A. How long at that period I don't recall. It
5 had been some years.

6 Q. Okay. And what did you know about Dax or his
7 relationship with -- their relationships as friends
8 with him?

9 A. ~~Dax didn't live too far from where my mom~~
10 ~~stayed in the Sangaree area, they hung out together,~~
11 ~~frick and frack, they had fun together, they got in~~
12 ~~trouble together, they did their thing together.~~ And
13 they seemed to be really close just like all friends.
14 Some days you get along, some days you don't. But
15 they were always together sometimes.

16 Q. Was Tim sometimes protective of Dax?

17 A. ~~Tim was protective of everybody.~~

18 Q. All his friends?

19 A. ~~All his friends, family especially.~~

20 Q. Now, ma'am, in 1994 in your testimony --

21 MR. BLOOM: Court's indulgence one
22 moment.

23 THE COURT: All right.

24 Q. ~~On page 895 through 896 Solicitor Bailey~~
25 ~~asked you some questions about when Tim was in~~

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 Alabama. And I would just ask you to read to
2 yourself beginning on page 895 beginning on line 18
3 to the bottom, and then 896 through line 4. Just
4 read that to yourself. And let me know when you're
5 done.

6 A. (The witness complies.) Okay.

7 Q. All right. Is that testimony consistent with
8 what you're recollecting as well today?

9 A. That is correct.

10 Q. Okay. And do you need to explain that at
11 all?

12 A. No.

13 Q. Okay. So those answers are still the same,
14 Tim didn't tell you why he left South Carolina?

15 A. No.

16 Q. He did discuss the incident, but he didn't
17 state specifically why he fled South Carolina?

18 A. No.

19 Q. All right. What do you know about Tim's
20 background?

21 A. Well, let's see. When Tim -- when I was 12
22 he was like 16, so we pretty much grew up, our
23 families went to the same church. So he would come
24 in and out, there would be times when he would go
25 back to New York and he would come back to South

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 Carolina. But background prior to 16 I don't know a
2 lot.

3 Q. Okay. What relatives did you know that he
4 had in New York?

5 A. His dad.

6 Q. All right. And what did you know about his
7 father?

8 A. He talked about his dad a lot.

9 Q. All right. This is his natural father?

10 A. Uh-huh.

11 Q. All right.

12 A. He talked about his father a lot. He always
13 wanted to go back up there. When he would come back
14 down south he would always discuss wanting to go back
15 up there and stay with his dad.

16 Q. This is Tim we're talking about?

17 A. Yes, Tim Rogers. So it was just a lot of
18 longing to go home to his father.

19 Q. What did you know about Tim's family life or
20 background here in South Carolina, if anything?

21 A. Well, I know his mom and his brothers.

22 Q. Okay.

23 A. And his stepfather, and they were really
24 close, him and his brothers.

25 Q. Tim and his brothers were?

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 A. Very close and very protective over his
2 little sister, Faith, and very passionate about his
3 mom.

4 Q. Very passionate about his mom?

5 A. Yeah.

6 Q. And protective of her as well?

7 A. Uh-huh.

8 Q. Okay. What are some positive characteristics
9 you know about Tim, what are some positive things you
10 could have testified to about him if you had been
11 asked in 1994 or 1996?

12 A. Tim was like the very protective figure in
13 his family and even outside the nucleus. He was just
14 considered the protector. He cared a lot and it's
15 just that the bad things that he did do, whether it
16 be small or few, out-shined all the good things and
17 the positive things that he always did. He's a very
18 strong figure. I just really don't believe that he
19 was ever given a chance to show those qualities
20 consistently.

21 Q. Is there anything else you can testify about
22 Tim in connection to this case or his background or
23 his family that I may have neglected to ask you a
24 specific question but that you want to comment about
25 him?

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 A. I'm not sure if the argument wasn't an
2 accident or not, I'm not sure if that's really the
3 question, but I can say that if he says it's an
4 accident, it was an accident.

5 MR. SALTER: I would object, Your Honor.

6 THE COURT: On the basis of...?

7 MR. SALTER: First of all, it's not
8 firsthand knowledge.

9 THE COURT: Sustained.

10 Q. Let me go back and retrace the foundation as
11 well. How long did you say you've known Tim?

12 A. Since I was 12.

13 Q. All right. And what was Tim's reputation for
14 truthfulness or telling truth in the community?

15 A. Whether he's right, wrong or indifferent.
16 Whether he did something wrong, he's going to tell
17 you he did something wrong. If he did something
18 right, he's going to tell you he did something right.
19 Pretty much what he said is what he said.

20 Q. So if Tim gave testimony or made a statement
21 that it was an accident, you believe that?

22 A. Yes.

23 MR. SALTER: Objection, Your Honor.

24 THE COURT: Sustained.

25 MR. BLOOM: I can ask that, I've laid

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 the foundation. She can testify as to both
2 reputation and once I've laid the foundation
3 under the rules her own opinion of the
4 witness's voracity.

5 THE COURT: You certainly can ask her.
6 There's a stylized way that you ask that.
7 Your question was different.

8 MR. BLOOM: All right, ma'am, I'll try
9 to rephrase.

10 THE COURT: Sure.

11 MR. SALTER: Thank you.

12 BY MR. BLOOM:

13 Q. Based on what you know about Tim and his
14 reputation for truthfulness, ~~do you have a personal~~
15 ~~opinion as to Tim's truthfulness?~~

16 A. Yes, I do.

17 Q. What is that opinion?

18 A. ~~That he is truthful.~~

19 Q. Thank you, ma'am. ~~And everything you've~~
20 ~~testified to today you could have testified to in~~
21 ~~1994 if you'd been asked?~~

22 A. Yes.

23 Q. ~~And also in 1996?~~

24 A. Yes.

25 Q. But it's your recollection prior to the 1994

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 trial Tim's attorneys, Mr. Leiendecker or Mr. Runyon,
2 did not contact you?

3 A. No.

4 Q. Would you have told them if they'd asked the
5 same thing you've told us today?

6 A. Yes.

7 Q. In 1996 when you were in Texas, if someone
8 had wanted to locate you or interview you about Tim's
9 case, how could someone have found you back then,
10 through family or other means, what connections did
11 you have to South Carolina?

12 A. My mother. Anybody that knows me knows my
13 mother's always been there, so they usually contact
14 my mother first.

15 Q. All right. And someone in this case
16 evidently I think you've told us had your phone
17 number or address in Texas because some office was in
18 contact with you in some way in 1996?

19 A. Actually I was on a job site in Texas and
20 obviously somebody had contacted my job, because I
21 was a consultant for hospitals at that time and I
22 traveled, I was based in Atlanta living in Jersey,
23 but I was all over the continent, so bottom line if
24 somebody contacted my mom they would have contacted
25 my job which would have contacted me.

Stephanie D. Simmons - Direct Exam by Mr. Bloom

1 Q. All right. And the information you got is
2 you weren't needed to testify?

3 A. Right.

4 Q. It wasn't we need to interview you, it was
5 you weren't needed?

6 A. Correct.

7 Q. Thank you, ma'am. Please answer any
8 questions opposing counsel or Her Honor may have.

9 THE COURT: Cross-examination.

10 MR. SALTER: Thank you, Your Honor.

11 THE COURT: Yes.

12 CROSS-EXAMINATION

13 BY MR. SALTER:

14 Q. Ms. Simmons, my name's Ed Salter, I'll be
15 very brief.

16 A. Okay.

17 Q. Now, you testified you didn't remember who
18 contacted you before the '96 trial?

19 A. At the '96, no, I don't remember.

20 Q. You just now said you were all over the
21 continent at the time?

22 A. Correct.

23 Q. It could be kind of hard to track you down?

24 A. Not really.

25 Q. Not really?

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 A. No.

2 Q. You were at one job site, say, for an
3 extended period of time?

4 A. My job sites would vary depending on
5 assignment, I could be there for three months to six
6 months. In Tyler, Texas, I was there for three to
7 four months.

8 Q. All right. And then you would -- you said
9 you went all over the continent. Where else did you
10 go?

11 A. After that I went to Milwaukee, I was in
12 Milwaukee for six months, Ketchikan, Alaska. Once
13 again I have a home base in Atlanta. Our location,
14 our headquarters is in Atlanta, Georgia.

15 Q. You testified that Mr. Rogers contacted you
16 after the incident?

17 A. We had talked earlier that day as well as
18 after the incident.

19 Q. You talked to him before?

20 A. They were just hanging out.

21 Q. Okay. He contacted you while he was just
22 hanging out with his friends?

23 A. Yeah.

24 Q. Okay. And he said that something bad had
25 happened?

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 A. Yes.

2 Q. Okay. All right. And thereafter I believe
3 you testified that thereafter when he got there he
4 explained to you what had happened?

5 A. Well, like basically there were three chain
6 of events. There was prior to Alabama, Alabama, and
7 then after he left.

8 Q. Okay.

9 A. So between the three is when I got all the
10 information that he told me bottom line.

11 Q. All right. So you didn't get it all --

12 A. At one time.

13 Q. -- at one time?

14 A. Yes, sir.

15 Q. That's what I was trying to get at. What did
16 he tell you when he came to Alabama?

17 A. We really didn't talk much in Alabama. I was
18 going to class, I had my own thing going on at
19 school. And mainly he wanted someplace to stay.
20 And --

21 Q. All you knew is something bad had happened?

22 A. Correct.

23 Q. All right. And so the other information you
24 acquired was in a conversation with him after he came
25 back to South Carolina?

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 A. Correct, because not long after he had been
2 in Alabama I was contacted by the police quickly.
3 Had I seen him, had I seen him around, had I talked
4 to him. And the last time I had seen him and the
5 last time I had talked to him was like that morning,
6 because they pulled me out of class by that afternoon
7 asking me had I seen him. And I knew that he had
8 befriended some guys over at the Job Corps facility
9 and that's where he was staying. The campus is --
10 it's large, but news travels fast.

11 Q. Right.

12 A. So I pretty much knew where he was.

13 Q. All right. Did you tell them?

14 A. I cooperated. I just said I had seen him
15 around.

16 Q. All right. But you didn't tell them
17 specifically where?

18 A. No, I did not.

19 Q. Now, your conversation where you actually
20 learned what happened, this is after he left Alabama
21 and came back, did he ever give you any other reason
22 for coming to Alabama?

23 A. I didn't ask.

24 Q. Okay, you didn't ask. Now, how far is
25 Tuskegee from Summerville just roughly?

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 A. It's probably a six-hour drive.

2 Q. Six-hour drive. It's a long ways, isn't it?

3 A. Yeah. But I have a lot of people that came
4 down to visit me at Tuskegee from Summerville.

5 Q. Did they come visit you when something bad
6 had happened or come visit you because they're your
7 friend?

8 A. Combination. Sometimes there were some
9 things going on back home, not necessarily shootings
10 or anything, but people just want to get away.

11 Q. All right. Had Mr. Rogers ever contacted you
12 and come seen you while you were in Alabama?

13 A. He's contacted me before, yes, prior to this,
14 yeah.

15 Q. But never came up there?

16 A. No, never came to Alabama.

17 Q. Or out there. I'm not good with geography,
18 so.... All right. All right. And I believe you'd
19 known his family for a long time, correct?

20 A. Yes.

21 Q. Y'all went to the same church?

22 A. Yes.

23 Q. But you didn't know much about him before he
24 was 16?

25 A. No.

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 Q. What can you tell me about his family?

2 A. What specifically do you want to know?

3 Q. Well, just generally, all right, what kind of
4 people are they?

5 A. They're fantastic people.

6 Q. They're fantastic people?

7 A. Yeah.

8 Q. They're honest people?

9 A. Very honest.

10 Q. Good church-going people?

11 A. Yeah, just like my mom. When I look at
12 Applicant's Mother, she reminds me of my mother. No
13 different.

14 Q. All right. And Mr. Rogers and his brothers
15 were very close?

16 A. Very.

17 Q. They got along very well?

18 A. Uh-huh.

19 Q. It's just that I think you said that the bad
20 things he did always outshone the good that he did?

21 A. Yes, that's my opinion.

22 Q. Okay. What other bad things are you aware of
23 other than the shooting?

24 A. When we were in high school, or when he was
25 in high school I should say, I just remember like

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 just different incidents like he might have got
2 suspended from school, three-day suspension, can't
3 ride the bus, you know, things like that, but you
4 would just hear it on and on and on. It's like,
5 okay, give it a break, he got in trouble. But, of
6 course, you know, parents do what parents do, we get
7 disciplined, we tell each parent, the parents talk
8 about it in church so you hear it a little bit more.
9 But just normal teen.

10 And that's not to say I never got
11 suspended, because I got suspended in high school, I
12 went to Stratford and I got in trouble, but I was on
13 punishment, couldn't have phone, lost car privileges
14 so no one's innocent of being in trouble, it's just
15 the amount of the rhetoric of being in trouble.

16 Q. All right.

17 MR. SALTER: Excuse me one for second.

18 THE COURT: All right.

19 Q. Do you recall precisely how long it was after
20 Mr. Rogers had been brought back from Alabama that
21 you had the conversation where you learned about what
22 had occurred at Spell's Grocery?

23 A. It was a long -- I don't remember if it was
24 two days, three days, I don't remember.

25 Q. Could have been longer than that?

Stephanie D. Simmons - Cross-Exam by Mr. Salter

1 A. I don't think so.

2 Q. But it was obviously after he was charged
3 with the crime of murder?

4 A. Yes, obviously.

5 Q. All right. I don't believe there's anything
6 further.

7 THE COURT: Any redirect?

8 MR. BLOOM: I have no further questions.
9 I ask Ms. Simmons be excused.

10 THE COURT: Any objection?

11 MR. SALTER: Without objection, Your
12 Honor.

13 THE COURT: And you are free to go.
14 (Whereupon, the witness steps down from the
15 witness stand.)

16 THE COURT: We're going to take a
17 morning break. Take about a 15-minute break.
18 (Recess, from 11:00 a.m. to 11:25 a.m.)

19 THE COURT: Great. Call your next
20 witness, please.

21 MS. HOLT: If it please Court.

22 THE COURT: Yes.

23 MS. HOLT: Mr. Rogers calls James
24 Robinson to the stand.

25 THE COURT: Very well.