

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 7 2010

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

James R. Barber, III, Circuit Court Judge

Case No. 2006-CP-32-3221

Johnny O. Bennett.....Petitioner,

v.

State of South Carolina Respondent.

APPENDIX

ROBERT E. LOMINACK
Law Offices of Robert E. Lominack
Post Office Box 5508
Columbia, South Carolina 29250
803.771.7271

Attorney for Petitioner

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ALPHONSO SIMON
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803.734.6305

Attorneys for Respondent

INDEX

Transcript of the Trial Proceedings	1
Jury Qualification	8
Jury Voir Dire	53
Jury Selection.....	831
In Camera Hearing re Juror Brown.....	868
Opening Statement by State	907
Opening Statement by Defense	917
 <u>State's Witnesses</u>	
Cecil McClary	920
Robert Maddox	933
Robert James.....	947
Rudolph Cooper, Jr.	977
William Dubose	986
Rhonda Smith	995
Sharon Brady	1012
Shannon Gilbert.....	1020
Helen McGough.....	1031
Mary Louise Rice.....	1069
Sandra Key	1076
Sammy Brown	1084
Mary Shealy	1093
Jody Gallman	1105
Thomas Stillinger.....	1109
Mark Jones	1118
Melvin Harrison	1133
Susan Hair	1168
Tracy Farrington.....	1174
Pamela Herlong.....	1182
Pamela Gonsalves	1190
Bonita Gonsalves	1216
Jackie Robinson.....	1259
Frederick R. Hamer	1269
James Hickman.....	1440
Jay Patel.....	1482
Rodney Dreher	1487
Paul Smith.....	1493
Nicholas Van Put	1504
James Harris	1506
Sharon McChesney	1526

Adrian Bost	1547
James Smith.....	1581
Priscilla Phillips	1587
Johnny Ray.....	1594
James Green.....	1599
Rudolph Tillman	1617
Martha Gilmore.....	1626
Willie Weldon	1630
Benjamin Montgomery	1647
John Christy.....	1665
Dr. Joel Sexton	1687
Paul Smith.....	1735
Annie Ruth Smith	1742
Cynthia Harrison	1744
State Rests.....	1751

Defense Witnesses

Sheila Mazeek	1789
Michelle McLauren (<i>in camera</i>)	1804
Allen Paavel (<i>in camera</i>).....	1813
Rebecca Dixon (<i>in camera</i>).....	1817
John Purvis	1830
Nathanial Sutton	1834
Marshall Jeffcoat	1842
Ben Killian	1852
Valerie Whitaker.....	1863
Lucius Martin.....	1870
Robert Roth	1873
Fishmend Sanders, Jr.	1875
Gloria Bell	1889
Johnny Buncumb	1892
Albert Mack.....	1897
Sharon Adcox	1901
Timothy Clark	1910
Candace Craggs.....	1913
Roger Stewart.....	1920
Joyce Perry	1921
Bryant Fuller.....	1926
Canada Knotts	1928
Andrew Jeffcoat.....	1929
David Martin	1935
Bobby Johnson, Jr.....	1938
Kenneth Tager	1961
Byron Collins.....	1974

James Aiken	1981
Robert Novinger	2016
James Brown	2019
Gina Dibble.....	2025
Defense Rests	2036
 Closing Argument by State.....	 2053
Closing Argument by Defense Counsel.....	2082
Closing Argument by Defendant	2101
Jury Charge.....	2106
Note from Jury	2142
Verdict	2148
 Hearing on Motion for a New Trial	 2161
 Partial Transcript of State’s Closing Argument	 2215
 Motion for New Trial.....	 2363
 State’s Response to Motion for New Trial	 2381
 Order Denying Motion for New Trial	 2407
 Final Brief of Appellant	 2455
 Final Brief of Respondent	 2504
 Final Reply Brief of Appellant	 2562
 Opinion of South Carolina Supreme Court	 2573
 Petition for Writ of Certiorari	 2588
 Brief in Opposition to Petition for Writ of Certiorari	 2653
 Letter Denial of Petition for Writ of Certiorari.....	 2703
 Application for Post Conviction Relief.....	 2704
 Return to Application for Post Conviction Relief.....	 2712
 Amended Return to Application for Post Conviction Relief	 2763
 First Amended Application for Post Conviction Relief.....	 2818

Second Amended Application for Post Conviction Relief	2825
Return to Second Amended Application for Post Conviction Relief.....	2832
Notice of Filing of Affidavits	2943
Respondent's Supplemental Response to Ground 11(b)	2947
Notice of Filing of Affidavit.....	2957
Applicant's Trial Brief.....	2962
Transcript of Evidentiary Hearing, May 27, 2008	2987
<u>Witnesses</u>	
Adam Humphrey	2992
H. Wayne Floyd.....	3008
Transcript of Evidentiary Hearing, July 11, 2008	3053
<u>Witnesses</u>	
Robert Dudek	3058
Hervy Young	3074
<u>Exhibits</u>	
App. 1: Notes of Robert Dudek	3109
Transcript of Post Hearing Arguments, February 17, 2009.....	3110
Applicant's Post-Hearing Memorandum	3161
Respondent's Proposed Order	3205
Respondent's Amended Proposed Order	3362
Applicant's Proposed Order	3517
Order Denying Relief, April 3, 2009	3550
Applicant's Motion to Alter or Amend the Judgment	3707
Respondent's Return to Motion to Alter or Amend.....	3718

Respondent's Proposed Order on Applicant's Motion to Alter or Amend Judgment	3732
Letter from Applicant's Counsel to PCR Judge	3748
Amended Order Denying Relief, October 1, 2009	3750
Order Denying Applicant's Motion to Alter or Amend Judgment, October 1, 2009	3905
Jury Strike List from First Trial, October 9, 1995	3917
Solicitor's Opening Statement in First Trial.....	3919
Testimony of Shannon Gilbert in First Trial	3923
Solicitor's Closing Argument in First Trial.....	3937

1 professional career, I have developed as well as implemented
2 as well as managed what is known as classification systems.
3 And to a layman, what that means is putting the right inmate
4 in the right place with the proper supervision and guidance
5 and security to reduce to the lowest level of probability of
6 risk of harm to the staff, inmates as well as the general
7 community.

8 MR. YOUNG: If it please the Court, we would move to
9 qualify Mr. Aiken as an expert in the field of corrections in
10 general and the predictability of inmate management?

11 MR. MYERS: No objection.

12 THE COURT: Without objection.

13 Ladies and gentlemen, again, this witness is
14 qualified to testify as an expert because, if you'll recall,
15 earlier we told you that he's qualified because of his
16 background, training, experience and education in this area.
17 He is allowed to give opinions in this area. Remember, you
18 decide how much weight to give to the opinion.

19 All right. Go ahead, Counsel.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Yes, sir.

22 BY MR. YOUNG:

23 Q. Mr. Aiken, do you know Johnny Bennett personally?

24 A. No, I do not.

25 Q. Have you ever met Johnny Bennett?

1 A. No, I have not.

2 Q. Have you ever consulted with him in any way?

3 A. Not to my knowledge.

4 Q. Tell this jury how you became involved in this case.

5 A. I became involved in this case as a contact from
6 counsel for the defense and asked to give an expert opinion
7 based on the information that they provided me and based on
8 the years of experience that I've had in classifying and
9 evaluating systems as well as thousands of inmates.

10 Q. Tell this jury whether or not you are being
11 compensated and if so, how much?

12 A. Yes, I receive fee for services. I stand corrected,
13 but I think it's \$125 dollars an hour, if I'm not mistaken.

14 Q. Were you given records to review in relation to this
15 case?

16 A. Yes, concerning Mr. Bennett, that is correct, sir.

17 Q. Would those records that you reviewed included
18 records relating to incidents that occurred at the Lexington
19 County Detention Center?

20 A. Yes, sir, that is correct.

21 Q. Would they also include records relating to
22 incidents at the South Carolina Department of Corrections?

23 A. Yes, sir, that is correct.

24 Q. Would those records include information regarding
25 Mr. Bennett's school experiences?

1 A. Yes, sir.

2 Q. Would those records include information regarding
3 his familyhood or his family structure?

4 A. Yes, partial records of that. Yes, sir, social
5 history as I call it.

6 Q. In reviewing these records -- well, let me go back.
7 Explain to this jury the purpose and the objectives of
8 correctional facilities.

9 A. The primary function of correctional facilities is
10 to protect the public. And that public is other inmates,
11 staff, as well as the general community. The purpose of it is
12 to insure that there is a safe secure environment for
13 individuals for the protection of the people that I just
14 shared, as well as to provide individuals opportunities to
15 better themselves if they want to obtain that opportunity.

16 Q. The Department of Corrections -- well, have you in
17 your profession kept up with developments at the Department of
18 Corrections or correctional facilities?

19 A. In South Carolina?

20 Q. Yes, sir.

21 A. Yes, sir. I do that basically through the National
22 Academy of Corrections as well as having informal contacts. I
23 think that I have taught at lease two wardens within the last
24 six months, wardens of major facilities in South Carolina in
25 relationship to the operating of the facilities, temporary

1 trends as well as -- one of the courses that I teach is
2 teaching wardens how to be wardens and how to be better
3 wardens, and I provided that, as well as managing the
4 difficult or hard to manage inmate in a correctional
5 environment.

6 Q. Now, by saying that you keep up with the
7 developments in the Department of Corrections, you're not
8 testifying today that if there was a change last week or two
9 weeks ago that you already know about it?

10 A. No. I'm saying that I look at trends. I look at
11 not only South Carolina but a number of jurisdictions
12 throughout the United States as well as in other countries to
13 see what are the merging issues, what are the actual issues,
14 what are the important things that we have to look at in order
15 to continuously improve the level of security, treatment as
16 well as to insure, as I said, public protection.

17 Q. I asked you to review records and give an opinion
18 relating to the predictability of Mr. Bennett being managed
19 and controlled by the Department of Corrections, correct?

20 A. That is correct, sir.

21 Q. In reviewing these records, explain to the jury what
22 are the things that you are looking for in order to make your
23 opinion.

24 A. There are a number of issues that I look at. And
25 those issues include age, the length of time a person's been

1 in prison or in a confinement area, the type of behavior in
2 the beginning, in the middle and later on. I look at a
3 person's relationship with other inmates as well as staff. I
4 look at major incidents as well as minor incidents, and I can
5 explain that. I assess this individual in relationship to me
6 being able to send my staff into that facility with a logical
7 expectation that they come out the way they went in. And the
8 same thing for inmate population.

9 And when I make those decisions, I sign my name to
10 them because I have to live with those decisions. And they
11 include a person's involvement in contraband, a person's
12 involvement in severability of that in relationship to
13 conflict with other people. And those are normal things, so
14 to speak, in a correctional environment.

15 A correctional environment not a normal environment.
16 It's not a normal environment in relationship to what people
17 encounter in the community. It's a place where people are
18 confined to protect the community and people that are there
19 are not necessarily always nice people. So I look at the
20 agency and their ability to manage that population as well as
21 the type of behavior that person demonstrates in that
22 particular environment.

23 Q. In assessing the Department of Corrections' ability
24 to manage and control an inmate, what things do you consider
25 from the perspective of the Department of Corrections?

1 A. I question and evaluate do they have the proper
2 design and facilities. I question and evaluate do they have
3 proper staff and the type of staff and the equipment. I
4 question do they have the appropriate laws that they can
5 actually have authorization to enforce.

6 I look at issues in relationship to their ability to
7 manage the type of population that's coming in, whether it's a
8 long-term population or short-term population, a violent
9 population, and whether that violence took place in the
10 community or whether it took place in the correctional
11 environment.

12 And the expertise of the people that are working
13 there. Do they have the proper equipment, do they have the
14 proper training, do they have the proper structures, do they
15 have the proper practices, do they have and continue to grow
16 and continue to improve on those practices? Those are some of
17 the ingredients that I look at when I assess a correctional
18 environment in relationship to housing and confining people
19 staying there.

20 Q. In making your assessment of the South Carolina
21 Department of Corrections and with you stand informed of the
22 developments at the Department of Corrections, have you formed
23 an opinion as to whether or not the Department of Corrections
24 in South Carolina has the capabilities of managing and
25 controlling inmates?

1 A. Yes, I have formulated an opinion in regards to
2 this, yes, sir.

3 Q. And what is that opinion regarding the capabilities
4 of the Department of Corrections?

5 A. Not only is the South Carolina Department of
6 Corrections very capable in relationship to the things that I
7 shared with you, the Department of Corrections of South
8 Carolina is a national leader in the relationship of managing
9 and controlling inmate population for the protection of the
10 community, staff, as well as other inmates.

11 They have the policies, they have the equipment,
12 they have the expertise and they have the authority to even
13 use lethal force if required in order to maintain that level
14 of control and manageability. And I have no hesitation,
15 professionally, to whether or not they would use that if
16 necessary.

17 Q. Based on that opinion as to the capabilities of the
18 South Carolina Department of Corrections, what type of inmates
19 do you believe the Department of Corrections is able to
20 control and manage?

21 A. They can manage and control the inmate population
22 that's least offensive to the correctional environment as well
23 as the community to the most violent predatorial, dangerous
24 individual.

25 Q. I want to go back to when you were talking about

1 your reviewing of records and your assessments. You stated
2 that you're reviewing this to make a decision that you would
3 have to put your name behind. Any decisions that are made as
4 far as the South Carolina Department of Corrections, certainly
5 your signature would not be on them?

6 A. That's correct, sir.

7 Q. You stated -- well, do you review these records in
8 the view as if you were the warden?

9 A. Yes, sir. I review it as if I was the warden of
10 that facility, in which I've been in that position, and
11 whether or not this individual can be placed there and
12 adequately managed at this facility.

13 Q. Now, when we talk about major and minor incidents,
14 as you mentioned earlier, explain to the jury what those are
15 or what you view those are in your assessments?

16 A. You have to look at not necessarily the title, but
17 you have to evaluate what we call the nuances. You go a level
18 below that. For example, possession of contraband can be a
19 piece of pipe. That is contraband and it's a major violation,
20 but it's more or less, should I say, severe of having a gun.
21 I mean, a pipe can be used as a weapon, but so can a gun. And
22 you have to be able to look between the two.

23 For example, another example is like creating a
24 disturbance. In a correctional environment, creating a
25 disturbance to a layperson may be creating a riot. And, yes,

1 it can be. But it can also mean talking back to an officer
2 with other inmates present, that's creating a disturbance.
3 And so what I do as a warden and what I've been doing for over
4 25, 28 years is looking at the areas below it. Making sure
5 that I fully understand the nuances that are involved, the
6 issues that are involved and look at it in the most objective
7 manner in relationship to the protection of the public.

8 Q. Once you formulated your opinions regarding the
9 capabilities of the South Carolina Department of Corrections,
10 did you then make an assessment as for as the -- as far as
11 Mr. Bennett is concerned?

12 A. Yes, I did.

13 Q. And what type of assessment were you making?

14 A. Assessment of his adaptability and whether the
15 Department of Corrections is capable of managing and securing
16 a person with the type of criminal history and behavior
17 patterns that he has demonstrated, not only in the community,
18 but within a correctional environment.

19 Q. And in conducting these assessments, what types of
20 things are you looking for?

21 A. Well, I look at the disciplinary history or
22 possession of contraband or talking back to the officers or
23 suicidal gestures. But I also look at the other issues that
24 are not in the record. And in this particular case, for
25 example, I mean, I found no information that he tried to take

1 hostages. I found no information that he had gang
2 involvement. I found no information that he was a controller
3 of facility operations.

4 And what I mean by that is that in the incidents
5 that I looked at, I found nothing to indicate that he had
6 control over other people in relationship to whether they
7 lived or died. And, unfortunately, in many jurisdictions,
8 internationally especially, inmates have that control. And I
9 found that that was not the case with him. I found that he
10 can be controlled within the proper environment.

11 Q. Now, so what you're telling us is that in making
12 your assessment, you didn't just look at what the record
13 showed as far as disciplinary things, correct?

14 A. That is correct, sir.

15 Q. But that record there indicated things that didn't
16 exist?

17 A. I don't understand the question, sir.

18 Q. You also looked for what the record didn't show?

19 A. That is correct. And that's where the 28 years of
20 experience comes in. Where you look at -- after looking at
21 thousands and thousands of records and developing systems that
22 create those records, you begin to look at what's not there as
23 well as what is there.

24 Q. Now, in making your assessment, are you required a
25 combination of those two to form your opinion?

1 A. That's correct, sir. I'd look at the totality of
2 the records as provided to me by counsel as well as to compare
3 that with my expertise, yes, sir.

4 Q. Well, why don't you just look at what the record
5 shows as opposed to the stuff that the record doesn't show?

6 A. I have found that when you do that, the probability
7 of making mistakes is heightened. That the probability of
8 actually being able to place the person in the right place
9 with the right supervision with the right type of confinement
10 is fairly diminished. It's just like taking your knowledge
11 and taking your understanding and taking your experience and
12 putting it aside and then just reading what was written.

13 I look at how it was written, when it was written.
14 I look at the relationships between this incident and that
15 incident. I look at what's not there based on some records
16 that I've read where things were there and use that also in
17 formulating an expert opinion.

18 Q. So you cannot make an accurate assessment or make an
19 accurate opinion without looking at all of that?

20 A. That is correct, sir.

21 Q. I want to look at Mr. Bennett's -- I show you what
22 is marked as State's Exhibit 12. We have here the start of
23 Lexington County Detention Center information. Going through
24 each of these incidents, tell the jury what -- how you viewed
25 each incidence as to whether it was a major or minor incident

1 as you view them in your assessment?

2 A. And, again, we need to rephrase or get a better
3 definition of what a major and a minor incident is. For
4 example, let's go back a little bit. He was back in the
5 Lexington County jail on December the 2nd, in 1990. And 18
6 days later, he has possession of contraband of a metal shank.
7 And a shank is a piece of metal that can be considered to be a
8 knife or weapon, that has been retrofitted to be that.

9 Q. Now, let me ask you something about that since you
10 mentioned it. A metal shank is something that can be used
11 against somebody?

12 A. That's only part of it, and that's what I was
13 leading to. You look at it, at the time a person has just
14 come into the jail and 18 days later he has a metal shank.
15 The question I ask, is that metal shank used to attack other
16 people or is it for protection.

17 And what -- the questions I ask is only 18 days into
18 this incarceration period, that would tend to give me the
19 credence that it is used for protection and not as a predator,
20 because of the length of time between coming in and actually
21 having the shank.

22 Or he could be -- another example, could be he's
23 holding it for somebody else, that he's being intimidated by
24 other inmates. You hold my weapon for me, and if you don't
25 hold my weapon something can happen to you. Those issues have

1 to be evaluated. And often times, you don't see that written
2 in the record.

3 Q. Well, Mr. Aiken, Johnny Bennett is a big guy. It's
4 safe to say that he may not be intimidated by anybody, right?

5 A. Well, stature has an impact, but also personality
6 has an impact on it, also. I have seen incidents in a
7 correctional environment where the inmate picks the biggest
8 guy. So if I pick on the biggest guy, nobody else is going to
9 bother me. And you have to evaluate each particular case in
10 relationship to that.

11 Q. Okay. In making your assessment, did you go through
12 and determine or make an opinion as to whether the incidents
13 are major or minor incidents?

14 A. In the context of what I just shared with you, not
15 necessarily in the contents of what's in a policy manual --

16 Q. Right.

17 A. -- because in a policy manual, you may see
18 possession of contraband is a major violation. And, yes,
19 contraband is a major violation technically speaking. But
20 looking at it under that, was it really a major incident that
21 jeopardized the security and safety of the people that are
22 involved.

23 Q. Based on your assessment of Johnny Bennett's
24 records, were you able to formulate an opinion as to his
25 ability to adapt to prison life?

1 A. Yes, I did, sir.

2 Q. What is that opinion?

3 A. My opinion is that he has a very high probability of
4 favorably adapting to the proper level of security, custody
5 and management within a correctional environment within the
6 South Carolina Department of Corrections.

7 Q. And did you formulate an opinion as to the
8 predictability of him being able to be managed by the
9 Department of Corrections?

10 A. Yes, I did, sir.

11 Q. What is that opinion?

12 A. Predictability of this individual is fairly high
13 that he would make a favorable adjustment. And I can share
14 with you why I have that opinion.

15 Q. Explain to us.

16 A. Well, you can look at the disciplinary records here,
17 the incidents that are taking place. When you started looking
18 at it in this totality, you will see at the beginning that
19 there was a high incident rate, even though we didn't get the
20 hostage situation, we didn't get the riots, we didn't get the
21 mass escape, we didn't get the escape by force, he didn't go
22 into what I call the major, major incidents, but there was a
23 high increase of incidents. And then you look at 1995 and on
24 to now, you see a decline, and this decline is fairly
25 predictable.

1 No, I cannot actually positively predict the future,
2 but what I'm saying is that we have the expertise, we have the
3 system, we have the knowledge to better predict human
4 behavior. And you will see at the beginning there was a high
5 and then it begins to level off. And age is a major factor as
6 I stated before. And that indicates to me very clearly that
7 this individual -- and try to avoid colloquial terms, but
8 chilled out, burned-out-type individual that can adjust very
9 well to a regimented, structured, very high secure
10 environments that you have within a correctional facility.

11 Q. Now, you mentioned that age was very important. How
12 did age factor into it?

13 A. Well, the younger you are, the more impulsive you
14 are, the more immature that you are, the more you do things
15 without thinking about it, the more -- I mean, that's -- you
16 have to understand they are human beings. And the older you
17 get, you don't do the things that you do when you were
18 younger. And the same is true within the correctional
19 environment, that the older they get, the less the probability
20 is of those individuals inflicting violence upon other persons
21 or being involved in the negative behaviors that are endanger
22 staff and other people within the correctional environment, as
23 well as the community. And I found that true, to be very true
24 in my 28 years experience in dealing with the thousands of
25 people that I've dealt with.

1 Q. In what ways -- well, let me ask you this. A lot of
2 his records while in correctional facilities seems to indicate
3 a lack of respect for authority, a particular attitude, how
4 did you consider attitude and motivation in making your
5 assessment?

6 A. Well, again, we get back to the type of things that
7 we see; clogging the commode, throwing food trays and being
8 sanctioned for that, extended on confinement, by which I think
9 is very appropriate. Refusing to follow orders, fighting
10 another inmate, being involved when he was at the youth
11 facility within the South Carolina Department of Corrections,
12 which is a youth facility, which is a minimum security
13 facility. Being involved in an altercation there. Those type
14 of things are the things that I look at, but I don't see where
15 he's taking hostages, I don't see where he escaped by force, I
16 don't see where he stabbed an officer. You know, those are
17 the things that I look at.

18 Q. Now, you were talking about this increase or this
19 decline in incidents. You stated that from '95 until today
20 there were no disciplinaries?

21 A. I don't recall seeing any, that's correct.

22 Q. Now, you are aware of an incident that he engaged in
23 sexual activities while incarcerated?

24 A. And there's a difference between an incident and a
25 disciplinary violation, and they are two major differences in

1 there.

2 Q. Explain that to the jury.

3 A. Well, a disciplinary violation is when a person,
4 such as Mr. Bennett, committed it and facilitated it and made
5 it happen. And an incident is where he was involved, but
6 there are other responsible authorities. Case in question,
7 where staff allowed the sexual contact to take place. And as
8 a result, I found no disciplinary record of Mr. Bennett, you
9 know, per se was the sole corporate of that happening.

10 Q. Now, Mr. Aiken, you've been a warden, correct?

11 A. Yes, I have.

12 Q. A number of facilities?

13 A. Yes, I have.

14 Q. Each inmate is given the rules when they come in,
15 correct?

16 A. They receive a rule book, yes, sir.

17 Q. And they are expected to know what the rules are?

18 A. Yes, sir.

19 Q. Having sex with a visitor while incarcerated is not
20 one of the rules that they are allowed to do, is it?

21 A. No, they're not.

22 Q. In this incident, Mr. Bennett would have broken a
23 rule?

24 A. Yes. But you again have to go back to the initial
25 points that I was making. You have to look at how was -- how

1 did that take place, you know, what were the factors that were
2 involved with this incident taking place.

3 Q. So what you're telling this jury is that in making
4 your assessment on adaptability and control or management of
5 an inmate that you're looking at things that that inmate would
6 have initiated or started?

7 A. Well, that, too, but where and how and under what
8 circumstance it took place.

9 Q. Now, is prior criminal history one of the factors
10 that you considered in your assessment?

11 A. Yes, sir. As I stated, community adjustment as well
12 as institutional behavior.

13 Q. And to the best of your knowledge or based on your
14 assessment, did Mr. Bennett have any significant prior
15 criminal history?

16 A. In comparison to the many cases that I have
17 evaluated, the answer to that is no.

18 Q. And would you agree with me that the only criminal
19 history that he had at the time that he was incarcerated for
20 this incident was the incident that he was at Aiken Youth
21 Offender Program for?

22 A. Are you talking about arrest history now, community
23 arrest history?

24 Q. Yes, his criminal history. Was that the only
25 incident you were able to find out about that dealt with the

1 Pizza Hut incident?

2 A. Yeah, the Pizza Hut, not Aiken Youth Correctional
3 Center. It was an assault of another person in which he
4 received what they call a YOA sentence or a one to six
5 indeterminate sentence for that. I could not find any other,
6 based on the records, criminal community-based behavior.

7 Q. In your opinion, has Mr. Bennett made an adjustment
8 to jail or prison life?

9 A. From the indications, as I stated at the beginning
10 and now, that's definitely a trend that I would see that his
11 adjustment is certainly, certainly much better than what it
12 was and is clearly an indicator to me that this will continue
13 based on his age and gain level of maturity, yes, sir. As
14 well as the expertise of the Department of Corrections.

15 Q. And, lastly, I ask you, have you formulated an
16 opinion as to whether or not Mr. Bennett could be housed,
17 managed and secured in the South Carolina Department of
18 Corrections?

19 A. Yes, I have.

20 Q. And tell the jury what that opinion is.

21 A. This individual can be housed, secured, managed in
22 the South Carolina Department of Corrections without causing
23 an unusual risk of harm to the staff, other inmates, as well
24 as the general community.

25 Q. Now, Mr. Aiken, explain to this jury why you formed

1 that opinion.

2 A. I formed that opinion based on reviewing the facts
3 as I shared with the jury previously as well as my years of
4 expertise in this particular area of making determinations and
5 making decisions as it relates to the confinement,
6 supervision, custody of inmates to protect the public, to
7 include staff, other inmates as well as the community.

8 MR. YOUNG: Thank you, Mr. Aiken. Please answer any
9 questions the State may have.

10 THE COURT: How long do you anticipate the cross?

11 MR. MYERS: Not long.

12 THE COURT: Okay.

13 CROSS-EXAMINATION

14 BY MR. MYERS:

15 Q. You looked at all his records, Mr. Aiken?

16 A. Yes, I did, sir, that was provided to me.

17 Q. And you saw his booking photograph, of course,
18 that's what he looked like when he was booked on this crime?

19 A. I don't remember a photograph, but I would assume
20 that this is this same individual, sir.

21 Q. On the booking sheet?

22 A. On the booking sheet, yes.

23 MR. MYERS: We offer this into evidence, Your Honor.

24 THE COURT: Any objection?

25 MR. YOUNG: No objection, Your Honor.

1 THE COURT: All right. Without objections.

2 (WHEREUPON, State's Exhibit No. 90, a Booking
3 Photograph, was marked and admitted into evidence.)

4 BY MR. MYERS:

5 Q. One of the last things you said was about the Pizza
6 Hut incident?

7 A. That's correct, sir.

8 Q. And did that victim require hospitalization?

9 A. To the best of my knowledge, I think he did, yes,
10 sir.

11 Q. Was it one victim?

12 A. I think it was more than one victim.

13 Q. Did both of them require hospitalization?

14 A. I would think so. Based on my recollection, I think
15 -- yes, he left them laying on the ground, if I'm not
16 mistaken.

17 Q. Was it a violent attack?

18 A. I would consider that to be violent, yes, sir.

19 Q. Have you talked with those two young men?

20 A. No, sir.

21 Q. And you never talked with the defendant, Johnny
22 Bennett?

23 A. No, sir. I approached this as a warden and I don't
24 necessarily interview inmates. I'd rather look at the
25 official records.

1 Q. You ever talked with Ms. Mazeek, the correctional
2 officer?

3 A. No, I have not talked to her about this particular
4 issue.

5 Q. You ever talk with Adrian Bost, correctional
6 officer?

7 A. No, I have not talked to Mr. Bost, I've just read
8 the documentation that's contained.

9 Q. You ever talk with Ms. McChesney, correctional
10 officer?

11 A. No, I have not, sir.

12 Q. Have you ever talked with Captain Sanders, a
13 correctional officer?

14 A. No, I have not, sir.

15 Q. Have you ever talked with those guards that let him
16 have sex with Judie Hardee?

17 A. No, I did not, sir.

18 Q. What correctional officers did you talk with?

19 A. I didn't talk to any correctional officers. Again,
20 I referred to the official records in which persons that were
21 involved signed their names to documents as well as submitted
22 documents.

23 Q. So if you didn't talk with anyone, you didn't talk
24 to the defendant, you really don't know what kind of person he
25 is, do you?

1 A. No more than what the official record reflects, and
2 that's what I make my decisions on, sir.

3 Q. If it's not written down, you don't know about it?

4 A. That is correct, sir.

5 Q. And, of course, you said the older you get, the
6 calmer you get. You said he's chilled out, burned out or
7 leveled off. He could be getting ready to come back into this
8 courtroom with a jury, too, couldn't he?

9 A. I didn't understand the last part of it.

10 Q. Well, he could be acting nice because he knows he's
11 coming back to court to face a jury on a life or death
12 situation, his life or death; isn't that right?

13 A. That is correct, sir. And I look at the duration of
14 that. I mean, you can play the game so long. When you have a
15 history like this and then you have a five year relatively
16 uneventful history, how long can you fake it? And in a
17 correctional environment, it's very difficult to fake it very
18 long because you've got the pressure of the staff watching you
19 every five seconds and you've got the pressure of very, very
20 disruptive inmates around you, too. So I take that into
21 consideration, also.

22 Q. But if it's not written down and you haven't talked
23 with anybody, you don't know what his activities are; isn't
24 that right?

25 A. I know what his official activities are and I think

1 looking at his record, you will see that it's well documented,
2 not only at the Richland County detention facility, but also
3 with the Department of Corrections.

4 Q. Where was he in Richland County Jail?

5 A. I'm sorry. I meant to say Lexington County --

6 Q. I thought you said Richland County?

7 A. Lexington County, sir, I'm sorry.

8 Q. That's all right. And if he had written down
9 something about he wanted to make sure his file was in order
10 because he was coming back to court, he knew it would be used
11 against him, that would be an indication he was getting ready
12 for court, wouldn't it?

13 A. I wouldn't doubt that, sir. And --

14 Q. Thank you.

15 A. -- as I stated to you before, I've seen so many
16 inmates saying I want to be good because I want to come back
17 to court and then hit an officer in the head.

18 Q. Sure. And you said your fee was \$125 an hour?

19 A. That's correct, sir.

20 Q. Or a thousand dollars day?

21 A. Eight hours a day would make it one thousand, that's
22 correct, sir.

23 Q. For a minimum of five days?

24 A. Usually, that is correct, sir.

25 Q. Plus, out-of-pocket expenses?

1 A. That is correct, sir.

2 Q. Plus travel, plus meals, plus lodging?

3 A. That is correct, sir.

4 MR. MYERS: No further questions.

5 A. Thank you, sir.

6 THE COURT: Any redirect?

7 MR. YOUNG: Just a few questions, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. YOUNG:

10 Q. Mr. Aiken, in order for you to formulate your
11 opinion and make your assessment, is it required that you
12 interview anyone?

13 A. No, sir.

14 Q. You based your opinions based on your experience,
15 based on your education and based on the record?

16 A. That is correct. The official record and not
17 necessarily the hearsay.

18 Q. And, again, you've been a warden, you understand how
19 the prison system works, correct?

20 A. Yes, sir.

21 Q. If there would have been any incidents or any
22 disciplinary actions on behalf of Johnny Bennett since 1995,
23 it would have been written up, wouldn't it?

24 A. In all probability, yes, sir.

25 Q. In fact, you teach and train wardens --

1 MR. MYERS: I didn't go into his background of
2 teaching and training. That's not proper on redirect.

3 THE COURT: I'm going to allow it. He, again, is
4 going into use of the records, as I understand.

5 Go ahead.

6 BY MR. YOUNG:

7 Q. In fact, you teach and train wardens to instruct
8 their correction officers to write up incidents, correct?

9 A. That is correct, sir, and to discipline them if they
10 don't.

11 MR. YOUNG: Thank you, that's all the questions I
12 have.

13 RECROSS-EXAMINATION

14 BY MR. MYERS:

15 Q. But you don't know the relationship between Johnny
16 Bennett and the correctional officers who have been around him
17 for the last two years, say, since June of '97, because you
18 haven't talked with them; isn't that correct?

19 A. To try to answer that question, the answer is yes, I
20 do know, because when I make decisions it's in relationship to
21 the official record. And as you would review the record, it
22 is well documented as to everything that he has done outside
23 of the normal course of operations of a facility.

24 Q. Well, tell me the relationship between him and
25 Officer Robert Roth?

1 A. And what I'm saying to you, sir --

2 Q. Just tell me the relationship. You can answer my
3 question first and then you can talk all you want to. What's
4 the relationship between him and Officer Robert Roth?

5 A. Officer Robert Roth, as you state, is a correctional
6 officer that has the general supervision over this particular
7 individual while being confined in whatever correction
8 facility he is in the capacity that you just stated.

9 Q. What is their relationship?

10 A. The relationship is one in which he is the prisoner
11 and that individual is the employee to insure that that person
12 obeys the rules and regulations and insures that if there is
13 something out of the ordinary, it is documented in his record.

14 Q. Show me anything you have in your files written by
15 Robert Roth.

16 A. I don't recall anything, sir.

17 Q. What's the relationship between him and Captain
18 Sanders?

19 A. The same goes for Captain Sanders as I just stated
20 to you with Roth.

21 Q. Show me anything in your files that you have written
22 by Captain Sanders.

23 A. I don't recall anything in the record, sir.

24 Q. And is that the same for Gloria Bell, Sergeant
25 Buncumb, Albert Mack, Sergeant Adcox, Lieutenant Clark,

1 Sergeant Craggs, Officer Stewart, Sergeant Perry, Brian Folk,
2 give me what you've got for those folks in writing.

3 A. I don't see anything in the official record, sir.

4 MR. MYERS: Thank you, nothing else.

5 THE COURT: Anything else?

6 FURTHER REDIRECT EXAMINATION

7 BY MR. YOUNG:

8 Q. What is Mr. Bennett's relationship to Captain Bost?

9 A. Captain Bost is the person, according to the
10 records, that provides management --

11 MR. MYERS: Now, this is re-redirect, and on my
12 recross I didn't mention Captain Bost of the Lexington County
13 Sheriff's Department. I mentioned the people from Lieber, so
14 that's certainly not --

15 THE COURT: I understand. It involved discussing
16 relationships, I'll let him do it.

17 Go ahead.

18 A. Do you mind repeating the question, sir?

19 Q. What is Mr. Bennett's relationship with Captain
20 Bost?

21 A. The same as I stated with the other individuals that
22 was shared, that this individual is responsible for the
23 safety, security and custody of this individual, and that
24 individual is an inmate.

25 Q. And what is the relationship of Johnny Bennett to

1 the correction officer, Johnny Ray?

2 A. The same as I just stated to you, sir.

3 MR. YOUNG: Thank you. I have no further questions.

4 THE COURT: Anything else, Mr. Myers?

5 MR. MYERS: No, sir.

6 THE COURT: You can step down. Thank you, sir.

7 THE WITNESS: Thank you so much. Am I excused, sir?

8 THE COURT: Yes, sir, you're free to go if you want
9 to.

10 THE WITNESS: Thank you very much, sir.

11 THE COURT: Might be a good time to take a break.

12 Why don't we just take a short break and give you a
13 chance to move around, as long as you don't talk about the
14 case.

15 (WHEREUPON, the jury leaves the courtroom at
16 approximately 9:36 a.m.)

17 THE COURT: All right. The jury is secured. We'll
18 take a short break.

19 MR. FLOYD: Your Honor, when we get a chance, can I
20 put something on the record?

21 THE COURT: Let's do it now. I'm sorry. Let's do
22 it now. You made a motion for a mistrial related to testimony
23 brought out by the Solicitor regarding a Ms. Hardee, I
24 believe.

25 MR. FLOYD: That's correct, Your Honor. I think I

1 made a motion for a dismissal for prosecutorial misconduct or
2 a mistrial. Your Honor, we have on several occasions during
3 this trial brought to the Court's attention by way of motion
4 our objection to the Solicitor's attempt to insert race into
5 this case with an all-white jury and a black defendant. On
6 those occasions, Your Honor has not granted us relief on the
7 -- generally, because the information came from the witnesses.

8 In this case, it was one of the most despicable
9 performances I've ever seen where a solicitor inserted race
10 into this case. Now, he tried to get the witness to admit
11 that Judie Hardee was white, that's why he asked him, did
12 Judie Hardee love him, who whose Judie Hardee. He wanted that
13 witness to say that was that white jailer that was friendly
14 with Johnny. He wanted the jury to find that out.

15 When he wouldn't tell him that, Mr. Myers then told
16 the jury, that's that blonde lady. So what's he telling the
17 jury? He's got a white lover. Now you can kill him. Now you
18 can take it out on him. Take the American flag down, put the
19 confederate flag back up there. He's got a blonde white
20 lover, kill him. Your Honor, that's despicable. I move for a
21 dismissal or a mistrial.

22 THE COURT: Mr. Myers?

23 MR. MYERS: He's nuts.

24 THE COURT: Now, let's not make any --

25 MR. MYERS: Well, he's attacking me, I can attack

1 him back.

2 THE COURT: Well, let's don't get personal about it.

3 MR. MYERS: Well, he got personal with me. But
4 beyond that, I didn't try to bring out anything. He was
5 trying to say which officer it was. The only thing I referred
6 to was blonde-headed. Let the record reflect that the black
7 female juror, Ms. Sands, had blonde hair when she was up there
8 and we were voir diring. It looked like a crew cut. Let the
9 record reflect that we put up some black females, I don't know
10 what color their hair was. Some of them had wigs on and
11 stuff. For him to make that accusation is asinine.

12 THE COURT: Anything else, Mr. Floyd?

13 MR. FLOYD: Your Honor, I ask Your Honor when he
14 said blonde, did white woman come into you mind? Did white
15 woman come into all those jurors' minds? Anybody in the
16 courtroom? Did anybody in the courtroom not think he was
17 telling them that was a white woman? I think it's clear and I
18 think the record will be clear on that.

19 THE COURT: All right. Counsel, I'm going to deny
20 the motion. Again, I grant that he may have made the comment
21 -- the witness -- actually, he was basically chatting with --
22 questioning the witness at the time and the witness sort of
23 started by saying he didn't know who she was and that sort of
24 thing. I think he referred to a big woman or something like
25 that. I understand that may have been the discussion, but I

1 can't pick -- and, you know, I don't -- maybe I'm just overly
2 naive, but I'll be honest, maybe it's just the way things are
3 these days, but when somebody says blonde, I don't necessarily
4 see a white woman. You know, that doesn't mean the jury's got
5 the same standards I have, but either way, I just don't see
6 that. I'm sorry.

7 MR. MYERS: I think of Dennis Rodman.

8 THE COURT: Well, I don't think of Dennis Rodman.

9 But either way, I'm going to deny the motion, Counsel.

10 MR. FLOYD: Thank you.

11 THE COURT: Let's take a short break.

12 (WHEREUPON, a short break was taken.)

13 THE COURT: Defense ready?

14 MR. FLOYD: The defense is ready, Your Honor.

15 THE COURT: State ready?

16 MR. MYERS: Yes, sir.

17 THE COURT: All right.

18 (WHEREUPON, the jury enters the courtroom at
19 approximately 10:15 a.m.)

20 THE COURT: All attorneys and parties are in the
21 courtroom and all jurors have returned.

22 Counsel?

23 MR. FLOYD: Thank you, Your Honor. Mr. Novinger.

24 ROBERT NOVINGER, after having been duly sworn,
25 testified as follows:

1 THE CLERK: Have a seat and state your name for the
2 record, please.

3 THE WITNESS: My name is Robert Novinger, Bob
4 Novinger.

5 DIRECT EXAMINATION

6 BY MR. FLOYD:

7 Q. Bob, where do you work now?

8 A. I'm an employee with R. L. Bryan, sales.

9 Q. And before that, where were you employed?

10 A. I was with the Lexington School District Four,
11 basketball, football, P. E.

12 Q. Were you a coach?

13 A. Yes.

14 Q. And a teacher?

15 A. Right.

16 Q. And how many years were you a coach?

17 A. 19 years. Seven years at Airport High School and 12
18 years at Swansea High School.

19 Q. And what years were you at Swansea?

20 A. '79 to '91.

21 Q. And at the time that you were coaching at Swansea,
22 did you have any contact with Johnny Bennett?

23 A. I knew Johnny. Johnny played for me, I can't recall
24 exactly what year, but it was around '86, between '85 and '90
25 in there somewhere. And also knew Johnny when he was over in

1 the intermediate school.

2 Q. And do you recall your first contact with Johnny?

3 A. Had Johnny in P. E. at the intermediate, and then
4 also at the Swansea High School.

5 Q. And --

6 A. I talked Johnny -- I talked him into coming out for
7 basketball.

8 Q. Can you tell the jury your relationship with Johnny.

9 A. Never had any problems with Johnny Bennett. I liked
10 Johnny. I think Johnny could have been a heck of a basketball
11 player. I knew the Bennett family, Ms. Bennett, Mr. Bennett.
12 The only disagreement I can really say I ever really had with
13 Johnny was in P. E. class, he told me one day he was going to
14 go get his dad -- I'm sure he remembers this, and I told him
15 to go get him because he is a gentleman we really needed to
16 talk. And he pretty much behaved well after that.

17 Q. So when you would tell Johnny things to do, would he
18 do them?

19 A. Oh, yeah. But I had a coach relationship with
20 Johnny.

21 Q. And did he actually play on the varsity for you?

22 A. Yes, he did.

23 Q. And had he had to improve his grades in order to
24 play, do you remember?

25 A. As I recall, I think he -- I think one year, he had

1 to get eligible by mid-term, I believe, something like that.
2 And he did that, got eligible, played the second half of the
3 season.

4 Q. And did he come out for the practices when he was
5 supposed to?

6 A. Oh, yeah, he came out to practice all year long when
7 he was not eligible to participate in the games, but he could
8 practice.

9 Q. And did he show respect for his teammates, too?

10 A. Yeah.

11 Q. Did he ever get in any trouble with other teams with
12 him?

13 A. No.

14 Q. And when he played for you, did he basically give
15 his all for you?

16 A. Oh, yeah, yeah.

17 Q. And was he ever a disruptive force to the team?

18 A. No. No. Even when -- like I said, he would -- even
19 when he wasn't playing, he would be there in his street
20 clothes on the bench with us. Then when he became eligible,
21 he became like a sixth man, came in, and then he started some,
22 also. But he was not a troublemaker, no, not in that context.

23 Q. And you had a -- basically, you knew him and had a
24 relationship with him for about two years during that time? I
25 mean, both when he played for you and --

1 A. Yeah, close, that was a close relationship for about
2 two years.

3 Q. And during that two years, he never gave you any
4 trouble?

5 A. No, he didn't.

6 MR. FLOYD: Thank you, Coach, answer any questions
7 that they have.

8 MR. MYERS: No questions.

9 THE COURT: You can step down, and you're free to go
10 if you'd like.

11 MR. YOUNG: We call James Brown.

12 JAMES A. BROWN, after having been duly sworn,
13 testified as follows:

14 THE CLERK: Have a seat and state your name for the
15 record.

16 THE WITNESS: James A. Brown.

17 DIRECT EXAMINATION

18 BY MR. YOUNG:

19 Q. Mr. Brown, where are you currently employed?

20 A. Right now at Macdougall Correctional Institution.

21 Q. And what position do you hold there?

22 A. I'm a chaplain.

23 Q. Prior to that, where were you employed?

24 A. Lieber Correctional Institution.

25 Q. In what capacity?

1 A. Chaplain.

2 Q. Do you know Johnny Bennett?

3 A. Yes, I do.

4 Q. And how do you know him?

5 A. I know him through my two years that I was with him.
6 I was primarily a chaplain to the death row inmates.

7 Q. Did they keep inmates who were awaiting trial in
8 that area, also?

9 A. Yes.

10 Q. How long have you known Mr. Bennett?

11 A. Two years, plus.

12 Q. During the time that you have known Mr. Bennett,
13 what type of activities has he been involved in, to the best
14 of your knowledge?

15 A. Well, church activities. The first year I started a
16 church called Church of Tomorrow on death row. After one
17 year, Johnny got involved. He was involved in my church
18 activities. He was involved in the Bible studies that we held
19 there on death row.

20 But after one year with the Church of Tomorrow, he
21 was growing and maturing in his walk and understanding of
22 theology, and those principles were being applied in his daily
23 walk. So as I watched him and observed him for two years I
24 felt that he needed to take more of a leadership role with the
25 church, and that way he can relate very well with the young

1 men who were there. So it was not a decision I made very
2 easily.

3 Q. Did Johnny assume a leadership position?

4 A. Yes, he did.

5 Q. And what types of responsibilities came with that?

6 A. Well, the first responsibility, that in my absence
7 he would operate the church. He would do the moderation. We
8 would open the church up. We would pray. He would lead the
9 church in hymns and etcetera. He also would organize who
10 would be singing, who would not be singing. He would
11 introduce the guest speakers we would have there. He would do
12 the closing part of our ceremony, like the benediction, as
13 well.

14 Q. Now, did you have visiting ministers coming in at
15 times?

16 A. Yes, I did.

17 Q. And was it the policy of the institution not to
18 allow the services to be conducted unless a pastor was
19 present?

20 A. Absolutely.

21 Q. In performing those duties, how did Johnny do?

22 A. Exceedingly well. At first, initially, he was a
23 little apprehensive, had some reservation in terms of
24 following the order of what we call the liturgy, but he grew
25 into his responsibility, as we all do.

1 Q. During the time -- he was under your guidance or
2 supervision at that time?

3 A. Yes, he was.

4 Q. Did you have an opportunity to give Mr. Bennett some
5 orders or some instructions as to what he needed to do?

6 A. I worked very closely with him, yes. To answer your
7 question specifically, yes, I did. The instruction was --
8 especially when he was managing the church, operating the
9 church in my absence. But he also, in the Bible studies as
10 well. I taught a class on death row called anger management
11 and conflict resolution, he was very actively corresponding
12 that class with me.

13 Q. And when you gave him an order to do something, how
14 did he respond?

15 A. Respectfully.

16 Q. Did he respond in an aggressive manner in any way?

17 A. No.

18 Q. Has Mr. Bennett ever been disrespectful to you?

19 A. No.

20 Q. Has he ever been violent towards you?

21 A. No.

22 Q. When you first met Mr. Bennett, what type of person
23 was he when you first met him?

24 A. When I first met Johnny, he had some reservation. I
25 would say that his approach toward me would have been somewhat

1 reserved. As a boxer analogy, would be feeling me out, seeing
2 whether I was really sincere in my effort, where was I coming
3 from.

4 And our relationship began to grow when he noticed
5 that I was -- I love the young men, and I have basically a
6 deep care for them because I was with them every day, as
7 opposed to once a week, going into the community, which is
8 required by policy. I was with them, basically, six and seven
9 hours a day.

10 Q. Then and today, how would you describe Johnny
11 Bennett?

12 A. A young man who has grown tremendously. He has
13 grown spiritually. He has grown emotionally. He is maturing.
14 If I like to add to that point, if I may.

15 Q. Go right ahead.

16 A. I have been praying for years for a best friend, a
17 male friend. And I used to wonder why God has not given me
18 one.

19 Q. You consider Johnny to be your best friend?

20 A. No, I don't consider, I know he is my best friend.

21 Q. Have you ever observed Johnny Bennett to be
22 disrespectful towards any of the correction officers there?

23 A. Not to my knowledge, and I'm usually with them six
24 and seven hours a day.

25 Q. Have you ever observed Mr. Bennett to be

1 disrespectful to any other inmates?

2 A. No, I have not.

3 Q. Have you ever observed Mr. Bennett to be violent or
4 aggressive with any other correction officers?

5 A. No, I have not, not even on the basketball courts.

6 Q. How about to any other inmates?

7 A. I have not seen that.

8 Q. Based on your exposure, and your talks, and working
9 with Johnny Bennett, do you believe that he is the type of
10 inmate who could be managed by the Department of Corrections?

11 A. Yes, I do.

12 Q. To the best of your knowledge, has he obeyed the
13 rules of the institution?

14 A. Yes.

15 Q. And we've heard discussion regarding Mr. Bennett
16 participating in these worship services. Do you, in your
17 experiences with working with him, do you believe that he is
18 sincere about that or is he just playing the game?

19 A. Before I relinquish any of my theological
20 responsibility over to anyone I have to notice their walk and
21 see if they are walking sincere. I think it has been
22 mentioned before, you can only play the game for so long. The
23 reality of the situation would definitely surface over a
24 period of time. Over the period of time I have known him, I
25 believe in my heart his walk and what he's doing, his growth

1 and maturity are from a sincere heart.

2 Q. Thank you, Chaplain Brown.

3 A. You're quite welcome.

4 MR. YOUNG: Answer any questions that the State
5 has.

6 MR. MYERS: No questions.

7 THE COURT: You can step down. Thank you.

8 MR. FLOYD: Your Honor, we'd call Gina Dibble.

9 GINA B. WILLIAMS DIBBLE, after having been duly
10 sworn, testified as follows:

11 THE CLERK: Have a seat and then state your full
12 name, please, ma'am.

13 THE WITNESS: Gina B. Williams Dibble.

14 DIRECT EXAMINATION

15 BY MR. FLOYD:

16 Q. Gina, where do you live?

17 A. I live in Gaston, South Carolina.

18 Q. Do you know the defendant, Johnny Bennett?

19 A. Yes, that's my baby brother.

20 Q. And how old are you, Gina?

21 A. I'm 37.

22 Q. So how much older than Johnny are you?

23 A. A good bit of years.

24 Q. Seven or eight years, something like that?

25 A. Uh-huh.

1 Q. Who are the members of your family?

2 A. I have an older brother, Roger. I'm the oldest
3 sister. I have another sister, Vanessa and Valerie, and
4 Johnny is the baby.

5 Q. And are any of them in the courtroom?

6 A. Valerie is.

7 MR. FLOYD: Valerie, could you stand up, please.

8 Q. Is that Valerie?

9 A. Yes, sir.

10 Q. How about your parents, are they here?

11 A. Yes. That's my mom and my dad sitting behind.

12 Q. That's your mom and your dad?

13 A. Yes.

14 Q. You all a close family?

15 A. Always been.

16 Q. Now, I'm going to show you some things and see if
17 you can identify them for us, okay. First this.

18 A. Yes, sir.

19 Q. And what is that?

20 A. This is a picture of my mother and my father with
21 Johnny. This picture was taken one Sunday morning, I believe
22 it was like Easter or around Easter before we got ready to go
23 to church.

24 MR. FLOYD: Your Honor, we'd offer this into
25 evidence.

1 THE COURT: Any objection?

2 MR. MYERS: No objection to all of those.

3 (WHEREUPON, Defense Exhibit Numbers 7 through 14
4 were marked and admitted into evidence.)

5 BY MR. FLOYD:

6 Q. So this is the one of Johnny and your mom and daddy
7 one morning before they went to church?

8 A. (Nodded).

9 Q. I now show you the Defendant's Exhibit 8, and ask if
10 you can identify that?

11 A. Yes. This is a picture of Johnny. He must have
12 been six or seven, maybe.

13 Q. And tell us about Defendant's Exhibit 10.

14 A. This is a picture of Johnny, my mother and my sister
15 there when we was on one of his visitations.

16 Q. And how about this?

17 A. This is another picture of my sister, Val, Johnny
18 and my mother on one of his visitations.

19 Q. These are some visitations at the prison?

20 A. Yes.

21 Q. And how about this Defendant's Exhibit 12?

22 A. This is a photo of our family when my baby sister
23 had her wedding reception, we was at the church.

24 Q. How long ago would you say this picture was taken?

25 A. Maybe 10, 11 years ago, 12.

1 Q. Now I show you Defendant Exhibit 9.

2 A. This is a photo of Johnny and his friends. He was
3 on a church outing, on a trip in Florida, Orlando, Florida,
4 and they was having lunch.

5 Q. And is that -- which one is Johnny?

6 A. This is Johnny right here on the end with the blue
7 shirt on.

8 Q. Are these the group of guys that always hung around
9 together growing up?

10 A. Most of them, yes, sir.

11 Q. Now, do you recognize Defendant's Exhibit Number 13?

12 A. Yes, sir. This is a certificate awarded to Johnny
13 for doing step-by-step through his Christian growth and
14 facility.

15 Q. And how about Defendant's Exhibit Number 14?

16 A. Yes. This was a certificate I have recognized being
17 awarded to him for completing some training that he had in the
18 institution where he's at.

19 Q. These are some training and education that he's
20 getting at the prison?

21 A. Yes, sir.

22 Q. Has the family remained close to Johnny even though
23 he's been gone now for about ten years?

24 A. Yes, sir.

25 Q. Do you all still visit him regularly?

1 A. Every chance we get.

2 Q. Now, I noticed -- I know these photographs that were
3 taken in the prison, at some point in time, he was where you
4 could actually get in and see him and so forth?

5 A. Yes, sir.

6 Q. Now, have you been out there since he's at Lieber?

7 A. Yes, sir.

8 Q. And how do you all have to do the visits now?

9 A. Well, you know we have to be processed in. Once we
10 get in and get back to where Johnny has his visits we're like
11 in a room but they're like inside like glass. So we can't
12 touch him, we can't even smell the breath of him. It's like
13 all glass and at the bottom is like a screen, like real thick
14 wire or whatever you want to call it. But you can talk to him
15 through that.

16 Q. And that's where your voices will carry through; is
17 that correct?

18 A. Yes, sir.

19 Q. And even though you can't touch him and hug him and
20 so forth, are those visits still special to the family?

21 A. Oh, yeah. I mean, you don't necessarily have to be
22 able to touch somebody in order to, you know, love them and
23 see them and stuff, you know what I'm saying.

24 Q. Now, tell the jury a little bit about how Johnny was
25 growing up. You were the bigger sister, so did you used to

1 have to take care of him and so forth?

2 A. Yeah, I took care of him a lot.

3 Q. Would you tell the jury what kind of young boy and
4 young man he was growing up.

5 A. As I recall Johnny growing up, he was just like any
6 other kid. I mean, kids going to be kids, kids going to do
7 things, you know. Then as they get older they learn more.
8 And he was just like any normal person to me.

9 Q. Now, did your family -- was your family friends with
10 the Smith family?

11 A. Yes, sir.

12 Q. And so this has been a very traumatic thing for
13 everybody, hasn't it?

14 A. I would imagine, yes, sir.

15 Q. Have you seen Johnny change any since he's been in
16 prison?

17 A. I've seen a drastic change in Johnny.

18 Q. Could you tell the jury what you've seen.

19 A. From the time Johnny first got in trouble and was at
20 the Lexington County place or whatever, I knew Johnny was what
21 I call butt-wild. You know, teenagers -- well, not saying
22 teenager, he was over 18, and he was doing things and getting
23 into things, you know, like you see other guys do.

24 You know, and I knew Johnny at some point smoked
25 weed or whatever you want to call it, and I've heard, I've

1 never seen it, but I've heard it, and I kind of suspected it.
2 You know, but I can't say I have walked up on him doing it,
3 but, you know.

4 And I would talk to him and I would tell him, I'd
5 say, now, you know you was not raised like that. And he would
6 listen to me but then, you know, he still would do whatever,
7 you know, when he was butt-wild, I call him. And from those
8 times to now, going to see him on different occasions, there
9 was visitations where he would start talking about the Bible.

10 You know, and I was always encouraging him. I was
11 writing scriptures and quoting scriptures and mailing them to
12 him, telling him to read this and read that. And when we
13 would talk, you know, basically, our conversations would be
14 about the Bible. And yes, I can sit here and say before his
15 face, behind his back, Johnny has changed.

16 Q. And would you tell the jury how Johnny is now.

17 A. The way I see Johnny now, when we go for visitations
18 we go in and we got to settle down, you know, talk about --
19 Johnny is always wanting to discuss the Bible. The other guys
20 that's out, you know, visit, you know, their families are
21 there, I guess because like sometimes they might be out
22 with -- you know, a lot of the families that come in they know
23 Johnny, you know, the guys' families or whatever. And, you
24 know, he be going around in there talking this and that and
25 the other, encouraging the guys. A lot of them even come out,

1 now when I see, with their Bibles, whereas opposed when I used
2 to go, none of them would come out with them.

3 Q. And have you seen Johnny working with his fellow
4 inmates in this kind of a way?

5 A. Oh, yeah, plenty of times.

6 Q. I know the jury has never seen that area, and I've
7 been there. Could you try to describe it for them a little
8 bit, about how large of a room is it that's glassed in.

9 A. It may be the size of the area they are sitting in.

10 Q. Okay. And then on the outside of that glass is just
11 an open room where the visitors come in?

12 A. Uh-huh.

13 Q. And so how many inmates would be inside the glass
14 room at the same time that families are there?

15 A. Well, it would depend on from the way the benches is
16 because each inmate got like a little stool they sit on when
17 they come out. If it's everybody in there got visits that
18 same time maybe seven, maybe seven.

19 Q. And then do the family members have benches on the
20 other side?

21 A. Well, they got chairs, you know, we can slide around
22 or up or whatever.

23 Q. Now, has Johnny always been very close to his momma?

24 A. Uh-huh, yes, sir.

25 Q. Now, how often does he get to see his momma now?

1 A. Every time he have visitation.

2 Q. And so how often do you all get to go up there?

3 A. He probably have it right now, he's been doing like
4 sometimes twice a month, depending on, you know, if it's where
5 we can be off and everybody can maybe get there because, you
6 know, you have to go such a distance so.

7 Q. Now, are you speaking here on behalf of your whole
8 family?

9 A. Yes, sir, I am.

10 Q. And does your mother feel and your father that they
11 are too emotional to try to get up here and try to speak to
12 the jury?

13 A. I feel like they are. In fact, my sister, the one
14 next to me, she hadn't been here, I think maybe one day, that
15 was like when they was doing the jury selection because she
16 just can't take it, handle it, whatever, you know.

17 Q. Now, Gina, have you noticed, does Johnny get to call
18 home any? Does he get to call your mom at home and speak on
19 the phone with them, too?

20 A. Yes, sir.

21 Q. So it's a family basically trying to keep up just as
22 much as a good family relationship as is possible in this
23 situation?

24 A. That's right. That's right.

25 Q. Gina, is there anything you can tell this jury that

1 would be a basis for the jury to spare Johnny's life?

2 A. Yes, sir, there is. There's a number of things I
3 can sit here and tell you why I feel, you know, but my main
4 thing is there's good in everybody. There's nothing made --
5 that God made that there wasn't good in it. We all make
6 mistakes. Some of us make bigger mistakes than others.

7 But if we was all today given the opportunity just
8 to go back, say 24 minutes -- or excuse me, 24 hours into our
9 past and if we could change things that we wanted to change
10 whereas we made mistakes, I'm quite sure there wouldn't be
11 nobody in this courtroom that wouldn't take it. We'd all be
12 rushing back trying to change something. And when that 24
13 grace period is up we still realize that there was still that
14 one thing I didn't get it changed, but I did get to change
15 some things.

16 And I say that to say this. When you all go into
17 you all's deliberation and you all get together and start
18 talking, when you make your decision, when you say this is
19 what I decided, ask yourself what would Jesus do --

20 MR. MYERS: Objection. This is more like a closing
21 argument now. She's not testifying, she's making a closing
22 argument, and I don't think that's responsive to the question.

23 THE COURT: Yes, I understand. I'm going to give
24 her a little bit of room to do it. Go ahead.

25 A. That's what I ask of you --

1 THE COURT: Ma'am, you're not allowed to go into
2 religious grounds though.

3 Q. Anything else you --

4 A. Okay.

5 Q. Now, Gina, in fact, is your family still close to
6 the Smith family?

7 A. Well, we still speak and talk, you know, whenever we
8 meet or whatever.

9 Q. There's some that's kind of torn up a lot of the
10 community, hadn't it?

11 A. (Nodded).

12 Q. And is everybody trying to put it behind them?

13 A. Well, at this point, we ain't got a choice. We got
14 to put it behind us and move on.

15 MR. FLOYD: Thank you. Answer any questions that
16 Mr. Myers may have for you.

17 THE COURT: Cross?

18 MR. MYERS: Just one or two.

19 CROSS-EXAMINATION

20 BY MR. MYERS:

21 Q. Ms. Dibble, back when Benton Smith was murdered, you
22 and your husband were working, you all had jobs during that
23 time?

24 A. Yes, sir.

25 Q. And it was behind your house where they found

1 Benton's body?

2 A. On my property, yes, sir.

3 MR. MYERS: Thank you. No further questions.

4 MR. FLOYD: Thank you, Your Honor. No further
5 questions.

6 THE COURT: You can step down.

7 MR. FLOYD: Your Honor, the defense rests.

8 THE COURT: Is there any rebuttal from the State?

9 MR. MYERS: No, sir.

10 THE COURT: Ladies and gentlemen, at this time then
11 all of the evidence in the case is completed, and that means
12 that the next step in the case will be actually the final
13 step. We're going to go to a procedure where the attorneys
14 will have final closing statements, and then once they've had
15 those closing statements, I'll charge you with the law, and
16 we're going to turn the case over to you. That's probably
17 going to be within the next couple of hours or so.

18 Now, it will take a little while to do all the
19 closings and everything, and there are a few matters that I
20 have to take up with the attorneys, also. So what we'll do is
21 take a little bit of a break, and this is going to be a good
22 little while. It probably will be a good idea to go ahead and
23 take a lunch break during this. Will there be any problem
24 with that?

25 I know it's 10 minutes until 11:00 so it may be a

1 little bit early. You may want to wait a little bit later on
2 getting lunch too. But as I understand, they've gone ahead
3 and tried to get lunch here for you as soon as they could.
4 And I realize it's early, but again, we're starting kind of
5 early too, so some of you may be ready for lunch at this
6 point. We'll stand in recess then. And while you're out, be
7 sure to remember we don't talk about the case, okay?

8 (WHEREUPON, the jury leaves the courtroom at
9 approximately 10:50 a.m.)

10 THE COURT: All right. The jury is secured. Let me
11 ask first, any motions? Did you want to renew motions from
12 yesterday, Mr. Floyd?

13 MR. FLOYD: Yes, Your Honor. At this time, we would
14 renew all the motions that were made at the conclusion of the
15 State's case. And we would also renew the motion that we made
16 during the defense case, specifically the one that we made
17 this morning for a dismissal or a mistrial because of the
18 Solicitor's question about the blonde lady, which injected
19 race into the jury, and which we think was improper, and would
20 renew that motion.

21 THE COURT: Okay. All motions are renewed then and
22 noticed and denied.

23 Any motions from the State?

24 MR. MYERS: No, sir. The only motion that we have,
25 which I'm sure Your Honor is going to do, is about the

1 defendant not testifying. I want to get that on the record.

2 THE COURT: Yes, sir. Let me do this and ask first
3 of all -- and I was going to examine Mr. Bennett about all of
4 this in just a second. This might be the appropriate time to
5 go ahead and do it.

6 Mr. Bennett, let me ask you to stand just for a
7 minute, okay.

8 Madam Clerk, would you put him under oath.

9 I know you've been put under oath so much.

10 Would you do it again, ma'am.

11 JOHNNY OLANDIS BENNETT, after having been duly
12 sworn, testified as follows:

13 THE COURT: All right. Mr. Bennett, I gather that
14 you've decided not testify; is that correct?

15 THE DEFENDANT: That's correct.

16 THE COURT: And you understand that you do have a
17 right to testify, if you wanted to?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And you understand that even if you were
20 to change your mind at this point we can still bring the jury
21 back and open the case back up; you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Now, have you made the decision to
24 testify yourself?

25 THE DEFENDANT: I've decided not to, Your Honor.

1 THE COURT: Okay. Do you feel that you are -- you
2 have been mentally and emotionally capable of making that
3 decision?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And have you done so in the advice of
6 your attorneys, or at least talking with your attorneys,
7 getting -- in other words, not that they've advised you to
8 testify or not testify, but have you at least heard what they
9 have to say and had their advice before you decided?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And, again, this sounds like a stupid
12 question, but have you been under the influence of any drugs
13 or alcohol or medication or anything while you were making
14 this decision?

15 THE DEFENDANT: No, sir.

16 THE COURT: Now, let me ask. Counsel, have both of
17 you advised -- let's start with Mr. Floyd first, have you
18 given Mr. Bennett the best advice you could give him in terms
19 of this decision?

20 MR. FLOYD: Yes, Your Honor, to the best of my
21 ability.

22 THE COURT: And do you have -- do you wish to make
23 any comment at all, either way, about his decision not to
24 testify?

25 MR. FLOYD: No, Your Honor, I think we've had

1 informed discussions, both myself and Mr. Young and
2 Mr. Bennett, and I concur in his decision.

3 THE COURT: Mr. Young, have you given Mr. Bennett
4 the best advice you could give him in this matter?

5 MR. YOUNG: Yes, sir, Your Honor.

6 THE COURT: And is there anything -- do you wish to
7 make any comment about it at all?

8 MR. YOUNG: No, sir.

9 THE COURT: Okay. All right. Mr. Bennett, let me
10 also note, there is -- even though you did not testify there
11 is a procedure called allocution, which means that, in
12 essence, you have the right to address the jury yourself and
13 make your own closing statement. Now, you understand that the
14 Supreme Court has said that that is not, in essence, is not a
15 chance to testify. In other words, you can't go into evidence
16 and bring up new things and, for example, make denials or
17 something like that.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: It is only your right to make your on
20 closing statement and speak to the jury in whatever fashion
21 you think is appropriate, at least interpreting the evidence
22 that's in the record; do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And you understand that, first of all,
25 that, of course, under our law that in a case such as this the

1 defense has the right to have the last closing statement.
2 Normally, what happens is the solicitor has the final
3 statement, but in this case, the law says the defendant, the
4 defense can have the final closing statement. Do you wish to
5 do that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And as far as the issue of allocution --
8 and, again, you understand it is where you -- I believe you've
9 done this before, as I recall?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: So you're familiar with it. But again,
12 for the record, I'll note it is a procedure where you would
13 stand here or whatever you wish, in front of the jury and
14 address them directly; do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Understanding that, have you decided
17 whether you will take part in that, in other words, whether
18 you would make a closing statement to the jury?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And what will you do, will you do it or
21 not do it?

22 THE DEFENDANT: I will do it.

23 THE COURT: You will do it. Okay. Have you
24 determined whether you will do it after your attorneys or
25 before your attorneys?

1 MR. FLOYD: We're still discussing that.

2 THE COURT: Okay. All right. And, again, you've
3 had a chance to have your attorneys advice on that; is that
4 correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And may still get some more advice on
7 that; is that right?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Okay. Is there anything about that that
10 you don't understand, that you have any questions about?

11 THE DEFENDANT: No, sir.

12 THE COURT: Okay. All right. We're going to give
13 you a chance in a minute to talk with your attorneys a little
14 further, and certainly if you have any other questions you can
15 bring those up later, okay?

16 THE DEFENDANT: Thank you, sir.

17 THE COURT: Counsel, do either of you wish to
18 comment on that at all?

19 MR. FLOYD: No, Your Honor.

20 MR. YOUNG: No, sir, Your Honor.

21 THE COURT: All right. I note for the record that
22 the defendant has freely and voluntarily, knowingly and
23 intelligently decided not to testify in this matter. I find
24 that it's his decision. And he has, in the same fashion, made
25 the decision to participate in the process of allocution.

1 And, again, I find that that is also his decision.

2 Anything else?

3 Counsel, I'm going to, again, give him a few minutes
4 to talk with his attorneys.

5 Let me ask, first of all, are there any further
6 requests for charge?

7 MR. FLOYD: Your Honor, yes, we have a list of
8 nonstatutory mitigating circumstances. At this point, we did
9 them last night so they're not typed yet. I have them
10 written. We will get them typed for Your Honor shortly or I
11 can go over them and make copies of this to show the Solicitor
12 or he can wait until I get them typed up.

13 THE COURT: Do you know which ones they are and the
14 statutes? If you do, you can --

15 MR. FLOYD: Well, I would say the same statutory
16 mitigating circumstances we had last time. I think there were
17 three of them. I reviewed the Court's charge last night and
18 they were like the statutory -- the statutory ones were --

19 THE COURT: Let me note this. As I understand,
20 according to this, the ones that Judge Anderson charged last
21 time were one, that the defendant has no significant history
22 of prior criminal conviction involving use of violence against
23 another person. Two, the murder was committed while the
24 defendant was under the influence of mental or emotional
25 disturbance, and three, the age or mentality of the defendant

1 at the time of the crime.

2 MR. FLOYD: That's correct, Your Honor. We would
3 suggest those same three would apply.

4 THE COURT: Okay.

5 MR. FLOYD: And then we have 14 nonstatutory
6 mitigating circumstance.

7 THE COURT: Well, you understand, as you know, we
8 don't discuss those specifically with the jury. What the
9 standard procedure in that is we just tell them basically they
10 can consider any other mitigating circumstances they deem
11 appropriate. Now, certainly, you can use those in your
12 closing statement, if you want to.

13 MR. FLOYD: I understand, but we would like to make
14 a formal request, you know, that the charge include a list of
15 nonstatutory mitigating circumstances that we feel apply.

16 THE COURT: Okay.

17 MR. FLOYD: And if I could put them on the record,
18 maybe, or if you'd rather me type them and submit them.

19 THE COURT: If you want to, you can go ahead and
20 just list them for the record, if you would like to.

21 MR. FLOYD: Thank you, Your Honor. The 14
22 nonstatutory mitigating circumstances that the defendant
23 requests to be charged to the jury are one, the defendant has
24 no significant history of criminal activity. Two, the
25 defendant can be rehabilitated or restored to useful

1 citizenship. Three, the defendant had a good prison record.

2 Four, the defendant has changed his life since the
3 crime was committed. Five, the defendant does good deeds for
4 others. Six, the defendant is useful to other members of his
5 community. Seven, the defendant has demonstrated that he
6 would be able to adapt to prison life. Eight, the defendant
7 has developed some spiritual religious or spiritual beliefs.
8 Nine, the defendant tries to help others be better people.

9 Ten, the defendant treats others with respect.
10 Eleven, the defendant tries to assist the employees of the
11 Department of Corrections in the performance of their duties.
12 Twelve, the defendant tries to make his community a better
13 place. Thirteen, the defendant demonstrates remorse for his
14 crime. Fourteen, the defendant had problems in school.

15 THE COURT: Okay. Again, I note those and I would
16 deny that motion, because as I indicated, I'm not familiar
17 with any circumstance where a judge has actually discussed in
18 detail the nonstatutory mitigating circumstance. Again,
19 certainly, you can include those in your closing.

20 MR. FLOYD: Thank you, Your Honor.

21 THE COURT: Any other requests of charge?

22 MR. FLOYD: No, Your Honor. We didn't notice
23 anything else. I mean, I know you would have noticed some
24 changes like in dates and so forth from the charge, but other
25 than that, we don't have any.

1 THE COURT: Yes, sir. Thank you, sir.

2 Any from the State?

3 MR. MYERS: No, sir. I think the only one that we
4 requested was the one we discussed last night, and that's the
5 charge on the continuous series of acts, and you said that
6 that was in yours, that the aggravating crimes are committed
7 while in the commission of a capital murder when they are
8 consummated in a continuous series of acts with the murder and
9 are in the same place and not separated by any substantial
10 lapse of time. The fact that the crimes are committed after
11 the murder does not invalidate them as statutory aggravating
12 circumstances.

13 THE COURT: I didn't look closely. Do you know if
14 that was in Judge Anderson's charge?

15 MR. MYERS: Page 3180, 9-12.

16 THE COURT: Okay. They are in that same language.
17 As I've indicated, I would -- since this passed muster with
18 the Supreme Court I will basically, in essence, from the point
19 of discussion of the factors in the sentencing phase I will
20 use Judge Anderson's charge. I will basically have the same
21 charges he did at the first part of it. They won't be quite
22 as lengthy as his were, I will be a little bit more brief on
23 those. But from that point on, it will be pretty close to
24 what he said.

25 Yes, sir?

1 MR. MYERS: Yes, sir. And as to the nonstatutory
2 mitigating circumstances, you've ruled on that but we would
3 have objected on you charging that. State vs. Simmons,
4 427 S.E.2d 175, the defendant requested a detailed list of 27
5 nonstatutory mitigating circumstances to be submitted to the
6 jury. In that case, the Supreme Court said the judge was
7 right in refusing to do that. And the Court even said, The
8 appellate concedes this procedure is not required as long as
9 the jury is instructed as it was there, that they are to
10 consider any nonstatutory mitigating circumstances. And State
11 vs. Lender, 1981, was the leading case on that.

12 The only other thing we have, are there any other
13 statutory mitigating circumstances that the defendant is
14 requesting, other than the three that were submitted the last
15 time and they have requested now for this time? Are there any
16 other statutory mitigating circumstances that they have
17 requested other than those three?

18 THE COURT: No, sir. My understanding is those were
19 the only three.

20 Is that correct, Mr. Floyd?

21 MR. FLOYD: That's correct, Your Honor.

22 THE COURT: Okay.

23 MR. MYERS: I don't think we have anything else --
24 yes, we do. We do have one more thing. I want the record to
25 reflect that the next to last defense witness, the chaplain

1 from Lieber, Chaplain James Brown, that he twice, I counted,
2 and maybe a third time, but I know at least twice mentioned
3 death row. And we did not ask any questions or follow that
4 up. But he brought it out on his own twice about counseling
5 or being on death row with the defendant, and he even said
6 that he taught an anger management course on death row, which
7 he said the defendant was there. And he said other things
8 about inmates on death row, but we didn't amplify that or go
9 into that.

10 THE COURT: Let me note for the record, I recall
11 when the witness did that, but I recall that Mr. Young very
12 adroitly followed that up with -- and, frankly, I congratulate
13 you for being on your toes, Mr. Young, followed that up with a
14 question to the affect that in addition to people being
15 convicted there were also people there who had not been
16 sentenced who were there for safekeeping.

17 So I think he -- and I would note that that came out
18 in two other witnesses' testimony yesterday. So I think the
19 jury very clearly understands that while he may be under the
20 area called death row that there are people there who are not
21 convicted and such.

22 MR. MYERS: Yes, sir, and the term I think he used
23 was pretrial detainees or safe keepers or something to that
24 effect.

25 THE COURT: Yes, sir. Again, quick thinking. Okay.

1 MR. FLOYD: That was my thoughts too. I've
2 congratulated him, Your Honor.

3 THE COURT: Anything else from either side just to
4 charge requests?

5 All right. Counsel, what we're doing is we're
6 giving the jury a lunch break. Of course, we'll take the same
7 lunch break. What is your desires in terms of starting? I
8 would think 12:00, 12:30 or 1:00, somewhere in that range.

9 MR. MYERS: Whatever you all decide.

10 MR. FLOYD: 12:30, because we'll have to send out
11 and get lunch now for Mr. Bennett.

12 THE COURT: 12:30, will that give you enough time to
13 do that?

14 MR. FLOYD: Give us a little time to talk.

15 THE COURT: Let's say -- let me just be sure that
16 they can get the jury fed and get them ready by that time. I
17 think they can.

18 And, Mr. Solicitor, does that give you enough time
19 to get ready?

20 MR. MYERS: I've just lost my brains here and I'm
21 taking with the defense attorney in a friendly, amicable way
22 about it. One o'clock.

23 MR. FLOYD: One o'clock would probably be better for
24 everybody.

25 THE COURT: They've agreed to start at one o'clock.

1 Can we get the jury ready, you think, at that point?

2 AGENT JACOBS: I just took their food in to them.

3 THE COURT: Okay. Why don't you do this. Tell the
4 jury that we're going to start at one o'clock, okay?

5 AGENT JACOBS: Okay.

6 THE COURT: And that way they'll know the schedule.
7 If some of them want to wait to eat they can. I guess, have
8 they checked out of the motel? I guess not.

9 AGENT JACOBS: No.

10 THE COURT: I don't know if any of them would want
11 to go back to rest. If they want to, that's certainly within
12 your authority to decide that.

13 AGENT JACOBS: Okay. One o'clock.

14 THE COURT: Counsel, we'll stand in recess until one
15 o' clock. If there are any problems, I'll be in the office,
16 let me know.

17 (WHEREUPON, a lunch break was taken.)

18 THE COURT: One thing we need to take up before we
19 begin is, Mr. Bennett, did you get a chance to talk with your
20 attorneys about the closing statements?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: What did you decide you wanted to do on
23 that?

24 THE DEFENDANT: I decided I would like to address
25 the jury.

1 THE COURT: Okay.

2 THE DEFENDANT: And I will do so after Mr. Floyd
3 addresses first.

4 THE COURT: At the very end; isn't that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Thank you, sir.

7 So as I understand, the order will be then
8 Mr. Myers, Mr. Floyd and Mr. Bennett; is that right?

9 MR. FLOYD: Correct, Your Honor.

10 THE COURT: What we'll do, Counsel, just to keep the
11 jury fresh is between each one we'll take about a five or ten
12 minute break after Mr. Myers and let you and Mr. Bennett both
13 do -- I won't mess it up during the two of yours, and then
14 after that before the charge we'll also take a short break,
15 okay?

16 MR. FLOYD: Thank you, Your Honor. That will be
17 convenient.

18 THE COURT: Okay. Have both of you had a chance to
19 look over the packet I gave you regarding the statutory
20 instructions and the sentences? Any objection to that from
21 the State?

22 MR. MYERS: No, sir.

23 THE COURT: Defense?

24 MR. FLOYD: No, Your Honor.

25 THE COURT: All right. Is the State ready to begin?

1 MR. MYERS: The State's ready.

2 THE COURT: The defense ready?

3 MR. FLOYD: The defense is ready.

4 THE COURT: Let's bring the jury in.

5 (WHEREUPON, the jury enters the courtroom at
6 approximately 1:12 p.m.)

7 THE COURT: All right. All parties and attorneys
8 are in the courtroom and all jurors have now returned.

9 Ladies and gentlemen, as I told you, at this time we
10 are prepared for closing statements by the attorneys, then I
11 will charge you on the law, and after that it's going to be
12 your case sometime later this afternoon.

13 Now, the procedure will be as follows. The State
14 will have the first closing statement. Mr. Myers will close
15 for the State. Following that, we'll take a short break, just
16 five or ten minutes, and we do this just to keep everybody
17 fresh. We'll take five or ten minutes to give you a chance to
18 use the rest room, just move around or whatever you need to
19 do.

20 Following that, Mr. Floyd will close for the
21 defense, and following that, in a case such as this, the
22 defendant is allowed to make a closing statement to the jury,
23 and Mr. Bennett will give a closing statement. When that is
24 completed, we'll again take a short five or ten minute break.
25 After that, I will charge you on the law, and at that point,

1 it's going to be your case.

2 Let me ask you, please, please, please, by all
3 means, give everyone involved at this time your undivided
4 attention, and that's why we take the breaks, so you can do
5 that. Very important that you keep up with what's going on at
6 this time.

7 With that in mind, now, Mr. Myers, are you ready?

8 MR. MYERS: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. MYERS: Madam forelady, ladies and gentlemen of
11 the jury, everybody in the courtroom joins me in thanking you,
12 thanking you for being away from your families, being away
13 from your jobs, having to stay in a motel, listening to all
14 these witnesses. I think we put up about 45, and they put up
15 about 25 or so.

16 But I say one thing, you are a happy jury. And you
17 are an attentive jury. You have listened as closely as any
18 jury I've seen. And that's your duty, and you've fulfilled it
19 well. So we appreciate it.

20 And you know when all of you were here, it seems
21 like weeks ago, but we were asking you -- and you all sat in
22 this chair right there, and we were asking you on Monday and
23 Tuesday about what your positions where, and did you know
24 anything about the case, and what about the death penalty.

25 Every one of you said, I have to listen to the

1 facts. I have to listen to everything. And after I've heard
2 everything, if the death penalty is warranted, if the death
3 penalty is the appropriate sentence, if the death penalty fits
4 the crime I can sign my name. And I know that's an awesome
5 decision, nobody makes light of it, but in an hour or so it's
6 going to become your responsibility to do that.

7 You know, I told you in my opening statement
8 Wednesday that you'll see why we're seeking the death penalty.
9 And I just told you a little bit about it. And now you've
10 heard about murderer, Johnny Olandis Bennett, Jr. You've
11 heard about his character. And I submit to you, the death
12 penalty is warranted. The death penalty is appropriate, and
13 the death penalty is the punishment that fits the crime.

14 Judge Westbrook is going to tell you about
15 aggravating circumstances. And I think he told you this, and
16 we told you this, at the end of all the arguments and all the
17 evidence he's going to explain aggravating circumstances.
18 He'll give you a definition of it. He's going to tell you
19 what aggravating circumstances mean under the law.

20 He's going to list aggravating circumstances, going
21 to give it to you in writing on a sheet of paper. And he's
22 going to tell you that the State relies on four. He's going
23 to tell you we only have to prove one. But haven't we proved
24 four to you, ladies and gentlemen?

25 That in the commission of the murder, also was

1 committed kidnapping. Benton Smith didn't go voluntarily to
2 his death. Johnny Bennett drug him to it with force, with
3 violence. He deprived Benton Smith of his freedom, and that's
4 kidnapping. If you don't think we've shown that to you, and
5 the Judge is going to charge you what kidnapping means under
6 the law, disregard that.

7 Robbery while armed with a deadly weapon. Haven't
8 we shown that to you? This, folks, as you know, is a deadly
9 weapon. This, folks, took the life of little Benton Smith.

10 And also, what else was taken from Benton Smith?
11 Those red lighted glasses; his key case; those pillows; those
12 floor mats; the walking cane; the little drinking glasses; his
13 wallet, which we never found; his Bible, which we never found;
14 the radar detector in the car; the speakers that were missing;
15 the money from where he cashed that check that morning with
16 Johnny Bennett with him; the black shaving kit.

17 And this is probably the reason behind all of this,
18 because what was in this black shaving kit on Monday? A wad
19 of money. Empty now. Benton was going to buy a car. You
20 know he was down in West Columbia looking at that white
21 Eldorado at the used car place. Ain't no money in there now.

22 Johnny Bennett gave this empty shaving kit to his
23 girlfriend in Orangeburg, along with the pillows, along with
24 the little drinking glasses, along with the radar detector,
25 along with the camera that he tried to sell to Jackie

1 Robinson. Robbery while armed with a deadly weapon. If we
2 haven't proved that to you, folks, disregard it.

3 Larceny with the use of a deadly weapon. This is
4 akin to armed robbery. But didn't he take Benton's car and
5 all of these other things? The Judge is going to explain that
6 to you.

7 And physical torture. God, poor little Benton Smith
8 was tortured. Did you hear Dr. Sexton? Wasn't he tortured?
9 Physical torture is aggravated battery. Wasn't what Johnny
10 Bennett did to Benton Smith aggravated? Aggravated battery
11 comes when there's a difference in the physical sizes and
12 conditions of the two people. And I'm going to talk with you
13 a little bit more about old mountain man Bennett and little,
14 frail Benton Smith.

15 The Judge is going to say it's the infliction of
16 vile, cruel, painful, inhumane injuries to the body of
17 another. The pathologist can't even tell us how many stab
18 wounds was in the body of Benton Smith. He said it was 64,
19 then I got up to 70, and there wasn't no use to look no more.
20 And the condition Benton's body was in, isn't that physical
21 torture?

22 If we haven't shown that to you, disregard it, and
23 stop right there, and the Judge will say come back with a life
24 sentence, if that's the truth in the case. I submit to you
25 not only have we shown one, we've shown four, but that's your

1 decision.

2 If you find that the murder was committed while in
3 the commission of these aggravating crimes, then you can
4 consider the death penalty. And the Judge is going to tell
5 you it doesn't all have to happen at one time. These can be
6 committed after he murdered Benton Smith. Because it's pretty
7 tough to rob him and murder him at the same time. So that's
8 why the law is like that. The Judge is going to tell you
9 that.

10 A continuous series of acts, all about the same
11 place, same time, not separated substantially in anything.
12 And didn't all this happen during that time? Oh, Johnny had
13 fun for several days getting rid of his things and everything,
14 but he took them from Benton. And Benton was left out in
15 those woods.

16 The Judge is going to tell you about mitigating
17 circumstances, things on behalf of the defendant. He's going
18 to explain mitigating circumstances to you, and he's going to
19 give you a list of those. You'll have those to take to your
20 jury room. And here's what he's going to submit to you.

21 Now, these, folks, are things in favor of Johnny
22 Bennett. That's what mitigation means, to lessen, if it's
23 lessened. Number one, the defendant has no significant
24 history of prior criminal conviction involving the use of
25 violence against another person. The defendant has no prior

1 conviction of violence against another person.

2 1988, Shannon Gilbert, Aaron McGough. If you think
3 it was no violence used there, if you think Johnny Bennett
4 isn't a violent person and didn't use violence on these two
5 people in 1988, prior to killing Benton Smith, then you give
6 Johnny Bennett the benefit of the doubt and say, oh, yeah,
7 he's not a violent person and he didn't have a conviction of
8 violence against anybody else. Just toss these aside, if
9 that's what you find. That's your decision. That's for you
10 to decide.

11 Number two the Judge is going to tell you in
12 writing. The murder was committed while the defendant was
13 under the influence of mental or emotional disturbance. Now,
14 if you heard some psychiatrist or some doctor, or anybody who
15 testified under oath from this chair that the defendant was
16 under the influence on November the 27th of 1990 when he
17 murdered Benton Smith, then he was under the influence of
18 mental or emotional disturbance, then you give him that
19 benefit.

20 Maybe you heard something that I didn't. I heard
21 Johnny Bennett does what Johnny Bennett wants to do. He's not
22 mental, he's mean. He's a murderer. But if you want to give
23 that consideration, you folks do that.

24 And thirdly, considering his, his behalf, the age or
25 mentality of the defendant, Johnny Bennett, at the time of the

1 crime. When he was 20, Benton Smith was in his early 20's .
2 That's something favorable to him? Or if you think there was
3 some mentality that you heard some testimony on, I didn't, but
4 if you did, you give it your consideration. Give old Johnny
5 Bennett that consideration, if you think that's the truth, if
6 you think that's supported by the evidence.

7 And then the Judge is going to say this -- these are
8 written up in the law, in our books up here, those blue books
9 back over here behind the Judge's desk, and he's going to tell
10 you that's what the legislature enacted, and you can consider
11 these. But he's going to say this to you. You can consider
12 anything in favor of Johnny Bennett. They call those
13 nonstatutory mitigating circumstances, which means those
14 aren't listed in our law books or by the legislature, but you
15 give that what consideration you want.

16 And then he will tell you this. You can give the
17 defendant life for any reason or no reason at all. You just
18 give him life, if that's justice, if that fits the crime, if
19 that fits the character of Johnny Bennett. That is for you to
20 decide.

21 And I told you folks that we were going to start
22 off, while we're talking about character, about Johnny
23 Bennett, I told you it would be the circumstances surrounding
24 the crime and the character. Well, for this gruesome murder
25 and the character of Johnny Bennett there is but one

1 punishment, one punishment that's warranted, one punishment
2 that's appropriate, one punishment that fits the crime, and
3 that's the death penalty, and that's why we're asking for it.

4 What kind of character? I told you we'd start when
5 he was in the -- I forgot what grade it was, fifth grade, I
6 believe, and we showed you all that stuff, starting back in
7 the fifth grade. Fighting on the bus, fighting in the bus
8 area, assaulting a student, writing a girl a dirty letter,
9 fighting on the school bus, fighting in class, fighting in the
10 class, disrespecting a teacher, fighting in class, fighting in
11 class, fighting in class, continually disrupting class,
12 disrupting class, pushed a girl down. That went on every
13 year.

14 The next couple of things. Now, we're up to the
15 ninth grade. Disrespecting a teacher, arguing in class,
16 fighting in the rest room, disrupting class during a test,
17 disrupting class, having fireworks in the class, harassing the
18 students, yelling at a teacher, disrupting class, and it goes
19 on and on and on. I don't know how he got out of any of these
20 classes because he was suspended most of the time he was in
21 school.

22 It didn't stop there. Right on, disrupting class,
23 disrupting class, refused to leave the school bus. They had
24 to call the police that time. Do you remember that? Tied
25 those school buses up. Wouldn't listen to anybody because

1 Johnny Bennett does what Johnny Bennett wants to do. Had
2 to call the police. And Mr. Cooper says, all right, you
3 stay here because the police are on the way. And that's when
4 he left.

5 Expelled finally from school. They gave him chance,
6 after chance, after chance, after chance but he wouldn't take
7 it. They tried to counsel him. They'd kick him out of
8 school, and finally they'd make him stay in school and have
9 in-school suspension. Didn't work. Tried to talk with him,
10 wouldn't listen. Until finally, so the other students could
11 get an education, expelled him.

12 Then he corrected his ways then, didn't he? No,
13 sir. No, ma'am. The Pizza Hut. Pizza Hut. Shannon Gilbert
14 in a coma for 13 days. Aaron McGough in a coma for four or
15 five days, hanging on to life, boot print in one of them's
16 head. You remember Ms. McGough said she went there and she
17 didn't recognize her son because his face was so beaten up and
18 had that round U-shape up there.

19 And what did those people say when they pulled in
20 the Pizza Hut parking lot? What was that fellow doing?
21 Stomping on them when they're down. But, of course, now all
22 of this are other people's faults. It's not Johnny Bennett's.
23 Because the other students picked on him, intimidated him.
24 They started the fights with Johnny Bennett.

25 It's the teachers' fault. They didn't help Johnny

1 Bennett. They should have been more accommodating. It's the
2 school in Swansea's fault because they didn't have the
3 programs to teach Johnny Bennett right. Johnny does what
4 Johnny wants to do.

5 Do you remember this Mary Felder Rice, that nice
6 black lady that testified? Johnny Bennett does what Johnny
7 Bennett wants to do. And it's Shannon Gilbert's fault. He's
8 in a coma for 13 days. It's Aaron McGough's fault because
9 he's in a coma for four days when Johnny Bennett beats him to
10 the ground and stomps him nearly to death. It ain't old
11 Johnny's fault.

12 And, you know, I don't know whether it was the young
13 black lady that was inside eating with her boyfriend or the
14 tall white boy that was outside that drove through, said that
15 they looked out -- or one of them, I don't know which one said
16 it, Johnny was even pulling one of them by his hair. Kind of
17 like an old caveman, dragging him by his hair. And the guy
18 was motionless.

19 Same thing happened in jail over there to
20 Mr. Dougins when he went in that cell and moved that female
21 guard out of the way and he dragged Mr. Dougins out by his
22 hair. Mr. Riddle wouldn't have that problem, he don't have
23 any hair, couldn't pull on him.

24 But it's not Johnny's fault. It's everybody else's
25 fault. Not old, big old Johnny, not him. And, you know, just

1 before he's getting ready to come to court to be sentenced to
2 prison, does he clear up his ways? No, because on the 14th of
3 September the judge sentenced him to prison. September the 2nd
4 he's back down in school, school just started. Suspended,
5 five days. But you know when he is sent to prison I bet he
6 straightened up then when they explained to him the rules of
7 being good. No, sir. No, ma'am.

8 By the first part of December he's getting in
9 trouble down there at the Aiken facility. Assaulting inmates,
10 disrupting institution operations, interfering with the duties
11 of an officer. But it's not Johnny Bennett's fault, it's
12 those other inmates' fault. Not big old Johnny because those
13 little fellows intimidate him and pick on him. If that's what
14 you believe, if you think that's the truth.

15 He has to be transferred to another institution back
16 up in Columbia, put on lockup. And they extend his sentence
17 seven months. Then they try to get him in a school over
18 there. Do you remember Ms. Shealy that testified, a
19 schoolteacher? Won't pay any attention, unexcused absences,
20 disturbing class, left class without permission, left class
21 under false pretenses, repeatedly cutting class, repeatedly
22 cutting class.

23 They had to add on, on top of this seven months,
24 they had to add on another month to his sentence in prison,
25 and then another month. Nine more months they had to add on

1 to his sentence. But it ain't Johnny's fault. He's a little
2 meek fellow. He wouldn't intimidate anybody. He wouldn't
3 manipulate anybody. He'll obey the rules. Has he done it so
4 far? That's for you to decide.

5 Until finally, June the 28th of 1990 they release
6 him on parole. And what did that lady say about parole? I
7 sat down with him and I explained the conditions of it, so let
8 him go. You can go Johnny. You still got your time hanging
9 out, but we're going to parole you, but you got to abide by
10 the rules. You got to get a job.

11 I have not heard a single witness from this stand
12 that has testified to one job Johnny Bennett has ever had in
13 his entire life. If you heard it, you give it the credit that
14 you think it's due. If you heard somebody say, oh, yeah, as
15 soon as Johnny got paroled he went out and got him a job to
16 live up to those conditions. Did you hear that? I'm kind of
17 hard of hearing sometimes, but I didn't. Johnny, you can't
18 break the law. You've got to abide by the laws of this State
19 like everybody else. Oh, yeah, I'm going to do that. I'm
20 going to do that.

21 Last June, first of July, he's let out of prison.
22 October, he's stealing gas from Mr. Stillinger's Gas Station.
23 Probably not Johnny Bennett's fault. That gas, holding the
24 gas can probably jumped up into his hand. It's the gas can's
25 fault, not his, if everybody else we're going to blame.

1 November the 27th, the day these folks won't forget.
2 It's the last day they saw their baby boy. Little, frail
3 Benton Smith, he trusted Johnny Bennett. Trusting Benton
4 Smith. Trusting Benton Smith. Johnny Bennett's friend,
5 Benton Smith. Because Johnny Bennett comes up to Benton's
6 house that morning. You heard his sister and his father say
7 the last time we saw Benton alive Johnny Bennett was in the
8 car with him.

9 Went to the bank, and Benton cashed that check.
10 We've never seen the money from that check. And then they
11 went to Columbia looking for jobs. Benton took Johnny Bennett
12 around looking for a job. Oh, he was going to get
13 a job then.

14 Came back through West Columbia over there by the
15 Kmart, and Benton was looking for a car, that white Eldorado
16 Cadillac at the used car place near the Kmart, because the day
17 before his brother-in-law, Melvin Harrison, had been with him
18 when he had that black shaving kit with a wad of money, and he
19 talked about buying a car.

20 And they didn't go to Orangeburg. Benton Smith
21 didn't go to Orangeburg, and you know that. And how do you
22 know that? Nobody in Orangeburg knows Benton Smith. Bonita
23 didn't know him. Pam doesn't know him. Big old Jackie
24 Robinson knows him, he's his cousin. But Benton wasn't with
25 Johnny Bennett when Johnny Bennett was trying to sell Benton's

1 camera to Jackie Robinson.

2 Here's what happened. Johnny Bennett already had
3 his murderous plans in place. He knew that Benton had money.
4 Johnny Bennett wanted that money. Bonita had been on him for
5 a week or so about getting money. Johnny Bennett said he had
6 to pay his sister's rent. He needed money. He ain't got no
7 job, how do you do it? You kill and steal. And that's what
8 he did.

9 And he wasn't driving that car. Benton don't let
10 anybody drive his car or use his things. Somehow Johnny
11 Bennett talked Benton into stopping the car. I don't know
12 what he told him. He might have told him he had to use the
13 rest room. He might have said the front tire is acting funny,
14 let's get out and look at it. That was the beginning.
15 Because when Benton got out, what did Dr. Sexton say? Three
16 injuries to the chin. Jaw loose. Broken up in here. That
17 massive fist right up under the bottom of Benton's chin. And
18 it knocked him out.

19 And where does Johnny Bennett go then? Right back
20 to his home turf around Happy Town to that bar. Back over
21 there after awhile Benton gains conscious back. Remember what
22 the doctor said? That's painful. That lick is painful. It
23 will knock you out.

24 Then when Benton came back, Johnny had to knock him
25 out again. That's why he got three blows around his chin. He

1 knocked him out again, and then he took him down behind his
2 sister's trailer, back down that road where Johnny Bennett
3 knew was an old cemetery.

4 Benton came to. He drug Benton down that fire path,
5 down past those logs in the woods, and he started and
6 completed his final plans. And Benton was alive and fighting,
7 and Johnny Bennett drug him down there. Johnny Bennett starts
8 stabbing him in the chest, in the front, side of the head, the
9 back of the head, the back of the neck, on his hands. And how
10 do we know that was physical torture? How do we know it was
11 painful? How do we know it was prolonged? Dr. Sexton told
12 you.

13 The defense wounds. Defense wounds on Benton's
14 hands. How does that happen, Doctor? How does that happen,
15 Doctor? When a screwdriver is coming at you, what do you do?
16 You try to fend them off. How do we know he was alive?
17 Dr. Sexton told us.

18 Remember when he explained this mark here and this
19 one. He said there had to be movement. Benton Smith had to
20 be moving because that screwdriver drug down. There's another
21 mark over here. It had to be movement. He was fighting for
22 his life. He was trying to save himself, but the little lamb
23 was no match for a big old tiger.

24 He's not through yet. The shirt that Benton has on,
25 his death shirt, still has stab wounds in it, front and back.

1 The doctor said some of those wounds to his head could have
2 been when his head was down on a hard object, like the ground.
3 He's hitting him when he's down.

4 Remember those boys from the Pizza Hut? Kicking
5 them when they're down. You don't just knock them down and
6 stab them, you make it worse when they're on the ground when
7 they're out. Can you imagine Benton Smith fighting off this
8 monster? Can you imagine the pain he went through? Can you
9 imagine the torture that he suffered?

10 He's not through yet. He's not through yet because
11 you're going to have some photographs of where he drug his
12 body over by a tree. You just don't fall down dead with your
13 feet straddling a tree. Somebody has to drag a body over to
14 put it in that position.

15 He's not through yet, not nice, sweet Johnny
16 Bennett. He covers him up. Another grave in the old
17 cemetery. But you know he doesn't have the decency to even
18 bury him. He doesn't have the common decency to bury him so
19 the animals won't get to him. If that is a life sentence,
20 folks, give him life.

21 Benton Smith put his trust in Johnny Bennett.
22 Johnny Bennett responded with massive fists, an uppercut, a
23 screwdriver and another body for the old cemetery. And you
24 know why he knew he could go back there and do that behind his
25 sister's house, the last person to testify today? I think I

1 asked her two questions. One of them is, Ma'am, at that the
2 time you and your husband were working? Yes.

3 So Johnny Bennett knew that nobody would be in that
4 trailer. He knew that he could carry out his murderous plans.
5 He knew he could go behind that trailer, down that break, into
6 those woods, murder, and leave the body of Benton Smith.
7 That's what happened, folks. If you don't think it happened
8 that way, you decide from the facts. You decide from the
9 facts.

10 And now the fun begins, because he's now got him a
11 car, Benton's little blue car. He's now got him a wad of
12 money. He's got some possessions. And where does he go?
13 Straight to Orangeburg. Straight to Orangeburg. That's when
14 he starts seeing Pam down there and Pam's sister, his
15 girlfriend, Bonita.

16 That's when he starts giving away things, selling
17 things. We don't know what happened to the speakers, they're
18 gone. He wanted to sell the radar detector to Pam but they
19 took it from him. He wanted to sell the camera to Jackie
20 Robinson. Jackie said, Man, what you doing with that camera?
21 You don't need to know about that, Johnny Bennett said.

22 Giving away the little glasses, giving away the
23 camera, giving away the pillows. It's not his, so why doesn't
24 he give it to his friends? That's exactly what he did. He
25 leaves that car behind the school right at the door of the

1 cafeteria where his mother was.

2 And what does Johnny Bennett tell Detective Freddie
3 Hamer over here? I always knew I'd kill somebody but I
4 thought it would be a family member. Now, how bad is that?
5 Always knew I'd kill somebody but I thought it would be a
6 family member.

7 If you want to know the character of Johnny Bennett,
8 go back to Stillinger's station. That morning old Mr. Paul
9 Smith right here is looking for his son. He's been looking
10 for his son since Tuesday. And the last person he saw his son
11 alive with was Johnny Bennett.

12 Mr. Paul Smith walks up to big old Johnny Bennett,
13 that old, little man with enough spunk, with enough love for
14 his son to confront mountain man Bennett. And what's Johnny
15 Bennett got in his hand? His dead son's cane. That would
16 show you the gall of this murderer.

17 What did Mr. Smith say? You heard several people
18 testify to this. Johnny, where's my boy? Where's Benton?
19 And what's sweet, loving, caring Johnny Bennett's response? I
20 don't know where he is and I don't give a damn where he is.
21 You got it on the calender right here. A couple people
22 testified to it. Bennett tells Mr. Smith, I don't know where
23 his son is and I don't give a damn where he is.

24 That's Johnny Bennett for you, with Mr. Smith's son
25 in Happy Town behind Johnny Bennett's sister's house near an

1 old cemetery out there with animals eating on him. You know,
2 it rained all Tuesday night. Remember that weatherman? All
3 day Wednesday it's raining on him and the animals are out
4 there; and I don't know where he is and I don't give a damn
5 where he is.

6 That's Johnny Bennett for you, folks. That's what
7 he thinks about another person, another human being. There
8 ain't no joy in Happy Town. He turned it into gruesomeville.
9 It's boo hill. That's Johnny Bennett for you.

10 And, of course, when Detective Hamer and the
11 officers start talking with him -- you know, he got that
12 warrant because he was tried in his absence, didn't show up
13 for stealing the gas. They bring him down to jail. Of
14 course, Johnny Bennett tells what happened. Not on your life.
15 He doesn't know what happened to Benton Smith.

16 Of course, the next day when Johnny Bennett gets out
17 of jail and the officers talk with him, of course, he tells
18 them what happened. Not on your life. Johnny Bennett doesn't
19 know what happened to Benton Smith.

20 And then that Saturday night after Bennett leading
21 them all over Swansea and out to Reeds Club and everywhere
22 else, and after they tell him, Look, Johnny, we know Benton is
23 dead. They've been in this business too long to know what's
24 happened after that time.

25 Tuesday, Tuesday night, Wednesday, Wednesday night.

1 Finding his car. Mr. Smith getting the pillows from
2 Orangeburg. Him having Benton's cane. Telling Mr. Smith, I
3 don't give a damn where he is.

4 Wednesday night, Thursday, Thursday night, Friday,
5 Friday night, Saturday, Saturday afternoon, Saturday night.
6 Then they say, Look, we know he's dead, but these folks need
7 to have the body of their son back. They need to give him a
8 proper burial.

9 Okay, drive. Takes them out behind his sister's
10 trailer. These officers don't even know where they are going,
11 Johnny Bennett is directing them. And when he takes them to
12 the mangled body of Benton Smith, of course, he tells them
13 what happened. Not on your life. Bennett says, check out
14 these other guys.

15 And then earlier that morning when they talk with
16 him Bennett is now starting to blame other people. Check
17 these other guys out. Does that sound familiar? It's
18 somebody else's fault. Not Johnny Bennett, somebody else did
19 it. Not old Johnny Bennett. I took you to the body, but
20 somebody else did it.

21 I just had this seance. Like a psychic, I just
22 happened to know where the body was. Just happened to be
23 behind my sister's trailer, but these other guys did it. The
24 officers know right then he's lying, but they don't stop.
25 They go right on and they talked to all these other people.

1 And they go on down to Orangeburg and they get the
2 camera back from Bonita. They get the two little drink
3 glasses. They get that black shaving kit, the money is gone.
4 The wad of money is gone. And they come back and they start
5 talking with good old truthful, honest Johnny Bennett again.
6 And what does he do? He's still blaming other people.

7 Until finally they said, Johnny, we ain't taking any
8 more of your lies. The gig is up. We've talked to too many
9 people, what you're telling us ain't checking out. Then when
10 he knows the gig is up and he knows officers have the goods on
11 him he gives this taped confession, and he's still lying in
12 that. He's still lying in that.

13 You can read this over. He and Benton didn't go to
14 Orangeburg. He wasn't driving Benton's car. Even though he
15 admits he killed Benton Smith he's still squiggling around and
16 squirming around and lying, just like he always does,
17 manipulating, because that's Johnny Bennett.

18 Not only that, he signs a confession the next day.
19 Then on a tip he takes them out on that road and shows him
20 where to find those red glasses. He takes them out and shows
21 them where to find Benton's key case, Benton's driver's
22 license. And he takes them back to the crime scene.

23 Now, how do we know that Johnny Bennett murdered
24 Benton Smith behind his sister's house? Because they found
25 this right where the body was. If you kill somebody somewhere

1 else you don't take the murder weapon with you, dispose of the
2 body and just throw it down. That's why the murder weapon was
3 right where the body was. And that's why they needed a metal
4 detector to find it, because it was up under all those leaves
5 when he was scratching around for leaves, and limbs, and
6 trees, and everything else he could find to put on top of
7 Benton's body.

8 They would return with the body that night? Sure
9 enough, when Johnny goes back out there on Wednesday with the
10 metal detector they find the murder weapon. Then the
11 following Thursday he shows them where the floor mats are. Of
12 course, somebody else saw the floor mats.

13 Remember the gentlemen that testified he was walking
14 down the road and he saw them? Did he touch them? No, sir.
15 No, ma'am. Mr. Lucius Martin. The fellow went in and told
16 him while Lucius called the police. But who took them to the
17 same exact spot? The murderer, Johnny Olandis Bennett.

18 Now he's in jail again. Of course, he's going to be
19 good now. No, sir. No, ma'am. Because he's in jail on
20 December the 2nd and December the 20th, he's already got some
21 contraband. And it keeps going, and it keeps going, and it
22 keeps going. But you know what? It's the other inmates'
23 fault, not Johnny because he's in jail.

24 And what did that paperman say this morning? I call
25 him the paperman, Mr. Aiken, they pay him six or seven

1 thousand dollars to come here and read papers. He said, Oh,
2 but Johnny was intimidated by these other little inmates. And
3 a shank. Well, a shank is not anything in prison. That's not
4 a threat to other people.

5 Well, Mr. Aiken, if it's not a threat to other
6 people, why does Johnny Bennett got it? He's got it for self
7 protection because he's intimidated. And he said a shank
8 doesn't mean anything because it wasn't a gun. Well, it
9 wasn't a stick of dynamite, but I haven't heard them passing
10 out guns and dynamite in jail.

11 But inmates get shanks. They make them out of
12 anything. Well, why does old Johnny Bennett got it for self
13 defense, for protection? Because he's being intimidated by
14 others. He's being manipulated by others. You believe that,
15 folks? Do you believe that for a second?

16 Well, here's a man, you know, rather than paperwork
17 he needed a crystal ball to open up a psychic shop down there
18 on Highway 1. He'd do just as good. He wouldn't make as much
19 money, but that's what he says. Of course, he's never even
20 talked with Johnny Bennett. At least a psychic talks with
21 you. He's never talked with the guards. He's never talked
22 with anybody. He's never talked with doctors or guards. He
23 hasn't talked with the guards, he's hasn't talked with
24 anybody. Nobody at the jail, not Johnny Bennett. He talked
25 with the lawyers, and that's it. The paperman.

1 In and out of prison. All these charts, I'm not
2 going to go over with you, you know. And he says, well, you
3 know, old Johnny, you got to understand here that around this
4 time there old Johnny is doing all right, then we don't have
5 any problems with him.

6 Do you remember in 1995 over there at the
7 penitentiary? And that large lady, Ms. Mazeek, said when
8 Johnny came in I sat him down and I gave him the rules and
9 said this is how it is, and this is what you got to do. Well,
10 of course, Johnny is going to follow grounds. No, sir, no,
11 ma'am. Because they said Johnny was what? Johnny was
12 manipulating. Johnny was smart. A smart, intelligent person
13 who is a manipulator and con artist. That's a dangerous
14 person, folks, and that's what Johnny Bennett is. And they
15 said, well, you know, he was all right. He was okay.

16 And then all those guards that came in here
17 yesterday, the bus load of them that came from Lieber, he's a
18 good fellow. Oh, he's a model fellow. We call him a big old
19 teddy bear. He's a gentle giant. He's the secretary of
20 defense. He knows all the changes. And we change our rules
21 at the Department of Corrections every day, and Johnny keeps
22 up with it. He teaches other inmates the changes. He lets
23 them know how it is. He makes sure they understand it. Kind
24 of gaining those guards' confidence. You see here from '95 to
25 '97, he was gaining some guards' confidence then.

1 He was gaining some guards' confidence at the Edisto
2 unit. You know why? Because that's when he was having sex
3 with the lady who used to be the guard over here at Lexington
4 County Jail, because he had been having sex with a guard at
5 Lexington County Jail before he left there.

6 But, oh, that's the guard's fault. That's that
7 woman's fault because she came in and made him have sex.
8 That's the other guards' fault because they let Johnny do it.
9 Johnny manipulates them. He controls people, and that's what
10 he's doing now.

11 You know how I know that? By his own handwriting.
12 After he's caught in '97, and after the investigation shows
13 he's been having sex with the female guard at the Lexington
14 County Jail, he's been having sex with the same female guard
15 at the Department of Corrections, where you can't even get
16 near people, can't touch them. He's having sex with a female
17 guard, and he's manipulating them. And you know why he's
18 doing it now? Because of you. Because he knows he's coming
19 to court, because he said so. And he talks about it in here.
20 He's manipulating again.

21 And the last thing down here when he's talking again
22 about, why did you all suspend my female visitor? We don't
23 know why. We don't know who did it. And how long is the
24 suspension for? Here's a man that knows all the rules and
25 they're changing as soon as they happen, but we don't know why

1 she was suspended.

2 And he makes up lies about that in some of the
3 documents. Said she didn't have permission from her
4 supervisor to visit. He says something else, somebody else's
5 fault. It says right down here, I want to talk with you. And
6 this is to the warden, Warden Weldon, down at Lieber.

7 He says I would very much like to speak with you
8 about these things as soon as you find the time. He wants to
9 talk with him. Because anything in my jacket could very well
10 have an impact on me when I go back to court, May 27th, 1997.
11 What did all those guards yesterday testify? I've been with
12 Johnny since 1997. He's been good since '97. Every one of
13 them. I don't think any of them went past '97, because I
14 wrote it down.

15 I didn't ask them hardly any questions. But every
16 one of them, I've been with Johnny since '97. Oh, he's the
17 secretary of defense now. He's good. He goes to Bible class.
18 He sings down there. He helps the preacher. The preacher is
19 his best friend in the world.

20 Has he manipulated anybody? Because I know if
21 anything bad is in my jacket, in my file, it could very well
22 impact me when I go to court and see 12 men and women on a
23 jury panel. So I think I'll be nice to some guards and get
24 them to testify for me. That's why I asked one of them, is
25 anybody working today, because you all seem to be up here in

1 Columbia testifying? And they were.

2 You give him life, the real Johnny will come back.

3 You give him life and he'll come back out. Meeting him again

4 will be like meeting King Kong on a bad day. Vile Johnny.

5 Mean Johnny. Manipulating Johnny. Murderous Johnny. You

6 give him life, those guards better button up their vests

7 because he's coming back out in force.

8 Because he's got what he wants. He's got the people

9 to testify, trying to pull the wools over his eyes, trying to

10 pull the wools over your eyes. Being smart, being

11 intelligent, being manipulative and being a con man, that's a

12 dangerous combination. And that's an explosive package

13 wrapped up in him, all six-foot-seven, 300 pounds of him. And

14 that's for you to decide.

15 You know, what did Benton Smith, what did he do to

16 deserve what he went through? Five-foot-seven and a half, 135

17 pounds. What did frail old Benton do? He had some money. He

18 trusted Johnny Bennett.

19 The last picture. The last picture that these folks

20 over here get to hold. That's his handiwork. How could a

21 human being do something like that to another living,

22 breathing, fragile, little person like that? That's Johnny

23 Bennett for you, folks. He turns happiness, Happy Town,

24 grief, destruction, pain and murder, then he leaves the body

25 out for animals to dine on. That's Johnny Bennett for you.

1 One of them -- I heard the doctor say one of them
2 went all the way through some bones, down into the brain.
3 Tremendous amount of force, I think the doctor called it.
4 Painful, vile, cruel, inhuman, everywhere. Everywhere.
5 Everywhere. The beast of burden.

6 Here's old Johnny Bennett. We gave him the benefit
7 of the doubt, that's only about six-five or six-six. That's
8 his booking photograph that's in evidence. Here is Johnny
9 Bennett. Everybody intimidates him. It's never his fault.
10 It's everybody else's fault.

11 And now he's so good because the guards told you so.
12 Of course, he was good for a two year time from '95 to '97,
13 wasn't he? Having sex with a woman that you can't even touch.
14 His family can't even touch him, they told you.

15 Here's little Benton Smith. That's a picture in
16 evidence taken from his prom. And here's Johnny Bennett's
17 handiwork on him. That's Johnny Bennett for you. That's what
18 you're dealing with, folks. That's what you've heard.

19 And they're going to say, oh, but Johnny is good
20 now. He can do some good. He's down there singing. Benton
21 got an award for being in the chorus. Where is his sweet
22 little voice today? Can you hear him singing?

23 And, of course, Johnny's family says they get to see
24 him. Where do these folks go to see Benton? Where do they
25 visit him? Where do they touch him or where do they look at

1 him? That's what we're dealing with.

2 Every one of you, every one of you said after I hear
3 it, after I hear about the crime, after I hear about the
4 person who committed it, I can sign my name. But if you don't
5 sign your name for Benton Smith his life would have been a
6 nothing. And if you don't sign your name for that, what will
7 you sign it for?

8 Now you see. Now you see why I'm asking for the
9 death penalty. It's warranted. It's appropriate. It's the
10 punishment that fits this crime and that callous murder.

11 THE COURT: All right. Ladies and gentlemen, we'll
12 take a short break, five or ten minutes, at this point. Now,
13 while you're in the jury room --

14 Everyone else remain seated, please. Everyone
15 seated.

16 Agents, you can get up, the sequestration team can.

17 Everyone else remain seated.

18 Be sure we don't talk about the case while we're in
19 the jury room, okay.

20 (WHEREUPON, the jury leaves the courtroom at
21 approximately 2:10 p.m.)

22 THE COURT: All right. The jury is secured. We'll
23 stand in recess for about ten minutes.

24 (WHEREUPON, a brief recess was taken.)

25 THE COURT: All right. We have everybody.

1 Go ahead, Mr. Floyd.

2 MR. FLOYD: Your Honor, before we bring the jury out
3 we request that the Solicitor be required to remove their
4 exhibits from right there where the jury will walk past them.

5 MR. MYERS: We'll take care of that.

6 THE COURT: Okay. I imagine they just had them in
7 the wrong place. That's fine.

8 Okay. Is the defense ready?

9 MR. FLOYD: The defense is ready, Your Honor.

10 THE COURT: The State ready?

11 MR. MYERS: Yes, sir.

12 THE COURT: Let's bring them in.

13 (WHEREUPON, the jury enters the courtroom at
14 approximately 2:30 p.m.)

15 THE COURT: All parties and attorneys are in the
16 courtroom and all jurors have now returned.

17 Ladies and gentlemen, at this time, we will have
18 closing statements from Mr. Floyd, the attorney for
19 Mr. Bennett, and from Mr. Bennett himself. Let me ask if
20 you'll give them your undivided attention, please.

21 Mr. Floyd?

22 MR. FLOYD: Thank you, Your Honor.

23 Madam Forelady and ladies and gentlemen of the jury,
24 before I get into my closing argument I, likewise, would like
25 to thank each and every one of you for the attention that you

1 have given to this matter. It's a most important matter, the
2 decision about whether someone should live or die.

3 Now, I listened to the Solicitor's argument, very
4 dramatic, motivated to bring out your passions, work you into
5 a killing frenzy. That might be appropriate for a lynching,
6 but for a decision in a court of law by members of our
7 community as to whether one of our citizens should live or
8 die, we suggest that the appropriate standard is such that
9 that decision should be approached with cool light of reason.

10 Now, all of you were selected by both sides because
11 you were qualified to serve on a death penalty jury. All of
12 you said that even though Johnny Bennett has been convicted of
13 murder, which he has, murder which is a killing with malice
14 aforethought, all of you said that we could still consider
15 that a life sentence could be the appropriate punishment.

16 Now, you've noticed through this trial, I'm sure,
17 that you heard about a lot of evidence that has nothing to do
18 with the actual murder of Benton Smith. Now, there is a
19 reason for that. Because you see, when you vote and decide
20 whether or not Johnny Bennett should receive a punishment of
21 life imprisonment or death you are to consider everything, and
22 that murder is only one circumstance.

23 Because what you're voting on is whether or not
24 Johnny Bennett should here in the year 2000 be sentenced to
25 death. What you're voting on is whether Johnny Bennett has no

1 merit in our society and therefore whether he should be
2 disposed of, whether he should be put to death now.

3 And that's why you heard about things all the way
4 from the time he was in the fifth grade until today. Because
5 what you decide is whether the type of man, the type of person
6 Johnny Bennett is here today in July of the year 2000, does he
7 merit being put to death?

8 Now, I want to talk a moment about all these
9 decisions that you're about to have to make, because it's
10 complicated. The Judge is going to give you several things
11 for you to use. Remember this, by the way, when I finish
12 speaking to you the Judge will charge you on the law, and you
13 go by what he says. But it's so important what's about to
14 happen I need to try to explain it to you, also.

15 First of all, the first decision you make is whether
16 or not this murder is accompanied by aggravation, aggravation.
17 Because, you see, not every murder can a person get the death
18 penalty for. So in order for you to first even consider
19 whether the death penalty is appropriate, the State must prove
20 to you beyond a reasonable doubt that at least one statutory
21 aggravating circumstance exists.

22 They allege four; kidnapping, torture, armed robbery
23 and larceny with a deadly weapon. Have they proven those to
24 you beyond a reasonable doubt? I heard about a theory of the
25 Solicitor about what happened. But I suggest to you, there

1 was absolutely no evidence whatsoever to support this theory
2 to speculate on as to how this murder happened. But I'm not
3 going to argue on this point a long time. I want to make just
4 a couple comments to you.

5 One, where is there any evidence of a kidnapping?
6 I believe the confession was he hit him, knocked him
7 unconscious, put him in the car, came back to the field, still
8 there's no murderous intent at that point. He gets out of the
9 car, something happens, the murder occurs. Where's the
10 kidnapping?

11 They talk about physical torture, it's a decision
12 for you to make. The doctor says it happened in about a
13 minute's time, is what I believe he said. Then they talk
14 about robbery and larceny. I don't think there's any evidence
15 that money had anything to do with this crime. They speculate
16 that there was money in this black bag. There's no proof
17 there was.

18 Let me tell you something. If Johnny Bennett would
19 have gotten money out of this murder, Bonita Gonsalves would
20 have gotten some of it, wouldn't she? Because that's what she
21 was all about, and she didn't. But I'm not going to belabor
22 those points.

23 Now, if you decide that the State has proven one of
24 these aggravated circumstances beyond a reasonable doubt then
25 you go to your next decision. You see, the finding of

1 aggravation does not necessitate or require a death sentence.
2 That is only the threshold that the State must reach before
3 you even consider the death sentence. So, the first decision
4 that you make, has the State proven aggravating circumstances?

5 Now, if you decide they have proven that beyond a
6 reasonable doubt, you then go to the second decision.
7 Because, see, if they don't do that then you can't even give
8 the death penalty. If you feel they've proven that, then you
9 go to the next decision, and the next decision is, should
10 Johnny Bennett be put to death or should he serve a life
11 sentence?

12 Now, don't think that if you don't vote for death
13 Johnny Bennett is walking out of this courtroom a free man.
14 Because you don't have that power, nobody has that power. A
15 jury has found him guilty of murder. Ladies and gentlemen,
16 some things are more important than that.

17 I want to tell you something. You make your
18 decision, when you make your decision you have to choose,
19 should Johnny Bennett live or should Johnny Bennett die. He's
20 not going to leave this courtroom a free man. The best that
21 can happen to him is that he'll spend the rest of his life in
22 prison, and you've heard what that's like. He gets one and a
23 half hour a day out of his cell, one and a half hour a day.

24 Now, when you go to choose what is the appropriate
25 punishment the law says that you consider, you can consider

1 what are called statutory mitigating circumstance and you can
2 also consider what are called nonstatutory mitigating
3 circumstance.

4 Now, the Judge will charge you on what are called
5 statutory mitigating circumstances. They are -- the ones that
6 may apply; one, that the defendant has no significant history
7 of prior violence. That's something for you to consider.

8 He's got one conviction before this of violence. Two, that he
9 was under some type of mental or emotional stress at the time,
10 or whatever the wording is. You've heard the confession on
11 what was going on in Johnny Bennett's mind and life at that
12 time. He said he snapped. Three, you can consider his age.
13 He was 20 years old at the time.

14 Now, those are just what are called the statutory
15 mitigating circumstance. What you also can consider are what
16 are called nonstatutory mitigating circumstances. What does
17 that mean? That means you look at Johnny Bennett's life now.
18 You can look at it before the murder, you can look at it after
19 the murder, and you can see and determine whether there's any
20 good in Johnny Bennett that merits his not being put to death.

21 Now, before I get into these, I'd like to discuss
22 something with you. The State has made a big deal about
23 Johnny Bennett always getting into trouble. They've got all
24 these posters they put into evidence to show you all the times
25 at the Lexington County Jail, for example, that he's gotten in

1 trouble; all these times in high school, elementary school and
2 middle school that he got into trouble. And he sure did. He
3 sure did. He got into some trouble.

4 What we tried to show you was that he wasn't all bad
5 during that time. You've heard Ben Killian, you've heard
6 Robert Novinger, and they told you he had some good, he showed
7 them respect, he did everything they asked him to do. To
8 them, he was a good student.

9 Now, the question, should he be put to death because
10 he passed a dirty note to a female student, Because he talked
11 out in class, Because he disrupted class when he was 14 or 15
12 years old, or 13 years old? Because he got kicked off the
13 bus, should he be put to death?

14 Now, let's go to the Lexington Detention Center --
15 no, the next thing will be Y. O. A. They talked about when he
16 went in for the Y. O. A. He had one incident of a fight in
17 however long he was there, 12, 18 months. It was on their
18 chart. And then he goes to the Lexington Detention Center.
19 There's a lot of incidents there. But let me tell you
20 something, some things about Lexington Detention Center that
21 give me a lot of trouble and hope they do you too.

22 You know, while he was there they used him. They
23 used him. He's a big guy. They used him to control other
24 inmates. When they got a troublemaker in there, well, they
25 put Johnny in a cell with them or send them down on the floor

1 with them, and Johnny, at their request, took care of the
2 problem. You heard them, they admitted it here.

3 Then some guards that were crooked, they used him.
4 He benefitted from it, sure, but they used him. They brought
5 cigarettes into the jail and had him sell them for them. They
6 didn't like him, the superiors, because they found out about
7 that. You check your list. Before this tazer incident, they
8 knew about the cigarettes. They knew about the crooked guards
9 that were using Johnny Bennett.

10 And what about that tazer incident? Captain Bost
11 looks down there and what does he see? He doesn't see Johnny
12 Bennett doing anything wrong. He doesn't see him doing a
13 thing wrong. He sees correctional officers pulling his
14 superior away, because the superior is out of control. He
15 can't see Johnny Bennett. What he sees is his superior out of
16 control. So what does he do? He grabs up that tazer gun.

17 Now, he didn't have to use the tazer gun to get
18 Johnny back in his cell. Johnny came back in his cell. Once
19 he gets in his cell, what did he say to him? They don't like
20 him, he hates him. Strip. Strip in front of these two female
21 guards. Now, why? Has anybody given him any indication that
22 a strip search was necessary? No. Speculation, that was
23 unfounded, because once he stripped there wasn't anything. So
24 he doesn't strip in front of those women, and they shoot the
25 tazer gun in him and put the electricity to him and take him

1 to his knees.

2 Now, think about this. They used him and now do you
3 think that maybe the fact they were using him might have an
4 impact on how he reacted to their authority? You think it
5 might have? And think about this. They used him, they abused
6 him and now they come into court and ask you to use this stuff
7 against him to kill him. They're going to clean their house
8 by asking you to kill Johnny Bennett.

9 Now, you remember there was only one thing I told
10 you in opening argument. I said to you, first of all, we
11 don't have to show you anything. No, we don't. We don't.
12 But I said what the evidence will show to you is that Johnny
13 Bennett is a different person now than he was when Benton
14 Smith was killed. And he is a different person now than he
15 was when he was at the Lexington Detention Center.

16 And what I suggested to you, is that when you hear
17 all of this evidence what I want you to conclude is that there
18 is some good in Johnny Bennett. There is some merit to Johnny
19 Bennett's life. There is good that Johnny Bennett does for
20 other people and can do for them in the future. In that, he
21 deserves to live and not die.

22 Now, these are what we consider to be the
23 nonstatutory mitigating circumstances that the evidence shows.
24 One, the defendant has no significant history of criminal
25 activity. Now, that goes beyond the violence thing. He has

1 basically two convictions, the ABHAN from the Pizza Hut,
2 assault and battery of a high and aggravated nature, and the
3 murder, the murder of Benton Smith.

4 Two, the defendant can be rehabilitated or restored
5 to useful citizenship. Don't you think the evidence shows
6 that? Three, the defendant has a good prison record. Don't
7 you think the evidence shows that? From 1995, no
8 disciplinaries in five years. Four, the defendant has changed
9 his life since the crime was committed. You've heard a lot of
10 witnesses on that. You've heard a lot of evidence on that.

11 You know, as Gina said, back there when he was 20
12 years old, 21 years old, back in the jail at Lexington, back
13 when this happened to Benton Smith he was a wild-butt, kind of
14 out of control. But now, he's a mature man, a man of
15 responsibility. I'm kind of reminded by, I believe it was
16 Chaplain Brown's comment, he saw Johnny Bennett grow into his
17 responsibility, and that's what Johnny's done.

18 Five, the defendant does good deeds for others.
19 You've heard all of that from the guards. What do they say?
20 When somebody is down, when somebody, for example, has a death
21 in the family, one of the inmates, Johnny is the one who goes
22 to console them. When the inmates receive letters and they
23 can't read them, Johnny goes and reads the letters to them.
24 When the inmates want to write letters to their family members
25 or loved ones, and they can't write, Johnny goes to write the

1 letters for them. When the guards need something done, Johnny
2 does it for them.

3 The defendant is useful to other members of his
4 community. Well, you know, his community is limited, I told
5 you that in the outset. It's the prison community where he
6 lives. But, you know, there's an old saying, bloom where you
7 were planted. That's where he is.

8 Does he let it get him down or does he turn it into
9 a positive situation and try to do good to improve everyone in
10 that community's life? Isn't that what the guards say? The
11 defendant has demonstrated that he will be able to adapt to
12 prison life. Five years no infractions. What do all the
13 guards say?

14 Eight, the defendant has developed sincere religious
15 or spiritual beliefs. You've heard that from a lot of people.
16 The chaplain's assistant, participates in plans and assists in
17 all the religious ceremonies. He tries to get the other
18 inmates to attend the religious ceremonies and the Bible
19 studies. He tries to get them to attend to their spiritual
20 and religious needs. His sister has seen a change, Chaplain
21 Brown has seen the change and all those correctional officer
22 have seen, he's sincere.

23 Nine, the defendant tries to help others be better
24 people, and we just touched on that. He tries to get the
25 other inmates to get their lives right, tries to get them

1 involved in helping themselves to be better people.

2 Ten, the defendant treats others with respect.

3 That's all we heard, wasn't it? There's not a single -- you
4 know, how many guards did we have, 12, 13? Every one of them
5 without exception said Johnny Bennett treats all of us
6 correctional officers with respect and he treats all of his
7 fellow inmates with respect.

8 You know, don't you think that if there was one
9 person at Lieber Correctional Center that had anything bad to
10 say about Johnny Bennett you would have heard about it,
11 because the State would have produced that witness? If they
12 can find things he did in the fifth grade, they can come in
13 here and tell you about him passing notes to girls in class
14 and knowing that he's got no disciplinaries on his record for
15 five years, don't you think they have scoured Lieber
16 Correctional Center with investigator after investigator
17 trying to find one person down there that would have anything
18 to say bad about Johnny Bennett?

19 Now, the defendant tries to assist employees at the
20 Department of Corrections in the performance of their duties.
21 You heard testimony on that. He helps them out every time
22 they ask him to do something, he tries to help them. If the
23 floor is noisy, he tries to shut it down.

24 When all these new rules come out, well, he's the
25 secretary of defense, that's his nickname out there. Because

1 what he does, he goes to the staff and he finds out why is
2 this rule in place, these new rules, why we're changing it,
3 then he goes to all the inmates and explains it the them,
4 explains it to them. He helps them out. And like manner, he
5 tries to make his community a better place.

6 Thirteen, the defendant demonstrates remorse for his
7 crime. Well, he's going to talk to you in a minute. He also
8 shows remorse through his actions, through the changes that
9 he's made in his life, through his attempts and efforts to
10 help other people.

11 And, fourteen, the defendant had problems in school.
12 That's there for you to consider, he doesn't have a good
13 education. Now, I'm not saying it's not his fault, but he
14 doesn't, and that's given him problems in life. He's trying
15 to overcome that, and he's doing that within the community
16 that he lives.

17 Now, those are just examples of nonstatutory
18 mitigating circumstances that you can consider. There may be
19 those that you have thought of that are not listed there, and
20 you can consider them. And then the law says you don't even
21 have to have mitigating circumstance in order to return a
22 verdict of life imprisonment. Because you can return a
23 verdict of life imprisonment for no reason at all or simply
24 for mercy. Let's talk about how that happens.

25 You see, if you decide by unanimous vote that the

1 State has proven aggravating circumstances beyond a reasonable
2 doubt you then go to the next step, is it life, or is it
3 death? Now, you may all decide unanimously that it should be
4 life. And if you all decide unanimously that it should be
5 life, then you've got one of two forms that you would be
6 allowed to sign. And in this situation, the forelady signs
7 that form.

8 There's one form where it says we, the jury, find
9 for life imprisonment, the forelady signs it. There's another
10 one, we, the jury, find for life imprisonment with aggravating
11 circumstances. Two choices on the life, regular life
12 imprisonment or life imprisonment with aggravating
13 circumstances, okay. I imagine you're already confused
14 because it's confusing.

15 Now, remember, if the State proves aggravating
16 circumstances that does not mean you have to give death, that
17 only means you consider death. And then when you go to
18 consider whether it's death or life imprisonment you can
19 consider the statutory mitigating circumstances and
20 nonstatutory mitigating circumstances, no circumstances
21 whatsoever or mercy.

22 Now, if the jury does not unanimously agree that
23 life imprisonment is the proper punishment then you go to the
24 consideration of the death penalty. Now, in order to give the
25 death penalty each and every one of you must sign on the line

1 that you think death is the appropriate punishment. Now, you,
2 each individual juror, must make that decision. And if one of
3 you do not sign on that line then the punishment will be life
4 imprisonment.

5 MR. MYERS: Objection. Objection.

6 THE COURT: Yes, sir. Sustained. I'll charge the
7 jury as to that issue later.

8 Go ahead.

9 MR. FLOYD: So you listen to what the Judge tells
10 you on that, because you see, Johnny Bennett has a right to
11 each one of your individual considerations when this decision
12 is made about whether he should live or die. And when you
13 make that decision we ask that you think of how Johnny Bennett
14 is now.

15 You know, there is no defense to the murder of
16 Benton Smith and there's not anybody that will say that is not
17 a terrible, vicious act without reason, without understanding,
18 but you're not deciding today whether Johnny Bennett should be
19 killed in 1990, you're not deciding today whether Johnny
20 Bennett should be killed in 1991, in 1992, in 1993 or in 1994
21 for these acts that you've heard about. You're not even
22 deciding whether he should be killed in 1995, 1996, 1997,
23 1998, 1999. You are deciding whether he should be killed here
24 in the year 2000.

25 You know, the State's put in a lot of these posters

1 for you. We didn't put any in, but we got one here we'll talk
2 to you about, and I got another one here. This is a record of
3 the disciplinary infractions of Johnny Bennett from the time
4 he was convicted of murder in 1995 through today. That's our
5 list.

6 Now, the State wants to argue to you, well, remember
7 1997, he broke a rule, and he sure did, he had sex with his
8 girlfriend. He wasn't supposed to. He and several other
9 inmates, because the guard was letting them do it. But the
10 prison understand that. I mean, he's man. The guard let him
11 do that. He's not hurting anybody. He's not violent toward
12 anybody. He's not sneaking behind anybody's back, and so he
13 was not disciplined. There's no infraction on his record for
14 what happened in 1997.

15 Now, they talk about -- you know, one thing the
16 Solicitor seemed to indicate, well, he's going to see these
17 visitors again, da, da, da, da, da, how did he do it with a
18 window? It's a different place. Talk about nobody at Lieber
19 knowing him for more than three years, three years ago he got
20 transferred to Lieber --

21 MR. MYERS: Objection. That's an improper argument
22 that is inaccurate.

23 MR. FLOYD: What's improper and inaccurate?

24 THE COURT: Ladies and gentlemen, it will be for you
25 to determine the facts of the case as you remember them.

1 Remember I told you that the lawyers statements are not
2 evidence. You recall the evidence as you recall it, and make
3 such inferences as you deem appropriate.

4 Go ahead, Counsel.

5 MR. FLOYD: I think you heard all the guards at
6 Lieber say they've known him since 1997, and I think you heard
7 the investigator say -- their investigation from another
8 institution, so I won't make a big deal on that. He's now in
9 a place where he can't even touch his visitors.

10 Now, should Johnny Bennett be put to death? You
11 know, he's done some wrong in his life. He's done some
12 terrible wrong in his life, and there may not ever be enough
13 years that Johnny Bennett could live to completely make up for
14 the wrong he did, because Benton Smith can never be replaced.
15 His family's loss can never be replaced.

16 But you know what Johnny Bennett can do? He can do
17 as much good as he can for the rest of his life to try atone
18 for the terrible wrong that he did. And if we kill him now,
19 what we kill is we kill the good, because that's what he has
20 now is the good. Where's the infractions? You've heard all
21 the people at Lieber, he does good now. He'll continue to do
22 good. So why should we kill him now and stop the good?

23 I'm going to shut up and sit down. I see you
24 depressing those smiles of relief. I've been up here talking
25 a long time, I apologize for that. But you see, I don't know

1 what's in your mind.

2 I wish the system were that if any of you jurors had
3 questions that you wanted to ask, because it's bothering you,
4 I wish you could raise your hand and ask me the question so I
5 can answer it for you. The system doesn't allow that. So I
6 got to sit up here and try to think of everything possible I
7 might can say in hopes that I answer any of those questions
8 that I don't know about. And when I shut up and go over there
9 and sit down, I don't get to say another thing to you.

10 And this decision that you're about to make, my,
11 it's such an important decision, it's such a serious decision.
12 It is a decision concerning life itself, and I wish I knew
13 whatever questions there were that you had. All I can do is
14 just remind you we're talking about whether or not to kill
15 Johnny Bennett today.

16 So when you talk about whether to kill Johnny
17 Bennett today, you've got to consider what type of man is
18 Johnny Bennett today. And when you do that, let me tell you
19 something. There has been not one piece of evidence presented
20 by the State to contradict the witness after witness, after
21 witness, after witness who came up here to speak on this man's
22 behalf and to tell you that that's a good man now, that that's
23 a man who shows respect to his fellow man, that that's a man
24 who tries to help his fellow man, that that's a man who's in
25 the worst kind of circumstances that a man could be in in

1 prison.

2 And what does he try to do? He tries to help the
3 other people there. He tries to lift their spirits. He tries
4 to console their spirits. He tries to get them to grow
5 spiritually so that they can deal with whatever life they
6 have. Because that's not a lot of life there is it? One and
7 a half hours a day out of prison -- out of his cell.

8 You know, Johnny is going to speak to you himself in
9 just a few minutes. I think the Judge said he's going to give
10 everybody a break, and if he does, then right after the break.
11 It's his life that you're going to decide about. I ask that
12 you give him your attention. I know you will. I know you
13 will.

14 We watch you all like you all watch us, and we know
15 you're good jurors and you're listening and you're concerned
16 and you're trying to put all this evidence together. I ask
17 that you give him your attention. And I tell you that we feel
18 comfortable placing Johnny Bennett's life in your hands.
19 Thank you very much.

20 THE COURT: Mr. Bennett, do you wish to make a
21 statement to the jury?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Jurors, are you okay? Did you want to
24 take a break now?

25 You're saying you're okay.

1 I apologize. Go ahead, Mr. Bennett.

2 THE DEFENDANT: First of all, I want to apologize to
3 each and every one of you from taking you away from your
4 everyday life, from your family, your friends and having you
5 to sit here and put you in a position where you got to place
6 judgment upon me.

7 I know that it's an unfortunate situation for
8 Ms. Annie Rosie, Mr. Paul Smith family, also for my family
9 because for the past ten years I've had to deal with this day
10 in and day out. And I'm not going to sit here and stand here
11 before you and tell you that I was a perfect angel because I
12 wasn't. You know, I started getting into things when I was a
13 little boy and it continued for awhile.

14 And I was placed into a situation where being a
15 young -- just coming of age, just turned 20 years old, really
16 didn't know any better with those who were -- you know, I was
17 just influenced in the wrong way to do some bad things. And
18 I'm not trying to place the blame on anyone, I'm not trying to
19 excuse the behavior because I did those things.

20 And for the past five years I would like to think
21 that I have become a changed man. You know, an alcoholic,
22 they can become a recovering alcoholic. A drug addict can
23 become a recovering drug addict. Even a prostitute can become
24 a reformed prostitute. So I would like to think that I have
25 become a reformed changed man.

1 I mean, I don't have that many opportunities or
2 advantages to me where I'm at, but what I do have I try to
3 make the best of it. You know, not just for myself but for
4 others around me. And, you know, like you've heard, I'm not a
5 dumb person, far from it.

6 I'm not the smartest person either, but from the
7 potential, the qualities that I do have now I see that there
8 is a better way for me to use those things, and that's what
9 I've done. Because there are people that are around me who
10 are less fortunate than myself who didn't have the chance to
11 get an education, who didn't have a chance to really be able
12 to look up to someone, and I had all those advantages, but I
13 didn't take advantage of them.

14 And now I see myself in the position where I can be
15 an inspiration to someone else, regardless of the situation.
16 And I wouldn't stand here before you and tell you that each
17 and every day is a bed of roses for me because it isn't.

18 But I also know because of my size a lot of people
19 will look at me and say, well, oh, he's a big man. Oh, he's
20 strong. Yeah, physically I may be, but also there's another
21 strength that is within me that allows me to look beyond
22 myself, my situation and look at those around me and try to
23 help them, and that's what I try to do now.

24 I haven't always had that frame of mind, but because
25 of the influence of some of the people that I've met along the

1 way who has helped me come to realize my true potential such
2 as Chaplain Brown, and I respect him a great deal. My mom, my
3 dad, my oldest sister, who I call little momma, you know, she
4 was always encouraging me. Her nickname for me is Jethro.
5 And she was always encouraging me to be the best that I can
6 be, to do all that I can do.

7 And I know that I disappointed a lot of people who
8 tried to help me, who tried to direct me, who tried to
9 encourage me, and for all those people, I'm sorry. I
10 apologize. But, I mean, this may sound crazy and -- but I
11 counted all the joy because had it not been for this situation
12 who's to say where I would be today.

13 Who's to say that I would wake up in the mornings
14 and truly look at myself in the mirror, and look at myself
15 eye-to-eye and say hey, I'm proud of what I've become. You
16 know, I may not be proud of where I'm at or the circumstances
17 that led me there, but I'm proud of who I am today, and that
18 is something that I was never able to do in my life.

19 You know, I'm just like any other person. And some
20 of you are older than I am. I will soon be 30 years of age in
21 September. And I'm sure that there's some mistakes that you
22 all have made in your life where you've looked back, like my
23 sister said, and said if only I could, if only I could. But I
24 can't. I can't go back.

25 The only thing I can do is move forward, and that's

1 what I'm trying to do with my life. And I don't want to sit
2 up here and try to preach to you. I don't want to seem like
3 I'm begging you or pleading with you because you said that you
4 would be fair to the State as well as to me.

5 And you've heard many witnesses come in and yeah
6 this, yeah that, yeah this, yeah that. But I wanted to give
7 you a chance to here from me, Johnny Olandis Bennett, Jr.
8 And I don't know what else I can say or what more I can do
9 because I honestly feel that there was a purpose for me. I
10 got away from that. But now that I have done some soul
11 searching I have been able to find myself.

12 I would like to think that I'm fulfilling that
13 purpose, because a lot of -- you know, a lot of guys around me
14 they look at me and they question me sometimes, well, why do
15 you do this or why do you do that? Because of my size.

16 When you automatically see me you would think I'm
17 going to do the exact opposite of what I'm doing, and it makes
18 me feel good because that lets me know that someone of my size
19 can be an encouragement to those around me, to let them know
20 if I can do it then someone like them can, and that alone
21 fills my heart with joy.

22 And like I said, whatever decision that you all come
23 back with, I have no choice but to accept that and I got to
24 live with that. But while you're back there, I just want you
25 to think to yourself, has there ever been a situation in your

1 lives where you said if only I could go back? And that's the
2 situation that I'm in right now. And I thank each and every
3 one of you for listening to me, and I just ask that you will
4 be fair. Thank you.

5 THE COURT: Thank you, sir.

6 Ladies and gentlemen, we're going to take a short
7 break at this time and give you a chance to move around a
8 little bit. Let me ask you to step to the jury room, but
9 remember, again, be sure not to talk about the case.

10 (WHEREUPON, the jury leaves the courtroom at
11 approximately 3:22 p.m.)

12 THE COURT: The jury is secured. Counsel, we'll
13 strand in recess for a few minutes.

14 (WHEREUPON, there was a brief recess.)

15 THE COURT: Counsel, one thing I planned to do in
16 charging the jury is that when we come to the forms I have
17 copies of each of the forms so that each of the jurors can see
18 the forms as I go over them. They will, of course, be taken
19 from all jurors except the forelady when they go.

20 Any objection to that from the State?

21 MR. MYERS: No, sir.

22 THE COURT: Defense?

23 MR. FLOYD: No, Your Honor.

24 THE COURT: Which one of the bailiffs will do this
25 for me? I'll tell you the designated time, Bailiffs. Don't

1 give them ahead of time because I don't want to distract them.
2 I'll tell you when I would like those given out, all right?

3 THE BAILIFF: Yes, sir.

4 THE COURT: All right. Are we ready to bring the
5 jury in? Is the State ready?

6 MR. MYERS: The State the ready?

7 THE COURT: The defense?

8 MR. FLOYD: The defense is ready, Your Honor.

9 (WHEREUPON, the jury enters the courtroom at
10 approximately 3:42 p.m.)

11 THE COURT: All parties and attorneys in the
12 courtroom and all jurors have now returned.

13 Ladies and gentlemen, let me ask you to please give
14 me your undivided attention. I will tell you ahead of time
15 that it will take a few minutes to give you this charge so
16 it's very important that you do so. If any of you at any time
17 feel your concentration flagging or lagging, please say so,
18 and we'll take a second to stretch or something if you need
19 to. It's very, very important that you hear what we're
20 talking about at this time.

21 Now, Madam Forelady and ladies and gentlemen, it is
22 now your duty and responsibility to determine what sentence
23 you will impose on the defendant, Johnny Olandis Bennett, Jr.,
24 for the murder of Benton Darrell Smith. You must now decide
25 whether to sentence him to life imprisonment or to death. You

1 will sentence the defendant.

2 Now, in this case, the fact that the defendant did
3 not take the stand and testify in his own behalf does not
4 create any presumption against him. He has a constitutional
5 right not to testify, and beyond that, he does not have to
6 testify anyway because he does not have the burden of proof.

7 Remember what I told you, and through all of this
8 you must always bear in mind that the State always has the
9 burden of proof on every issue, and they must prove each issue
10 to you beyond a reasonable doubt. So bear in mind, again,
11 that the defendant does not have to testify and this should
12 not enter into your discussion or your deliberations, should
13 not even think about it at any time and in any way. It has
14 nothing to do with these issues. You must base the evidence
15 as you have it.

16 Now, Madam Forelady and ladies and gentlemen, under
17 the constitution and laws of this State you are the finders of
18 fact in this case. I do not have the right to pass upon the
19 facts or express my opinions in any way, nor may I intimate in
20 any way what I think about what the proper sentence should be.
21 You are the judges of the credibility or the believability of
22 the witnesses.

23 Now, remember that I told you, you are the finders
24 of fact. And as the finders of fact, you do so by determining
25 the credibility or the believability of the witnesses who

1 testified. And in testifying, upon the credibility of the
2 witnesses who testified you may take into consideration many
3 factors.

4 Some examples of those factors are, you may consider
5 the appearance and manner of a witness on the stand, which is
6 sometimes referred to as the demeanor of the witness. You may
7 consider whether the witness was forthright or hesitant in his
8 or her testimony. You may consider whether the witness's
9 testimony was consistent or did it contain discrepancies.

10 You may consider the ability of the witness to know
11 the facts about which he or she testified. Did the witness
12 have a cause or a reason to be biased or prejudiced in favor
13 of the testimony that he or she gave? Was the testimony of
14 the witness corroborated or made stronger by the other
15 testimony and evidence in the case or was it made weaker, in
16 other words, impeached by the other evidence in the case?

17 You also heard evidence of prior convictions of
18 crimes of moral turpitude by certain witnesses who have
19 testified in this case. Now, this evidence was admitted and
20 may be considered by you only for the purpose of evaluating
21 the credibility or believability of that particular witness.
22 Evidence of these such convictions can be used by you in
23 determining whether a witness is truthful or worthy of belief,
24 and you may give it such weight or value as you feel it may be
25 entitled to.

1 Now, as jurors you have a right to believe a small
2 portion of a witness's testimony and discard the latter or
3 vice versa. You may believe all of what a witness says or you
4 may believe none. You may believe the testimony of a single
5 witness against all of the others or vice versa.

6 And most certainly, you would not determine
7 credibility or believability by counting up the number of
8 witnesses who testified for each side.

9 Throughout this process you have one single duty,
10 and that is to seek the truth in arriving at an appropriate
11 sentence, and you must do so bearing in mind that you must
12 give the defendant the benefit of every reasonable doubt.

13 You also heard witnesses who testified as what are
14 called expert witnesses. Now, they were allowed to do so
15 because of special knowledge, skill, experience, training or
16 education in a particular field, and as such, they were
17 allowed to give their opinions as experts in those matters in
18 which they were skilled.

19 Now, in determining the weight to be given to such
20 an opinion, you should consider the qualifications and
21 credibility of the expert and the reasons given for his or her
22 opinion. You are not bound by any opinion of any expert. As
23 to each one, you determine how much weight and credibility to
24 give to it.

25 Now, there are two types of evidence which are

1 generally presented during a trial; direct evidence and
2 circumstantial evidence. Direct evidence is the testimony of
3 a person who asserts or claims to have actual knowledge of a
4 fact, such as an eyewitness. Now, circumstantial evidence is
5 proof of a chain of facts and circumstances indicating the
6 existence of a fact in issue.

7 The law makes no distinction between the weight or
8 value to be given to either direct or circumstantial evidence,
9 nor is a greater degree of certainty required of
10 circumstantial evidence than of direct evidence. You should
11 weigh all the evidence in this matter, and in weighing all the
12 evidence if you are not convinced beyond a reasonable doubt
13 that a death sentence should be given then you must give a
14 life sentence.

15 Now, while the Court generally determines the
16 admissability of evidence, I instruct you that in this case as
17 regards a statement, an alleged statement made by the
18 defendant, that you would have to make certain determinations.
19 Now, when a statement is alleged to have been made by a
20 defendant, again, the Court determines the admissability.

21 Now, you as members of the jury make the ultimate
22 determination of whether or not the defendant made the
23 statement, and if you find that he did make the statement then
24 you determine whether the statement was made by the defendant
25 voluntarily and of his own free will and accord. And then if

1 you determine he did, you would determine what weight, if any,
2 should be given to an alleged statement.

3 Now, you must determine if the alleged statement was
4 the product of an essentially free and unconstrained choice by
5 its maker. If you determine it was, and the burden is upon
6 the State to prove this as all other facts beyond a reasonable
7 doubt, then you may give the statement such further
8 consideration as you deem proper.

9 Now, if you determine the alleged statement was not
10 the free and voluntary willed expression of the defendant then
11 you should not consider the statement at all.

12 In determining whether a defendant's will was
13 overcome in obtaining a statement you should consider both the
14 characteristics of the defendant and the details of the
15 interrogation, which is referred to in the law as the totality
16 of the circumstances.

17 Now, some of the facts that you may consider are as
18 follows. You may consider the age of the accused; his
19 education or lack of education thereof; his mental ability or
20 mental capacity; his I. Q. or intelligence; his background and
21 environment; the advice or lack of constitutional rights,
22 including but not limited to the procedural safeguards known
23 as Miranda warnings concerning the right to remain silent.

24 And those are that a statement could be used against
25 him in a court of law; that he has the right to have a lawyer.

1 present; and if indigent, he could not afford a lawyer, then a
2 lawyer would be appointed to represent him without any cost;
3 and that he could stop making a statement at any time. These
4 are the Miranda factors. These and other factors you would
5 consider. Now, other factors to consider are the place and
6 length of the questioning and the nature of the detention.

7 Now, you, as the jury, must carefully scrutinize all
8 of the surrounding circumstances before you give any weight to
9 any alleged statement. You must be satisfied beyond a
10 reasonable doubt that the statement was made by the defendant
11 uninfluenced by any promise of reward or threat of injury or
12 diminution of his rights.

13 A suspect also who has expressed his desire to deal
14 with police only through an attorney or only through counsel
15 cannot be subjected to further interrogation unless counsel
16 has been made available to him, unless he, himself, initiates
17 further communication. If the accused himself initiates
18 communication with the police then the police are allowed to
19 talk to the defendant in the absence of his lawyer.

20 Now, the same constitution and laws which make you
21 the finders of fact make me the judge or the instructor of the
22 law. You must accept as correct the law as I give it to you.
23 Now, if I'm wrong there is another time and place for it to be
24 corrected. But for the today's purposes, you must accept it
25 as correct. And I charge you that you should not be concerned

1 about what you think the law ought to be but rather what I
2 charge you that the law is.

3 Now, as I told you a moment ago, you will consider
4 at this time the appropriate sentence to give to the
5 defendant. Now, in arriving at your sentence there are four
6 classifications of evidence, and I mentioned this earlier,
7 there are four classifications you will consider.

8 Now, you may consider two types of evidence
9 introduced by the State; statutory aggravating circumstances
10 and character evidence. Now, these statutory and aggravating
11 circumstances and character evidence must be proven by the
12 State beyond a reasonable doubt.. Secondly, you must consider
13 the two types of evidence introduced by the defense, and those
14 are statutory mitigating circumstances and any general
15 mitigating circumstances of any nature whatsoever as shown by
16 the evidence.

17 So let's begin discussing these in just a little bit
18 of detail. First, let's discuss the first ones I mentioned,
19 statutory aggravating circumstances. You may consider
20 statutory aggravating circumstances which are proven by the
21 State beyond a reasonable doubt. And remember I told you
22 earlier, the State has the burden of proof. Before you can
23 use any statutory aggravating circumstance the State must
24 prove it beyond a reasonable doubt.

25 Now, in arriving at your decision, you must first

1 determine from the evidence whether the alleged statutory
2 aggravating circumstance or circumstances existed beyond every
3 reasonable doubt at the time the victim in this case was
4 murdered.

5 Now, what do we mean by the term statutory
6 aggravating circumstance? What is a statutory aggravating
7 circumstance? Well, a statutory aggravating circumstance is a
8 fact, an incident, a detail or an occurrence which the general
9 assembly of this State has declared by statute would make
10 worse or would aggravate the offense of murder when that fact
11 or incident detail or occurrence accompany the act of murder.

12 Now, a statutory aggravating circumstance is one
13 which is recognized by law as a circumstance which increases,
14 increases the enormity of the offense or circumstance which
15 adds to the injurious consequences of the offense. Before you
16 can impose a death sentence on the defendant, again, before
17 you can give a death sentence all 12 jurors must agree beyond
18 every reasonable doubt that the evidence discloses the
19 existence of an alleged statutory aggravating circumstance.

20 Again, unless you, the jury, unanimously, all 12
21 find beyond a reasonable doubt that the evidence discloses the
22 existence of at least one statutory aggravating circumstance
23 then you cannot even consider the death penalty.

24 Now, I have instructed you that you may not consider
25 imposing death as a punishment unless you first find beyond a

1 reasonable doubt that the defendant committed the murder while
2 in the commission of a crime of kidnapping or committed while
3 the -- in the commission of a robbery while armed with a
4 deadly weapon, sometimes referred to as armed robbery, or
5 committed while in the commission of physical torture, or
6 while in the commission of larceny with the use of a deadly
7 weapon.

8 So in other words, in proving a statutory
9 aggravating circumstance, the State must prove beyond a
10 reasonable doubt that not only that the defendant murdered the
11 deceased but that the murder was committed while in the
12 commission of a kidnapping, or in the commission of an armed
13 robbery, in the commission of a physical torture, or in the
14 commission of larceny with a deadly weapon.

15 Now, I remind you again that the burden of proving
16 existence of the alleged statutory aggravating circumstance
17 remains at all times upon the State. So after impartially
18 considering all the evidence if you are left with a reasonable
19 doubt as to whether the murder of Benton Darrell Smith was
20 committed while in the commission of a kidnapping, or armed
21 robbery, or physical torture, or larceny with a deadly weapon
22 then you must give the benefit of that doubt to the defendant
23 and find that the circumstance -- statutory aggravating
24 circumstance was not proven.

25 Now, aggravating crimes are committed while in the

1 commission of a capital murder when they are consummated in a
2 continuous series of acts with the murder and at the same time
3 in place and not separated by any substantial lapse of time.
4 The fact that the crimes are committed after the murder does
5 not invalidate them as statutory aggravating circumstances.

6 So what aggravating -- statutory aggravating
7 circumstances may you consider? In other words, what
8 statutory aggravating circumstances does the State allege
9 existed here beyond every reasonable doubt at the time the
10 murder was committed? And those are as follows. I mentioned
11 them a moment ago, I will repeat them again here.

12 One, that they allege that the murder was committed
13 while in the commission of a kidnapping. Two, they allege
14 that the murder was committed while in the commission of an
15 armed robbery. Three, they alleged that the murder was
16 committed while in the commission of physical torture; and
17 four, they allege that the murder was committed while in the
18 commission of a larceny with use of a deadly weapon.

19 Before we go further, I'm going to define each of
20 these four for you in just a minute with a little more detail.
21 First, let's talk about murder. What is murder? In South
22 Carolina murder is defined as the willful felonious killing of
23 a human being by a human being with malice aforethought.
24 Malice aforethought. And that malice being either expressed
25 malice or direct malice.

1 Now, again, let me give you that definition again
2 for the sake of emphasis. Murder is defined as the willful
3 felonious killing of a human being by a human being with
4 malice aforethought, that malice aforethought being either
5 expressed malice or implied malice.

6 All right. What is malice? What is malice in the
7 law? Malice is a word suggesting wickedness, hatred, and a
8 determination to do what one knows to be wrong without just
9 cause or excuse or legal provocation.

10 Now, malice is a term of art in the law. Malice is
11 a technical term, it imports wickedness and it excludes just
12 cause or excuse. Malice is something which springs from
13 wickedness, from depravity, from a heart devoid of social duty
14 and fatally bent upon mischief.

15 Now, malice need not be in the mind of the one doing
16 the killing any particular length of time before the act of
17 killing in order to render the killing as murder. If malice
18 is present in the mind of the one doing the killing any length
19 of time before the act, then its presence would be sufficient
20 to render the killing as a murder.

21 Now, malice has said to be expressed malice when
22 there is manifested a violent deliberate intention unlawfully
23 to take away the life of another human being. And the words
24 expressed malice or implied malice now do not mean different
25 kinds of malice, but they rather refer to the way -- in the

1 law, the way they may be shown to exist.

2 So what is implied malice? Well, the law says that
3 if one intentionally kills another with a deadly weapon then
4 the implication of malice may arise. If facts are proven
5 beyond a reasonable doubt sufficient to raise an inference of
6 malice to your satisfaction then this malice would be simply
7 an evidentiary fact to be taken in consideration along with
8 the other malice in the case, and you may give to it such
9 weight as you determine it should receive.

10 What is a dangerous object or a deadly weapon
11 object? Well, that is a factual matter that you, as the jury,
12 must decide or you must determine. You must answer the
13 question factually based on the evidence that has come before
14 you. It is for you, as the jury, to determine and decide in
15 this case beyond a reasonable doubt of whether a dangerous or
16 deadly object was used. And if you determine factually that a
17 dangerous or deadly object was used then you may consider
18 implied malice. I've just given you a definition of murder.

19 Now, let's talk, if we might, for a moment, as to
20 the four statutory aggravating circumstances alleged by the
21 State. First, kidnapping. Kidnapping. Section 16-3-910 of
22 our law says that kidnapping, that whosoever shall unlawfully
23 seize, confine, inveigle, decoy, kidnap, abduct or carry away
24 any other person by any means whatsoever without authority of
25 law is guilty of kidnapping.

1 Now, the elements of kidnapping are as follows.
2 One, the unlawful seizing, confining, inveigling, decoying,
3 kidnapping, abducting or carrying away of another person; and
4 two, by any means whatsoever; and three, without authority of
5 law. Now, kidnapping is the intentional taking of a person
6 and compelling him or her to be detained against his or her
7 will. Kidnapping is the willful and unlawful seizing of a
8 person against his will with the intent to cause him to be
9 confined or detained.

10 Now, the essence of the offense of kidnapping is the
11 lawful detention of the person. Kidnapping means the carrying
12 away of a person by unlawful force or by fraud and against his
13 will or his seizure and detention for the purpose of carrying
14 him away.

15 Now, the gravamen of the offense of kidnapping is
16 some form of compulsion, but the requisite force or compulsion
17 need not consist of the use of actual physical force or
18 violence or expressed threats. An essential element of the
19 offense of kidnapping is that the taking and detention of the
20 person kidnapped is without lawful authority.

21 So kidnapping then is the taking and carrying away
22 of a person without authority of law, intentionally detaining
23 and holding that person. The offense of kidnapping commences
24 or begins when one is wrongfully and unlawfully deprived of
25 his freedom and continues until his freedom is restored.

1 That's kidnapping.

2 Armed robbery. Section 16-11-330 of our code says
3 that any person convicted for the crime of robbery while armed
4 with a deadly weapon is guilty of armed robbery. Now, in
5 order to understand armed robbery I must tell you that robbery
6 is a part of armed robbery, and that larceny is a part of
7 that.

8 So I will first define for you larceny, and then
9 robbery, and then armed robbery so that you understand the
10 sequence of issues involved. Again, robbery is larceny from
11 the person or the immediate presence of another by violence or
12 intimidation. Again, remember, robbery involves the violence
13 or intimidation.

14 So let's talk about larceny. Larceny is the
15 felonious taking and carrying away by any person of the
16 personal property of another with the intent to appropriate to
17 one's own use and to deprive the owner permanently of his
18 property. Now, there are four elements which must be present
19 and which must be established in order to constitute the crime
20 of larceny. And again, as you recall, these must be proven
21 beyond a reasonable doubt.

22 First, there was a taking. Second, that the taking
23 was of the personal property of another. Third, that after
24 being taken the property was carried away; and fourth, that
25 the taking and carrying away of the personal property was done

1 with the intent to steal.

2 Now, to constitute robbery, in addition to these
3 elements of larceny there must be two additional elements.

4 And first, these are that the property must be taken from the
5 person of another in his immediate presence; and second, that
6 the taking must be done not only without the consent of the
7 owner but it must be done so by violence or the threat of
8 violence or by putting the person in fear. And this violence
9 or intimidation must either precede or be contemporaneous with
10 the taking.

11 And finally, in addition to the elements of larceny
12 and robbery, as I've just told you, there is another, one more
13 element which must be considered -- which must be added to
14 constitute the crime of armed robbery in South Carolina, and
15 that is that the robbery must have been committed with a
16 deadly weapon.

17 That is, that the person who committed the crime
18 actually had and used a deadly weapon or deadly object to
19 obtain possession of the property or to put the person in fear
20 to obtain it. And I have previously defined for you a deadly
21 weapon. I would refer you back to that definition, and keep
22 that in mind.

23 Now, the third statutory aggravating circumstance
24 alleged by the State is torture. What do we mean by torture?
25 Well, torture occurs when the victim is subjected to serious

1 physical abuse before his death. Torture occurs when the
2 victim is subjected to what is called aggravated battery.

3 Now, aggravated battery is the unlawful act of
4 violent injury to the person of another accompanied by
5 circumstances of aggravation. And some of these circumstances
6 may include factors such as the use of a dangerous or deadly
7 object, the serious -- inflection of serious bodily intent
8 with intent to commit a felony, or a great disparity between
9 the ages and physical conditions of the parties.

10 Now, physical torture is the intentional infliction
11 of serious, vile, horrible or inhuman abuse upon the body of
12 another before death. The instantaneous death of the victim
13 does not constitute torture.

14 Physical torture may include the malicious
15 infliction of bodily harm to another by depriving the person
16 of a member of the body, or by rendering a member of the body
17 useless, or by seriously disfiguring the body, or the
18 intentional and unmerciful prolonging of severe pain and use
19 upon the body, or the intentional and unmerciful infliction
20 of serious and intensive physical pain and abuse to the body
21 of another.

22 And then the fourth statutory aggravating
23 circumstance alleged by the State is larceny with the use of a
24 deadly weapon. Now, remember a moment ago I defined for you
25 the elements of larceny. And I would again refer you back to

1 that, and you would use those in determining whether or not
2 larceny with a deadly weapon was present as a statutory
3 aggravating circumstance.

4 Now, in this case the State has also presented other
5 aggravating circumstances. We've talked about statutory
6 aggravating circumstances, but as I indicated, the State must
7 also prove beyond a reasonable doubt any general aggravating
8 circumstances. These are sometimes called character evidence.
9 And, in essence, these are presented through evidence of
10 crimes or bad acts or rules infractions.

11 Now, you must understand this, and please understand
12 this right away. Give me your close attention on this. These
13 crimes or bad acts or rules infractions may not be used to
14 prove a statutory aggravating circumstance. Again, these
15 crimes or bad acts or rules infractions may not be used to
16 prove a statutory aggravating circumstance.

17 The evidence of other crimes or bad acts or rules
18 infractions should be considered as evidence of an aggravating
19 circumstance, but if you are convinced beyond a reasonable
20 doubt that the defendant committed these other crimes or bad
21 acts or rules infractions then you may consider them as
22 evidence of the defendant's character and characteristics as
23 they bear relevance to the crime.

24 Now, these may be considered by you, as the jury,
25 along with all of the other evidence and you may give them

1 whatever weight you consider proper under the circumstances of
2 this case.

3 Now, the statutory aggravations which you are
4 authorized to consider in this case have been typed on a sheet
5 of paper and I hold that in my hand here. It is entitled
6 statutory instructions. Now, you will have this with you in
7 the jury room during deliberations, and as required by law I
8 have signed it. And I will tell you that we're going over it
9 again. I'm going to give each of you a copy in a moment and
10 we're going to go over it with you in a few minutes. We are
11 not ready to do that yet, but we will in a few moments.

12 So in the event, therefore, that you unanimously
13 find beyond a reasonable doubt that an alleged statutory
14 aggravating circumstance existed at the time the victim was
15 murdered then you would be authorized to impose the death
16 sentence upon the defendant.

17 And let me be certain you understand that I am not
18 suggesting to you that you would be required. You simply
19 would be authorized to do so, but you're not required to do
20 so. I've told you before, told you from the very start,
21 you're never required to give the death penalty. But if you
22 find a statutory aggravating circumstance then you would be
23 authorized to impose the death sentence.

24 Now, should you determine that an identified
25 statutory aggravating circumstance existed at the time the

1 murder was committed and should you unanimously decide that
2 the sentence of death be imposed upon the defendant then you
3 are required to specify in writing in your verdict form the
4 statutory aggravating circumstance or circumstances that you
5 found to exist beyond every reasonable doubt.

6 In other words, there's a form, Madam Forelady, that
7 you're going to use, and you will have to write those out.
8 But, again, you must first determine that they've been proven
9 beyond a reasonable doubt.

10 Now, the first form, as I indicated, that I have
11 referred to, is my instruction to you in writing. It is a
12 statutory instruction and it identifies statutory aggravating
13 circumstances that you are authorized to consider. Now, this
14 same form on the same sheet also identifies statutory
15 mitigating circumstances, and that you are also allowed to
16 consider. And again, remember, statutory aggravating
17 circumstances and statutory mitigating circumstances are both
18 listed on the sheet.

19 Now, if you find that there was a statutory
20 aggravating circumstance, then I have another form that is to
21 be used by you, as the jury, and it would be called finding of
22 a statutory aggravating circumstance or circumstances.

23 So if you find beyond a reasonable doubt that the
24 State has proven the existence of a statutory aggravating
25 circumstance or circumstances, then you as the forelady would

1 write out the circumstance or circumstances on the blank
2 lines, and under law, all jurors would be required to sign the
3 form, if you find as such, and it must be unanimous. In other
4 words, all must agree to it, and again, it must be proven
5 beyond a reasonable doubt.

6 Again, as to an alleged statutory aggravating
7 circumstance, should you not find beyond every reasonable
8 doubt that an alleged statutory aggravating circumstance
9 existed at the time the murder in this case occurred, then you
10 would not be authorized to impose the death sentence. And in
11 that event, your sentence must be life imprisonment.

12 And for that matter -- and I will tell you more
13 about this later. For that matter, you can decide, still
14 decide that the defendant be sentenced to life imprisonment
15 even if you find that the alleged statutory aggravating
16 circumstance or circumstances existed at the time the murder
17 in the case was committed. Again, even if you find they've
18 been proven beyond a reasonable doubt you can still decide to
19 give the defendant a life sentence.

20 Now, in addition to considering -- and I've
21 discussed here statutory aggravating circumstances, you are
22 also required by law, you must consider statutory mitigating
23 circumstances. Well, what are statutory mitigating
24 circumstances? A statutory mitigating circumstance is a fact,
25 a detail, an incident or an occurrence which the general

1 assembly of this State had said or declared would render the
2 murder less severe. In other words, it would mitigate the
3 offense of murder when that fact, detail, incident or
4 occurrence accompanies the act of murder.

5 Now, a statutory mitigating circumstance is one
6 recognized by the statute and by the law as a circumstance
7 which in fairness and mercy would be considered as extenuating
8 or as reducing the degree of moral culpability for the
9 commission of the act of murder.

10 Now, you must note, this does not constitute
11 justification or excuse for the offense in question. It does
12 not constitute justification or excuse for the offense in
13 question, it simply lessens one's guilt. In other words,
14 makes him less blameworthy or less culpable.

15 Now, you are required to consider any mitigating
16 circumstance regardless of whether it is a statutory
17 mitigating circumstance of any nature that is supported by the
18 evidence in addition to the statutory mitigating
19 circumstances.

20 In other words, there are statutory mitigating
21 circumstances and general mitigating circumstances, which I
22 will discuss in a moment, you are required by law to consider
23 any of these. And by this, I mean that you, as the jury, are
24 required to consider not only statutory mitigating
25 circumstances but mitigating circumstances of any nature

1 whatsoever supported by the evidence.

2 So what is a general mitigating circumstance, In
3 other words, a nonstatutory mitigating circumstance? Well, it
4 is a circumstance which is recognized as one which in fairness
5 and in mercy may be considered to be extenuating. Again, as I
6 told you, a mitigating circumstance is never considered to be
7 justification or excuse for the murder. It similarly lessens
8 the severity of its existence. And you are required to
9 consider any circumstance of any nature whatsoever as a reason
10 for not imposing the death penalty. Any factor may be taken
11 into account as the reason for not imposing the death
12 sentence.

13 Now, I charge you that you may not consider the
14 statutory aggravating circumstance unless -- as alleged by the
15 State, unless all 12 of you found that a statutory aggravating
16 circumstance has been proven beyond a reasonable doubt.
17 Again, remember, if you do not find that it's been proven
18 beyond a reasonable doubt you may not consider a statutory
19 aggravating circumstance.

20 Now, listen to me on this. This is not true for a
21 statutory mitigating circumstance or any mitigating
22 circumstance. In the case of a mitigating circumstance you
23 need not unanimously agree on the existence of any mitigating
24 circumstance nor does the defendant have to prove any
25 mitigating circumstance to you in any way before you may

1 consider it. Rather, each member of the jury may consider any
2 mitigating circumstance which he or she feels is supported by
3 the evidence.

4 Before you can impose a life sentence it is not
5 necessary -- I repeat, it is not necessary for you to find the
6 existence of a statutory mitigating circumstance or any
7 mitigating circumstance of any nature. There is no burden on
8 the defendant to prove a mitigating circumstance. Rather, the
9 burden is upon the State to prove aggravating circumstances.

10 The burden is upon you, as the jury, to consider the
11 evidence submitted and determine whether any mitigating factor
12 or factors exist, and if so, the significance and weight to be
13 given to any mitigating circumstance. And, again, I will
14 repeat for the sake of emphasis, there is no burden upon the
15 defendant to prove a mitigating circumstance or any mitigating
16 circumstances.

17 While it is necessary for you to find beyond every
18 reasonable doubt the existence of a statutory aggravating
19 circumstance before you can give a sentence of death it is not
20 required that a mitigating or statutory mitigating
21 circumstance be proven in order to decide that the defendant
22 be given a sentence of life imprisonment.

23 Now, I've instructed you that any finding that a
24 statutory aggravating circumstance has been proven must be
25 made unanimously and beyond a reasonable doubt. No such

1 requirement exists for consideration of mitigating
2 circumstances. Rather, in deciding the appropriate punishment
3 in this case each individual juror must consider each
4 mitigating circumstance which you find is supported by the
5 evidence.

6 It is not necessary that the entire jury unanimously
7 agree on the existence of any mitigating factor before you, as
8 jurors, can consider it. Rather, the existence of mitigating
9 circumstances and the weight to be given to them are matters
10 which each juror must determine for himself or herself.

11 Now, as I told you a moment ago, it is not necessary
12 for the existence of any mitigating circumstance to be proven
13 beyond a reasonable doubt before you may consider it. The
14 defendant has no burden of proof. He does not have to prove
15 mitigating circumstances. Rather, you are to consider each
16 and every mitigating circumstance which you find to be
17 supported by the evidence.

18 And as a matter of fact, you may decide that the
19 defendant receive a life sentence irrespective of whether you
20 find in the evidence a statutory or nonstatutory mitigating
21 circumstance or not. In other words, you may choose to give
22 life imprisonment as an act of mercy.

23 As I say, you may impose a life sentence without
24 finding the existence of a mitigating circumstance and you may
25 give a life sentence even if you find beyond a reasonable

1 doubt that statutory aggravating circumstances were proven.
2 Again, even if you find that statutory aggravating
3 circumstances had been proven you may still give a life
4 sentence.

5 Now, should you unanimously find beyond every
6 reasonable doubt the existence in the record of an alleged
7 statutory aggravating circumstance then your sentence would be
8 life imprisonment even though there's no proof in the record
9 of an alleged statutory or nonstatutory mitigating
10 circumstance. In other words, even if you find a statutory
11 aggravating circumstance, then you may give a sentence of life
12 imprisonment even though there's no proof of mitigating
13 circumstances.

14 Now, ladies and gentlemen, under the law your
15 decision must be unanimous. Your verdict must be unanimous.
16 All 12 must agree to it. Your decision for life imprisonment
17 must be unanimous. Your decision for death must be unanimous.
18 Whichever it is, it must be a unanimous decision.

19 Now, again, so what statutory mitigating
20 circumstances may you consider here? You remember a moment
21 ago I told you the four statutory aggravating circumstances
22 you may consider. I will tell you now what statutory
23 mitigating circumstances.

24 Now, remember, these are statutory mitigating
25 circumstances. One, that the defendant has no significant

1 history of prior criminal conviction involving the use of
2 violence against another person. Two, the murder was
3 committed while the defendant was under the influence of
4 mental or emotional disturbance; and three, you may consider
5 the age or mentality of the defendant at the time of the
6 crime. And also, you may also consider any nonstatutory, in
7 other words, general mitigating circumstances.

8 Again, I repeat, for the sake of emphasis, you are
9 required to consider any mitigating circumstance of any nature
10 whatsoever, whether it's included in the statute or not, if
11 the evidence presents that to you. Again, you must consider
12 any mitigating circumstance of any nature whatsoever
13 regardless of whether it's in the statute or not.

14 Now, in the event that you find that an alleged
15 statutory mitigating circumstance existed, in fact, at the
16 time that the murder was committed, then that still does not
17 preclude you from finding at the same time that there were
18 statutory aggravating circumstances. Again, even though you
19 may find that a statutory mitigating circumstance existed you
20 may also still find that statutory aggravating circumstances
21 have been proven. And if you find that, you may still
22 sentence the defendant to death.

23 In other words, the existence of a statutory
24 mitigating circumstance is not a bar to the imposition of the
25 death sentence. And, again, please listen very closely. The

1 existence of a statutory aggravating circumstance -- or rather
2 the nonexistence of a statutory aggravating circumstance is a
3 bar to the imposition of the death penalty.

4 Again, that simply means this. If you find no
5 statutory aggravating circumstances existed you may not give
6 the death penalty. Remember, you cannot impose a death
7 sentence unless you find beyond every reasonable doubt the
8 existence of a statutory aggravating circumstance at the time
9 of the murder.

10 And as I've already instructed, Madam Forelady, you
11 will write out your finding on the aggravating circumstances
12 proven beyond every reasonable doubt under the statute.
13 Where, after considering all the evidence, you find beyond
14 every reasonable doubt, that an alleged statutory aggravating
15 circumstance existed at the time of the murder, then you may
16 decide that the sentence -- the defendant should be sentenced
17 to death even if you find that a statutory mitigating
18 circumstance existed.

19 Now, an important factor is whether the defendant
20 should be sentenced to life imprisonment for any reason or for no
21 reason at all. Now, this, again, is what is called, I
22 mentioned this a moment ago, a finding of mercy. Again, you
23 may give the defendant a life sentence for any reason or for
24 no reason at all. And if such should be your decision, then
25 you would indicate by filling out the appropriate form and

1 returning the sentence of life in prison to us.

2 Again, I'll go over that form with you in just a
3 moment, Madam Forelady.

4 You must keep in mind that the decision to sentence
5 the defendant to death must be unanimous. The sentence to
6 sentence the defendant to life imprisonment must be unanimous.
7 Either sentence must be unanimous.

8 Now, give me your attention, if you would, for a
9 moment. I want to go over certain forms with you.

10 Mr. Bailiff, would you pass out these forms, please,
11 sir.

12 Now, the bailiff is passing these forms out to you.
13 I do so at this time only so that you may have them in
14 reference as I go over them. Before you go back in the jury
15 room we're going to take them from you. You won't have all of
16 them in the jury room.

17 Madam Forelady, you will have this one right here,
18 which has been signed. No one else will have the forms, and
19 there will be only one form. Again, they are given to you
20 at this time only for purposes of your reference as we go over
21 them.

22 You will find the first form is entitled statutory
23 instructions. Recall that I told you earlier what's on here,
24 and it says that in determining whether to sentence the
25 defendant, Johnny Olandis Bennett, Jr., to life imprisonment

1 or death for the murder of Benton Darrell Smith you may
2 consider the following statutory aggravating circumstances.
3 And they were listed, the four that I defined for you a moment
4 ago. It goes on and says you must also consider the following
5 statutory mitigating circumstances. And the three that I
6 cited a moment ago also were listed there for you. And again,
7 I will note that mine is signed and dated for you.

8 And, Madam Forelady, you will have that with you.

9 Now, the second form you have is a form called
10 sentence of life imprisonment. Now, if you find that the
11 State has proven no statutory aggravating circumstances
12 whatsoever then you would sign this form.

13 Madam Forelady, only you would sign the form and you
14 would return to us -- now, again, if you find that there have
15 been no statutory aggravating circumstances proven whatsoever
16 then you're through, you sign this form and knock on the door
17 and we will take the verdict.

18 Now, the next form, however, is one called finding
19 of statutory aggravating circumstances. Now, you will note on
20 here that it says as to the murder of Benton Darrell Smith,
21 we, the jury, find beyond a reasonable doubt the existence of
22 the following statutory aggravating circumstances.

23 Madam Forelady, it would be up to you to fill that
24 form out on the first four lines, you notice there are four --
25 and I hasten to note this. There are four statutory

1 aggravating circumstances alleged by the State. That does not
2 mean you are required to list four here. I put four only
3 because that's how many that the State alleged. You may find
4 that only three existed, you may find that only two existed,
5 you may find only one existed, or you may find none existed.
6 But if you do find that any existed, then you would write
7 those on here.

8 And, Madam Forelady, you should basically write it
9 in the same language as on the form before us.

10 Now, if you do make this determination, then all 12
11 jurors would sign the form. And there is a line for each
12 juror to sign.

13 Now, after making that determination, if you make
14 the determination that statutory aggravating circumstances
15 have been proven by the State beyond a reasonable doubt then
16 you would look at the final two forms. There are two forms
17 remaining. One is sentence of life with aggravating
18 circumstances, and the last is sentence of death. Those are
19 the two you would consider, if you find aggravating
20 circumstances have been proven.

21 I will note on the sentence of life with aggravating
22 circumstances I put four on there, and very frankly, I just
23 slipped on the computer, Madam Forelady, to tell you the
24 truth. I think I needed some of you computer specialists to
25 help me on that. There obviously are not five. Again, if any

1 of you find, if you find any have been proven beyond a
2 reasonable doubt you would write them on that form also if you
3 find the sentence of life.

4 And, Madam Forelady, you would sign it.

5 And it says as to the murder of Benton Darrell
6 Smith, we, the jury, having found beyond a reasonable doubt
7 the existence of the following statutory aggravating
8 circumstances, and you would list the appropriate ones, do
9 sentence the defendant, Johnny Olandis Bennett, Jr., to life
10 imprisonment.

11 And, again, Madam Forelady, you would sign it, date
12 it and let us know.

13 The last form is entitled sentence of death, and it
14 says that as to the murder of Benton Darrell Smith, we, the
15 jury, having found beyond a reasonable doubt the existence of
16 the following statutory aggravating circumstances, and again
17 you would list any that may -- that you find, do hereby
18 sentence the defendant, Johnny Olandis Bennett, Jr., to death.

19 Now, if you do so and you fill out that form, again,
20 remember, all 12 jurors must sign the form.

21 And, Madam Forelady, you would simply date it at the
22 bottom of the page.

23 Now, those are the forms that you will have and that
24 you will consider.

25 And, Madam Forelady, on each case you should handle

1 the matter of filling out the forms, and, of course, if it is
2 a life sentence then you simply would sign it. But if it does
3 involve a finding of statutory aggravating circumstances or if
4 it involves a sentence of death, then all 12 jurors must sign
5 the form.

6 Let me ask, Mr. Bailiff, would you now take the
7 forms back, please, sir.

8 And, again, Madam Forelady, you will have this one
9 with you.

10 Now, jurors, the terms life imprisonment and death
11 penalty should be understood in their ordinary and plain
12 meaning by you. As I've said, you simply accept these two,
13 life imprisonment and death penalty, and understand them in
14 their plain and ordinary meaning.

15 Now, Madam Forelady and ladies and gentlemen, we are
16 now about to commit this decision to you. We're going to send
17 this case to you at this time for sentencing, and before we do
18 I want to go over a couple of things first.

19 Are all jurors feeling satisfactory? Anyone having
20 any problem, not feeling well at all? Does anyone have any
21 reason you feel like you cannot go into the jury room and
22 participate, at this time?

23 (There was no response.)

24 THE COURT: Let the record note, that no one has
25 responded.

1 Is there anyone who has any difficulty with
2 continuing their jury service at this time?

3 (There was no response.)

4 THE COURT: Again, let the record note that there
5 has been no response.

6 Now, as you leave in just a moment let me be sure to
7 instruct you that you must not begin talking about the case
8 just yet. Don't begin talking about it as you go to the jury
9 room, and once you get in there don't even begin talking about
10 the case at that point. What will happen is this. I will
11 send the 12 regular jurors to the jury room.

12 Mr. Alternate, we will keep you in a separate room.
13 You will be available in the event there are any problems with
14 any other jurors in the jury room.

15 But when you go to the jury room do not begin
16 discussing the case. I have some matters that I have to take
17 up with the attorneys. And what will happen is if there are
18 no problems then we will send all of the evidence, along with
19 this form that I've just been over to you.

20 Once you get this form, Madam Forelady, and all
21 evidence, you may then begin deliberating, okay. But it is
22 extremely important that you not do so.

23 Now, ladies and gentlemen of the jury, you have
24 taken an oath and you've sworn to try this case fairly and
25 impartially and to give both sides a fair and impartial trial.

1 You must not base your verdict, your sentence on any form of
2 caprice or prejudice for or against any party or any excessive
3 emotions for or against any party.

4 You must make a dispassionate analysis of the
5 record, in other words, the evidence that you've received, and
6 based on that you must decide the sentence. You have no
7 friend to reward, you have no enemies to punish. You must
8 give both sides a fair trial in determining your sentence.

9 Let me ask you if you will now step to the jury
10 room. Do not begin talking about the case until I send
11 instruction.

12 Everyone else remain seated except the parties,
13 please.

14 (WHEREUPON, the jury leaves the courtroom at
15 approximately 4:38 p.m.)

16 THE COURT: The jury is secured. Any exception to
17 the charge from the State?

18 MR. RIDDLE: No, sir.

19 THE COURT: From the defense?

20 MR. FLOYD: No, Your Honor.

21 THE COURT: Counsel, let me ask you both to come up
22 and get with the court reporter and go through the evidence,
23 please.

24 (WHEREUPON, a brief recess was taken.)

25 THE COURT: For the record, Counsel, as I

1 understand, you got all the information together; is that
2 correct?

3 MR. RIDDLE: That's correct, Your Honor.

4 THE COURT: The State agrees with that?

5 MR. RIDDLE: Yes, sir.

6 THE COURT: The defense agrees?

7 MR. YOUNG: Yes, sir.

8 THE COURT: Mr. Bailiff, Madam Clerk, who's going to
9 take this back? If you would take that with you, that's the
10 instruction form. Take that to the forelady and tell her they
11 may begin deliberating. Bring the alternate out first.

12 (WHEREUPON, the alternate enters the courtroom.)

13 THE COURT: Now, take the evidence into the jury
14 room and tell the jury they can start deliberating.

15 Mr. Alternate, thank you for being patient with us.
16 I will tell you, we're still not quite through with you yet.
17 What we'll do is ask you to sit in another room, and anything
18 you need let them know and they'll be glad to take care of
19 you. It's still important that you not talk about the case
20 and not be exposed to anything about this case at all, okay?

21 THE ALTERNATE: Yes, sir.

22 THE COURT: If something were to happen with a juror
23 we might have to put you into the jury room. But hopefully
24 that won't happen. I hope they'll all be okay. But we want
25 to have you available just in case, but you see why it's

1 important not to talk about the case. The agent is going to
2 take care of you. Just let us know if you need anything.
3 Thank you, sir.

4 (WHEREUPON, the alternate leaves the courtroom.)

5 THE COURT: Let's note for the record, the jury's
6 got the case at 4:53 p.m.

7 If you would record that, Madam Court Reporter.

8 We'll stand in recess subject to the call of the
9 jury.

10 (WHEREUPON, court was in recess while awaiting a
11 verdict from the jury.)

12 (WHEREUPON, Court's Exhibit No. 5, a note from the
13 jury requesting an easel, was marked and made a part of the
14 record.)

15 (WHEREUPON, court reconvened at approximately 6:15
16 and the following occurred.)

17 THE COURT: All parties and attorneys are in the
18 courtroom. Counsel, I had received a note from the jury and
19 it has two questions -- well, three within two, basically.
20 The first is, if we decide life imprisonment does this mean
21 life without parole any time or life with possible parole, or
22 is this decision left up to the Judge?

23 The second question is, and if we decide death
24 penalty, when would it be put into effect, and if there were
25 to be an appeal how many appeals do they allow?

1 As to the first question, I would think the only
2 possible thing I could do would be to give them the Norris
3 charge again, because as you know, that's all that's allowed.

4 What's the State's position on that?

5 MR. MYERS: If the defense requests it, we have no
6 objection.

7 THE COURT: Defense?

8 MR. FLOYD: Yes, Your Honor, as long as it's the
9 brief form that you use in your original charge.

10 THE COURT: Okay. On the second question, I'll be
11 frank, I've got a little bit of concern about that. Because
12 in all truthfulness, they're going into areas they are not
13 supposed to be going into. Obviously, there's nothing in the
14 record about this.

15 And truthfully, I guess as a practical matter, you
16 know, people would generally consider it, but this is not
17 something they need to be considering. Obviously, I would --
18 and I think the only way I can tell them is just that simply,
19 just tell them that I couldn't answer that question for them
20 and it's not something they need to be going into anyway.

21 What's the State's position on that?

22 MR. MYERS: We agree.

23 THE COURT: Defense?

24 MR. FLOYD: Your Honor, I believe you said you were
25 thinking about telling them that they are not consider that?

1 THE COURT: Right, obviously, they are not.

2 MR. FLOYD: Well, I agree with you, that would be
3 the best way to -- we'd go along with Your Honor on that.

4 THE COURT: Okay. Actually, they're not even
5 supposed to really be thinking about the first one either, but
6 -- shouldn't be considering either one of them.

7 All right. Let's bring the jury in.

8 (WHEREUPON, the jury enters the courtroom at
9 approximately 6:17 p.m.)

10 THE COURT: All parties and attorneys are in the
11 courtroom and all jurors have returned.

12 Madam Forelady, I have received a note from you --

13 Where is the alternate? Bring him on in, I'm sorry.
14 Any time we bring the jury in always bring the alternate in
15 with them.

16 (WHEREUPON, the alternate enters the courtroom.)

17 THE COURT: The alternate is now with us. We have
18 all jurors are present.

19 Madam Forelady, I have a note that I've received
20 from you that involves about two basic questions. First says
21 if we decide life imprisonment does this mean life without
22 parole at any time or life with possible parole or is this
23 decision left up to the Judge?

24 Let me tell you that the only thing I'm allowed to
25 comment on that -- and you understand that there are all sorts

1 of varieties in this thing and it's something that I can't get
2 into with you directly. All I can do is basically give to you
3 the charge that I gave you earlier. And let me just give you
4 that charge again. And I know it's kind of general, but you
5 have to take this into account.

6 The terms life imprisonment and death penalty should
7 be understood in their ordinary and plain meaning. You simply
8 accept these, life imprisonment and death penalty, and
9 understand them in their ordinary and plain meaning. So when
10 you make these determinations you have to consider life
11 imprisonment -- the term life imprisonment and death penalty,
12 and you have to consider those in their plain and ordinary
13 meaning.

14 As to the second question, it says and if we decide
15 death penalty when would it be put into effect? And if there
16 were to be an appeal how many appeals do they allow?

17 Now, this is a matter that a jury is not allowed to
18 go into. Again, it's something that I really couldn't answer
19 for you anyway. As you understand, there's nothing in the
20 record about something like this.

21 And remember, as I told you earlier at the very
22 start, that you must decide this based only on the evidence
23 that has come into the courtroom, and there's been nothing in
24 the record about this. So be sure you stay within the record,
25 okay, within what was in the courtroom. And, again, this is

1 an area that you cannot go into. Okay.

2 With that in mind, we'll send you back and let you
3 continue deliberating. Thank you.

4 (WHEREUPON, the jury returns to the jury room at
5 approximately 6:20 p.m. to continue deliberating.)

6 THE COURT: All right. The jury is secured. Any
7 exception to that charge from the State?

8 MR. MYERS: No, sir.

9 THE COURT: The defense?

10 MR. FLOYD: Your Honor, the only, I guess objection
11 we'd make to the charge, was Your Honor's mention of -- and I
12 forgot the exact wording, something about there are lots of
13 varieties of this.

14 THE COURT: Yes, sir.

15 MR. FLOYD: Something to that. And we don't know
16 whether it was cleared up with life in its ordinary meaning,
17 death in its ordinary meaning. That would be the only
18 objection we would have to it, whether or not that might
19 confuse them.

20 THE COURT: Well, what I was trying to -- the basic
21 point I was trying to get to them, frankly, was that they
22 don't need to be thinking about all that, they simply need to
23 take it in the plain ordinary meaning. And, again, I told
24 them probably two or three times plain and ordinary meaning.
25 I think they got the message on that.

1 MR. FLOYD: Thank you, Your Honor.

2 MR. MYERS: I think they did, because most of them
3 were shaking their heads when you told them that's not for
4 their consideration and the plain and ordinary meaning. Just
5 about all of them were shaking their heads.

6 THE COURT: Yeah, I noticed them too. Particularly
7 on the second, they reacted pretty clearly. So it maybe --
8 you know, what happens sometimes they will do something like
9 this just to pacify one juror, one or two jurors, and that may
10 be what they were doing. But, again, I think you're both
11 right, they got the message though, they understand. All
12 right. We'll stand in recess.

13 (WHEREUPON, Court's Exhibit No. 6, a Note from the
14 Jury, was marked and made a part of the record.)

15 (WHEREUPON, court was in recess while awaiting a
16 verdict from the jury.)

17 THE COURT: We have all parties and attorneys in the
18 courtroom. Counsel, I'm advised the jury has a verdict. Are
19 we ready to take the verdict?

20 MR. MYERS: The State is ready.

21 MR. FLOYD: The defense is ready, Your Honor.

22 THE COURT: Bring them in.

23 (WHEREUPON, the jury enters the courtroom at
24 approximately 7:58 p.m.)

25 THE COURT: All right. All parties and attorneys

1 are in the courtroom and all jurors have returned.

2 Madam Clerk?

3 THE CLERK: Madam Forelady, have you reached your
4 decision?

5 THE FORELADY: Yes, we have.

6 THE CLERK: Please pass it up by the bailiff.

7 THE COURT: Thank you, ma'am.

8 It's in proper form. Would you publish it, please.

9 THE CLERK: Indictment 93-GS-32-2354, The State vs.

10 Johnny Olandis Bennett, Jr., as to the matter of the murder of
11 Bennett Darrell Smith. We, the jury, find beyond a reasonable
12 doubt the existence of the following statutory aggravating
13 circumstances. That the murder was committed while in the
14 commission of robbery while armed with a deadly weapon; that
15 the murder was committed while in the commission of larceny
16 while armed with a deadly weapon; that the murder was
17 committed in the commission of kidnapping; that the murder was
18 committed while in the commission of physical torture. And it
19 is so signed.

20 THE COURT: Counsel, let me note that when she
21 publishes the verdict there should be no comment from either
22 side of the courtroom. Whether favorable or con, there should
23 be no reaction.

24 Bailiffs and deputies, take whatever actions you
25 need to, okay.

1 THE CLERK: As to the murder of Bennett Darrell
2 Smith, we, the jury, having found beyond a reasonable doubt
3 the existence of the following statutory aggravating
4 circumstances. That the murder was committed while in the
5 commission of robbery while armed with a deadly weapon; that
6 the murder was committed while in the commission of larceny
7 while armed with a deadly weapon; the murder was committed
8 while in the commission of kidnapping; that the murder was
9 committed while in the commission of physical torture, do
10 hereby sentence to death, Johnny Olandis Bennett, Jr., to
11 death. And it so signed, Kay Locklair, Madam Forelady --

12 THE COURT: Let me note. If you have a camera
13 going, please be sure don't record the names or anything about
14 the jurors at this time, okay.

15 Is it signed by all jurors?

16 THE CLERK: Yes, sir, it is so signed.

17 THE COURT: All right. It's signed by all jurors.
18 If you would, at this time, please poll the jury as you would
19 in a standard procedure.

20 THE CLERK: And it is so signed. Ann Bedenbaugh,
21 please raise your hand for me, please. As to the sentence, is
22 this your sentence and is it still your sentence?

23 MS. BEDENBAUGH: It is.

24 THE CLERK: Jennifer Garrett, as to the sentence,
25 this is your sentence and it's still your sentence?

1 MS. GARRETT: It is.

2 THE CLERK: Frances Smith, as to the sentence, this
3 is your sentence and it's still your sentence?

4 MS. SMITH: Yes, ma'am.

5 THE CLERK: Ashley Ray, as to the sentence, is this
6 your sentence and still your sentence?

7 MS. RAY: Yes, it is.

8 THE CLERK: Kay Locklair, as to the sentence, is
9 this your sentence and still your sentence?

10 MS. LOCKLAIR: It is.

11 THE CLERK: Joan Follmer, as to the sentence, is
12 this your sentence and is it still your sentence?

13 MS. FOLLMER: Yes.

14 THE CLERK: Brenda Quaethem, as to the sentence, is
15 this your sentence and is it still your sentence?

16 MS. QUAETHEM: Yes, sir.

17 THE CLERK: Clifton Simmons, Jr., as to the
18 sentence, is this your sentence, is it still your sentence?

19 MR. SIMMONS: Yes, ma'am.

20 THE CLERK: Gwendolen Brown, as to the sentence, is
21 this your sentence, is it still your sentence?

22 MS. BROWN: Yes, it is.

23 THE CLERK: Jimmy Elmore, as to the sentence, is
24 this your sentence and is it still your sentence?

25 MR. ELMORE: Yes, it is.

1 THE CLERK: Wally Sox, as to the sentence, is this
2 your sentence and is it still your sentence?

3 MR. SOX: Yes, it is.

4 THE CLERK: Adam Humphrey, as to the sentence, is
5 this your sentence and is it still your sentence?

6 MR. HUMPHREY: It is.

7 THE CLERK: All jurors polled, Your Honor.

8 THE COURT: Thank you, ma'am.

9 Counsel, all jurors have been polled and have
10 indicated this was their sentence and remains there sentence.
11 They have affirmed the sentences given before. I'm going to
12 give you a chance for motions in a moment. Are there any
13 motions before we let the jury go back in the jury room?

14 MR. MYERS: Nothing from the State.

15 THE COURT: From the defense?

16 MR. FLOYD: Nothing at this time, as far as letting
17 them go.

18 THE COURT: Madam Forelady and ladies and gentlemen,
19 let me first of all thank you for the service that you've
20 given us in this matter. I always make it a point never to
21 either praise or criticize a jury's verdict, that's not my
22 job. Each of you have a job and we all have our job in this
23 particular procedure, and you have carried out your job as
24 required by law. You complied with your oath and you have
25 done so with great dignity and we appreciate it.

1 So I want you to know that I am grateful as well as
2 all the attorneys and everyone else for the fact that you have
3 been so diligent and have been so committed to the work that
4 we had, and we took you away from your families for, I guess,
5 five days now, and basically introduced you to a world of
6 violence and conflict that most of you probably have not been
7 exposed to before, and I'm sure that could be a little bit of
8 culture shock for some of you. And I think you acquitted
9 yourself well, you handled it very well and you responded well
10 to it.

11 And I am advised by the agents that were on the
12 sequestration team that you're probably one of the best, if
13 not the best jury that they've dealt with. They said you
14 seemed to have a good attitude, very cooperative with them,
15 and we appreciate that. I've had juries that have not been so
16 cooperative, I can tell you. It's a difficult task for me and
17 everyone else when that happens.

18 Now, one thing I want to do is give you an
19 instruction that I'm required, that we're required by state
20 law to give you. We're going to give it to you in writing in
21 just a moment, but I will give to you now for the record and
22 in just a moment --

23 In fact, if you would, how about go ahead and hand
24 these to them, okay.

25 For the record, let the record show that my law

1 clerk is now handing these documents to the jury. The two
2 documents are the final instructions. One has your name on it
3 on the letter, and has a copy of this instruction with it. So
4 just find the one with your name on it and pass it on down, if
5 you would, okay. And you also are getting letters from your
6 Clerk's Office.

7 Now, by the way, we're going to let you go back in
8 the jury room in just a moment and I'm going to meet with you
9 for just a second before you leave.

10 After your service in this trial has concluded you
11 have the right to either refuse to discuss the verdict you've
12 rendered or to discuss the verdict to the extent that you so
13 desire. Now, if you choose to discuss the verdict with
14 anyone, and I'm talking about anyone on the street, anyone who
15 comes to your home, news media, anyone like that, if you
16 choose to discuss the verdict you are free to terminate the
17 discussion at any point.

18 And if the person with whom you are speaking
19 continues to pursue a discussion of the verdict after you've
20 communicated a desire to end the discussion, or if a person
21 should act in a way that you consider as to be harassing to
22 you after you've refused to discuss the verdict, then you
23 should report that person to me.

24 My name and address and telephone number are on this
25 document, and I would encourage you if you feel like you are

1 being bothered by anyone in any fashion about your verdict to
2 get in touch with me and there is a procedure under law by
3 which we will deal with them.

4 You also have a letter on there that I have sent
5 that you may send to your employers, and in addition, the
6 clerk is giving you a form to go to your employers too.

7 I'll ask if you would in just a moment -- it will
8 take a few minutes to go through the sentencing process, and
9 then I'm going to ask you to step to the jury room while we do
10 so and I'll come back to meet with you in just a second. It
11 won't take but just a moment. I'm sure at this point you want
12 to get back and get your bags packed and get home. I
13 certainly understand that. So I'll be back with you in just a
14 few minutes. If you'll step to the jury room.

15 (WHEREUPON, the jury leaves the courtroom at
16 approximately 8:08 p.m.)

17 THE COURT: Counsel, are you ready to come around
18 for sentencing?

19 Let me ask, did the State have anything you wanted
20 to say, at this point?

21 MR. MYERS: The State has nothing further.

22 THE COURT: Did the victims have anything they want
23 to say?

24 MR. MYERS: Your Honor, I would think that they are
25 pretty well drained and with the sentence handed down. We

1 have nothing further to say at this time, sir.

2 THE COURT: All right. Mr. Floyd, Mr. Young?

3 MR. FLOYD: Your Honor, as to post-trial motions,
4 we'd like to exercise our right to file those within ten days.

5 THE COURT: We'll give you ten days to make any
6 motions you wish.

7 MR. FLOYD: And, of course, you've heard about
8 Mr. Bennett. I know you have no discretion right now, but we
9 would ask that you would consider how he's a different man now
10 than he was back when this happened. You've heard all these
11 people come forward and say he's a good person now, that he
12 cares for other people, he helps other people. We want you to
13 keep that in mind.

14 THE COURT: Mr. Young, did you want to say anything?

15 MR. YOUNG: No, sir, Your Honor.

16 THE COURT: All right. Mr. Bennett, did you want to
17 say anything?

18 THE DEFENDANT: Yes, sir, Your Honor. First of all,
19 I would like to say thank you, Your Honor, for treating me
20 like someone, instead of some thing. Also, to the security, I
21 would like to thank them for treating me like someone. And,
22 you know, for my family, I'm sorry it turned out this way once
23 again. But, you know, like I said before, it ain't over until
24 it's over, and we'll be back. That's it, Your Honor.

25 THE COURT: Well, I don't know exactly what it

1 implies, but I have to tell you that I'm impressed by the fact
2 that's the first time that I've heard someone stand there and
3 thank the security people for their job. You know, they
4 probably have the most thankless job in the whole process and
5 I appreciate the fact that you did it, and I'm sure they
6 appreciate the fact that you did that too.

7 I would note, Mr. Bennett, that in the evidence that
8 we received, let me tell you, I told your lawyers this a few
9 moments ago, I thought that when you did your closing
10 statement to the jury, I thought you acquitted yourself as
11 well as any defendant that I've seen in this courtroom.

12 THE DEFENDANT: Thank you.

13 THE COURT: And I certainly admired the candor that
14 you expressed in that statement and certainly appreciated the
15 way you conducted yourself. I was not here for the previous
16 trial now. I sat through -- I was watching this trial to get
17 ready to start my first capital trial after that, and I
18 watched for a couple of days and kind of picked up drifts of
19 things that occurred during the trial, and I told a number of
20 people that, frankly, that having observed you during this
21 trial that you are nothing like you were five years ago.

22 THE DEFENDANT: Thank you.

23 THE COURT: And you understand that I think it just
24 came down to a question of what the jury gave weight to, and
25 as you know, they decided to give weight the other way.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And certainly that was their job to do
3 so it was their role to determine in what fashion they would
4 do it. But I, frankly, do give some credence to the idea that
5 perhaps you have maybe -- maybe over the years you've just
6 grown up a lot.

7 THE DEFENDANT: Well, I'd like to think so, Your
8 Honor.

9 THE COURT: Yes. But I admit, you're much different
10 than you were five years ago. You understand that what I do
11 now I have to do?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Let me note first that as the presiding
14 judge in the above entitled action and prior to the imposition
15 of the death penalty upon the defendant, Johnny Olandis
16 Bennett, Jr., for the murder of Benton Darrell Smith, I find
17 as an affirmative fact that the evidence of the case warrants
18 the imposition of the death penalty and that it's imposition
19 is not a result of passion, prejudice or any other arbitrary
20 factor.

21 I also find that the defendant, Johnny Olandis
22 Bennett, Jr., has been found by a jury to be guilty of the
23 offense of the murder of Benton Darrell Smith, and has been
24 sentenced to death by a subsequent jury.

25 It is therefore the judgment of the law and the

1 sentence of the Court that the defendant, Johnny Olandis
2 Bennett, Jr., be taken to the county jail of Lexington County
3 and then to the South Carolina Department of Corrections to be
4 kept in close and safe confinement until the 24th day of
5 August, 2000, on which day between the hours of six o'clock
6 a.m. and six o'clock p.m., the defendant, Johnny Olandis
7 Bennett, Jr., shall suffer the penalty of death, and it's
8 signed by me and dated this date.

9 And as you know, Mr. Bennett, while I'm required to
10 set a date of execution, obviously, there is an automatic
11 appeal. Obviously, it's absolutely certain that the Supreme
12 Court will waive that date while you go through your appeals.

13 I'm also required, as you know, to sentence you on
14 the other charges, and I will sentence you to 30 years on the
15 kidnapping charge, but your lawyers may have told you that
16 that is subsumed by the murder charge. But I give that
17 sentence for the record, anyway. 30 years on the armed
18 robbery and five years on the larceny of a vehicle, and those
19 will run concurrently with this sentence. I wish you good
20 luck, Mr. Bennett.

21 THE DEFENDANT: I appreciate it, Your Honor.

22 THE COURT: Yes, sir.

23 MR. MYERS: I don't think you can impose a sentence
24 on kidnapping when he gets the death penalty.

25 THE COURT: I think you're right. I did that,

1 frankly, because I had to put something in here, Mr. Myers.

2 Good luck to you, Mr. Bennett.

3 THE DEFENDANT: Thank you, Your Honor.

4 THE COURT: Anything else at this time,
5 Mr. Solicitor?

6 MR. MYERS: Nothing from the State.

7 THE COURT: We're in recess. Thank you.

8 (WHEREUPON, the trial of this case was concluded.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Sharon L. Vizer, Official Court Reporter for the
11th 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
the evidence introduced in the trial of the captioned case in
Circuit Court on the 16th day of June 2000.

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

May 19, 2004



SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) COURT OF GENERAL SESSIONS

State of South Carolina,)
PLAINTIFF,)
-VS-) MOTIONS HEARING
Johnny O. Bennett,) DEATH PENALTY
DEFENDANT.) 93-GS-32-2354

BEFORE THE HONORABLE MARC H. WESTBROOK, JUDGE

Thursday, October 26, 2000
LEXINGTON, SOUTH CAROLINA

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

Donald V. Myers, Esq.
S. Graham, Esq.
For the Plaintiff

H. Wayne Floyd, Esq.
Herbert B. Young, Esq.
For the Defendant

REMA K. GANTT
CIRCUIT COURT REPORTER

2162

2

E X H I B I T S

PAGE NO.

(There were no exhibits admitted at this hearing.)

25 (The defendant complied.)

1 CLERK OF COURT: Would you raise your
2 right hand, please?

3 (The witness was sworn.)

4 THE COURT: All right, Mr. Bennett, do you
5 understand what this hearing is about today?

6 MR. BENNETT: Yes, sir.

7 THE COURT: All right. And I know this
8 sounds like a stupid question, but I always have to
9 ask it. And you know I asked you this before, too.
10 At this time, are you under the influence of any
11 sort of medication, or drugs, or alcohol, or
12 anything that affects your judgment in any way?

13 MR. BENNETT: No, sir.

14 THE COURT: All right. You've had a
15 chance to talk with your attorneys about this?

16 MR. BENNETT: Yes, sir.

17 THE COURT: You've been satisfied with
18 their services in this?

19 MR. BENNETT: Yes, sir.

20 THE COURT: All right. And you feel like
21 you're capable of working with them today?

22 MR. BENNETT: Yes, sir.

23 THE COURT: All right. Thank you, sir.

24 THE COURT: Okay. At this time, the
25 defense, I will entertain the motion for a new

1 trial. You had various grounds for the motion.
2 I'll let you discuss them as you see fit, and we'll
3 proceed from there, okay?

4 THE COURT: Now, counsel, as I said, we
5 have a jury that, as you know, is deliberating. If
6 they do come up with a verdict or have any
7 questions, we may have to interrupt for that. But,
8 otherwise, we'll proceed and give both of you all
9 the time that you need.

10 THE COURT: All right, who will speak for
11 the defense, Mr. Floyd?

12 MR. FLOYD: Your Honor, I will.

13 THE COURT: Go ahead.

14 MR. FLOYD: Thank you, Your Honor. Your
15 Honor, the first ground for a new trial that we'd
16 like to discuss with Your Honor is the State's
17 blatant use of race throughout this trial, which we
18 feel prejudiced Mr. Bennett and deprived him of a
19 fair trial and violated the constitutional concept
20 of fundamental fairness.

21 Your Honor, I'd like to briefly
22 reiterate the manner in which the State placed race
23 into the trial. It began with the selection of the
24 jury. As Your Honor will recall, we ended up with
25 an all-white jury to try the defendant. There were

1 only two potential black jurors in the panel that we
2 were able to pick. One was a little lady who was a
3 schoolteacher. The State struck her. We objected
4 to the strike as being violative of the facts and we
5 had a hearing on that.

6 The State argued that the reason that
7 they struck her was that she had a reputation for
8 being argumentative and hard-headed and because she
9 was a school employee and Mr. Bennett's mother works
10 for the school district.

11 Your Honor, it's our position that
12 first of all, this lady worked for School District
13 Five, and Mr. Bennett's mother works in the
14 cafeteria out in Swansea, School District Two, miles
15 apart. The State called five or six educators so it
16 was a pretext that because she was in the education
17 system, she would be somehow more responsive to Mr.
18 Bennett because his mother worked in a school
19 cafeteria.

20 The other potential black juror was a
21 male who was placed on the panel. But after he was
22 placed on the panel, he recognized the victim's
23 family and advised the Court that he did not feel
24 like he could be a fair juror. So we lost him.

25 We asked the Court to consider

1 empaneling a new jury at that point because we felt
2 if we were going to start with an all-white jury, we
3 weren't going to get a fair trial. We were denied
4 that.

5 Then, once the trial started, race
6 began the overriding factor. Every chance that the
7 State could get, they injected race into the trial.

8 First of all, one of the State's
9 witnesses, a prison guard, was testifying about a
10 fight Mr. Bennett was in down in Aiken when he was
11 doing a YOA sentence down in Aiken. And she said
12 it was a fight of blacks on whites. And there was
13 no reason for that to be an issue except the State
14 wanted to keep hammering race to this all-white
15 jury.

16 Second, Shannon Gilbert, who was a
17 witness who testified that he had been injured at
18 the Pizza Hut, had mentioned where Mr. Bennett
19 assaulted him. The State introduced through that
20 witness, testimony, over our objection, because he
21 started talking about a dream he was having, that he
22 was having. We objected because we didn't want
23 anything about a dream coming in, but they were
24 allowed to go forward. And he said in that dream,
25 black Indians were chasing him.

1 Now, Your Honor, the State knew what
2 was coming from that, the point of asking that
3 question. They wanted him in front of the jury to
4 inflame the jury, bringing race in again.

5 Next, Your Honor, there was a lot to
6 do with a sexual relationship. There was evidence
7 introduced about a sexual relationship between Mr.
8 Bennett and a law enforcement officer who was
9 employed by the Lexington County Sheriff's
10 Department.

11 Now, she was white, and the jury
12 didn't know that. And there was no way for them to
13 know that. So what the State wanted to do was to
14 make sure they knew that.

15 So we had a witness who testified --
16 I believe his name was Jerry Collins -- and he came
17 in and testified that Mr. Bennett saved his life,
18 that he tried to kill himself in the jail and that
19 Mr. Bennett got out of his cell, the guard let him
20 out of his cell, and he went and got him down
21 because he was the only one big and strong enough to
22 get him down from his perch. He saved his life.

23 When the Solicitor was cross-
24 examining him, he kept trying to get him to say
25 about this guard, this female guard, because he made

1 some kind of comment in response to the Solicitor's
2 question of "Isn't it true he's a lot of problem for
3 the guards?" -- behavior. The witness said, "No,
4 the guards love him."

5 And the Solicitor kind of carried
6 that forward and said, "Well, at least Judy Harwell
7 (PH) loves him. Do you know her?" And he was
8 trying to get him to say, You mean the white lady?
9 Well, he didn't say that.

10 So when he didn't say she was a white
11 lady, and the Solicitor then asked him, "Don't you
12 know her -- the blonde woman?" And there was no
13 reason for him to ask that at all, except he wanted
14 to once more put race in front of this all-white
15 jury, in hopes they would be inflamed against the
16 defendant.

17 Now, as if all those things that came
18 out during the trial in the evidentiary stage were
19 not enough, then in the closing argument, the
20 Solicitor compared Mr. Bennett to King Kong. Now,
21 we will agree that Mr. Bennett is a large man. And
22 that's no dispute. The jury can see that. There
23 was no reason to compare him to King Kong for his
24 size. They could look at him and see how big he is.

25 They compared him to King Kong for

1 only one reason, racism. I thought we were back in
2 the 1930s, and 1920s, or the 1940s, back when white
3 people used to compare blacks to gorillas and apes.
4 And that's what he was trying to do. He was trying
5 to call on this old racism that used to be allowed
6 in this state and in other places in this country,
7 Your Honor.

8 Now, according to the law as we set
9 forth in this brief, it is sufficient to raise that
10 issue in a motion for a new trial. You don't even
11 have to make a contemporaneous objection to
12 something that is so blatantly racial as that.

13 The standard case is *Toyota of*
14 *Florence versus ???*, 314 SC 257, 442 SC 2nd 611, a
15 1994 case, which had to do with a Japanese company.
16 Now, of course, we don't need to make a
17 contemporaneous objection when there's such a
18 blatant, outrageous, abhorrent appeal to racism in
19 front of the jury.

20 Now, it does not matter whether or
21 not the Solicitor intended for that to be racial.
22 It does not matter whether or not the Solicitor was
23 acting in good faith or not when he made such
24 remarks. That question is not determined. What
25 the Court must look at is the impact upon the jury,

1 and that's all.

2 And there is no way that we can deny
3 that that type of argument wasn't blatantly racial.
4 He was called King Kong. He was called a caveman.
5 King Kong is a gigantic black gorilla. And that's
6 what he was trying to do. He was trying to
7 dehumanize Johnny Bennett to this jury, in hopes
8 that if he could dehumanize him, it would take away
9 their responsibility.

10 They're not killing him, they're not
11 sentencing to death a man. They're sentencing to
12 death a sub-human guy, this black guy. That's what
13 they're arguing to the jury.

14 The overall impact of race in this
15 trial, particularly with an all-white jury, is such
16 that Johnny Bennett did not get a fair trial. And
17 fundamental fairness, equal protection, due process
18 -- all of these constitutional protections that we
19 all have dictate that he be granted a new trial free
20 of racial bias.

21 The second thing, the State
22 introduced evidence that while Mr. Bennett was on
23 Death Row, he began a sexual relationship with, had
24 a sexual relationship with--

25 THE COURT: Why don't we do this? If we

1 could, I'll let you address each point. Let's take
2 each point with full argument and then come back.
3 Does that sound okay?

4 MR. FLOYD: That's fine.

5 THE COURT: That way, we can keep them
6 compartmentalized a little bit.

7 MR. FLOYD: Yes, sir.

8 THE COURT: Mr. Young, did you want to add
9 anything to this argument?

10 MR. YOUNG: Not at this time.

11 THE COURT: All right.

12 Mr. Myers?

13 MR. MYERS: Yes, Your Honor. I don't take
14 offense to Mr. Floyd's comments. I realize he's got
15 to represent his client. He's got to make
16 arguments, even as flimsy as they might appear.
17 Race never was involved in this case. It was
18 irrelevant. It's immaterial. It was a non-issue.

19 They can refer to the written
20 transcript as much as they want to. But what
21 they'll find there is that race wasn't involved
22 because the defendant was black, and the victim was
23 black.

24 Not only was our chief investigating
25 officer black, photographing evidence on a road

1 outside of Swansea when they were recovering the
2 victim's items after the defendant stole them from
3 him and after he killed him, it was three black
4 officers who were working on the case. Over 55
5 percent, over 55 percent of our witnesses were
6 racial in origin.

7 So there's no reason for race to be
8 involved. As a matter of fact, the only party that
9 feebly attempted to bring up race and play the race
10 card would have been the defendant. They did play
11 the race card, and they dealt from the bottom of the
12 deck.

13 First of all, we've talked about
14 Juror Sands, and the Court has ruled on that. So
15 they're just plowing, or trying to replot, firm soil
16 when they try to bring that back up. We stated on
17 the record why we didn't want Ms. Sands. And the
18 reason we didn't want Ms. Sands you saw as the trial
19 developed. They are education witnesses, and the
20 defense tried to put all the blame for Mr. Bennett's
21 problems in school was because of the school system.

22 They put the school system on trial.
23 They blamed the teachers down there for letting
24 other students intimidate Mr. Bennett. They blamed
25 the school system for not providing him things which

1 he needed.

2 It's just like a witness I had in the
3 *State versus Benjie Coward (PH)*. A teacher got on
4 that stand and lambasted me and the school system,
5 saying Mr. Coward murdered some people because the
6 school didn't take care of him when they should
7 have.

8 By the way, that same witness is
9 going to be testifying in Richland County, probably
10 tomorrow, in the De La Cruz case. And that's the
11 same information that we had on Ms. Sands, that did
12 not do it alone. And as you saw the trial develop,
13 that's what it's about. As a matter of fact, we
14 felt that she would sympathize with the defendant on
15 that. But, anyhow, that was our ground.

16 As to the other black juror, we
17 wanted him -- I told you that -- because we had
18 information he'd be favorable to the State. And
19 after he came in the courtroom, after he was
20 selected by the State, he brought to the Court's
21 attention that he -- I think he said he was a part-
22 time minister or something. And because he knew
23 them so closely, he felt uncomfortable serving as a
24 juror in this case.

25 And he told Your Honor he could no

1 longer carry out his duties as a juror and be fair
2 and impartial. We had no other ground but to
3 excuse him, as we properly did.

4 And to go back further in their race
5 theory, they tried to blame some correctional
6 officer in Aiken, about his incarceration in Aiken.
7 There was a fight and he got so many infractions
8 against him, they had to move him to another prison
9 because of that fight.

10 And she said, "Well, the fight was
11 more than just the defendant. It was four guys on
12 each side. And there were some white guys on one
13 side and black guys on the other side." That
14 witness, that witness was a black lady. So they're
15 saying we put a black lady up to attack blacks. I
16 believe that's not reasonable.

17 They talked about Ms. Harwell (PH).
18 If I wanted to bring up Ms. Harwell's life -- I
19 wasn't trying to identify this woman because that
20 was Johnny Bennett's lover in jail. She was a guard
21 at the Lexington jail having sex with him. She went
22 on over to Death Row and had sex with him.

23 And then what they want to do, Your
24 Honor, as their favorite tactic on closing argument
25 was to take comments out of context, which, of

1 course, they can't do. And say I used statements
2 like King Kong doesn't make sense. I didn't say
3 nothing about that, And you recall in my opening
4 statement to the jury in the guilt phase, the first
5 part of the trial.

6 And you will recall in my opening
7 statement to the jury, the first opening statement,
8 I started right off talking about the big, old,
9 tall, Johnny Bennett and the little frail victim.
10 And throughout the trial we talked about that --
11 6'8", 300-pound Johnny Bennett; 5'7", 130-pound
12 Benton Smith.

13 You will recall in my closing
14 argument, I even had some cutouts depicting both of
15 them to show how Mr. Bennett would engulf little,
16 frail Benton Smith.

17 And if you'll look through all of my
18 closing argument relating to this issue in your
19 packet, they don't want all of it brought out. They
20 want it brought out that what we were doing is also
21 responding to their theme of how Mr. Bennett, after
22 stabbing Benton Smith, which the pathologist
23 couldn't tell -- over 7 times with that headed
24 screwdriver.

25 After taking Mr. Smith out behind his

1 sister's home after that, and after covering Benton
2 Smith up with leaves out there in those woods for
3 animals to eat his body, and after leaving him
4 there, after taking all of his goods and going on
5 his happy times around Orangeburg, Swansea, and
6 everywhere else, selling them.

7 And after all the trouble after that
8 when he got into prison, up until 1997, they brought
9 in all of these 15 or 16 correctional officer
10 witnesses saying what a wonderful person he is, he's
11 changed his ways. He's now a model prisoner.

12 And you recall, I'm sure, that their
13 own witnesses, that they described him in glowing
14 terms. We were combatting that. They described him
15 -- their witnesses -- as now a gentle giant. Was
16 that a white gentle giant or a black gentle giant?
17 That was their witnesses. They described him as the
18 secretary of defense and said he was a mediator, and
19 they called him a big, old teddy bear. Was that a
20 white teddy bear or a brown teddy bear? That's
21 their witnesses. So we were responding to that.

22 And what I told the jury in my
23 closing argument was about him manipulating people
24 in prison, how we put into evidence documents
25 written by him to the warden. He wanted to make

1 sure what went into his case jacket in his file
2 because it might hurt him when he went back to
3 court.

4 And we were talking about all those
5 people down at the Lieber that came up here to
6 testify. I asked him was anybody working down at
7 the prison down there. Seems like they were all up
8 here. And after going through all of that, I asked
9 the jury has he manipulated anybody, because he
10 said, If anything bad is in my jacket, in my file,
11 it could very well impact on me when I go back to
12 Court and see 12 men and women on the jury panel.
13 So I think I'll be nice to some guards and get them
14 to testify for me.

15 That's why I've asked them if anybody
16 was working today, because all of y'all seem to be
17 up here to testify. Here, again, I'm quoting.

18 And I said to the jury, "If you give
19 him life, the real Johnny Bennett will come back.
20 If you give him life, then he'll come back out. To
21 give him life and meeting him again would be like
22 meeting King Kong on a bad day -- wild Johnny, mean
23 Johnny, manipulating Johnny, murderous Johnny. If
24 you give him life, those guards better buckle up
25 their vests because he'll come back out in full

1 force."

2 And then I go on to tell him he got
3 what he wants. And, here, again, I said, "An
4 explosive package wrapped up in all 6'7", 300
5 pounds. He'll come back. And then I talked about
6 frail Benton Smith.

7 The use of the King Kong term, it
8 wasn't an a purely racial statement. That's a
9 deplorable statement for the defense to make. That
10 term depicted the brutality of the murder committed
11 by Johnny Bennett in this case. It went to his
12 character. It emphasized the tremendous size of the
13 defendant, his violent character, and referred to
14 the evidence in the record that you charged the
15 jury, particularly to his size. It went to his
16 characteristics, his prior record, his prior
17 history, and it went to those cutouts I have of him.
18 It's like huge Johnny Bennett holding little Benton
19 Smith in his hands. That was it.

20 And we cited the case, a Fourth
21 Circuit Case that talks about the evidence -- four
22 or five aggravating circumstances. And then the
23 arguments in the evidence by opposing counsel when
24 they themselves, by their own witnesses, talked
25 about the gentle giant, the secretary of defense,

1 the mediator -- the big, old teddy bear, they called
2 him. I don't know how a big, old teddy bear is
3 good. King Kong is bad, they said.

4 Fourth, in here, the time is
5 mentioned one time, and one time only. And then,
6 lastly, ever since *State versus Thomas*, I'm told, as
7 I read the Supreme Court case, you've got to object.
8 They didn't object and then come up with another
9 flimsy argument, well, they couldn't hear.
10 Everybody in the courtroom could hear.

11 And they don't cite you a single
12 criminal case. What they cite you is a case in
13 Florence of Toyota where the people suing Toyota in
14 their closing arguments in that civil case they
15 analogized Toyota to Pearl Harbor and the Japanese.
16 That's got nothing to do with this case. That's
17 totally out of context.

18 Then we have a person that's not
19 familiar with this thing to argue there's some
20 racial connotation to compare somebody 6'8", 300
21 pounds to King Kong with a frail little Benton
22 Smith. It's a figment of their imagination.

23 The caveman comment, just like the
24 King Kong statement, they don't have much to rely
25 on, and they've objected to the connotation for the

1 word "caveman."

2 Well, as you recall, when he nearly
3 killed the two young fellows up here at the Pizza
4 Hut, when he beat them unconscious, one was in a
5 coma for 14 days, and the other one was in a coma
6 for five days. The young black lady testified to
7 us, who was inside the Pizza Hut having supper with
8 her boyfriend, she looked out, and as he had beaten
9 one of them unconscious, then he started to stomp
10 him with his boots.

11 Well she testified about seeing him,
12 she said she couldn't recognize him. She said he
13 reached down and grabbed one of them by the hair and
14 was dragging them across the parking lot, a
15 lifeless, motionless body.

16 And then you've got the lady, I think
17 it was Ms. Mochesney [ph] -- Sharon Mochesney -- who
18 was a guard at the jail, guarding Johnny Bennett.
19 And Johnny Bennett wanted to get to another inmate
20 named Dugans, for some reason, to beat him up.

21 And Guard Mochesney went up there to
22 settle Johnny Bennett down, and she said that Johnny
23 Bennett picked her up, pushed her out of the way,
24 went in and started beating Dugans to the floor, and
25 then grabbed Dugans by the hair and pulled him out

1 of his cell across the cell floor. That was in the
2 evidence, and my argument was on that.

3 And I talked with the jury about them
4 kicking him out of school for all the trouble. How
5 many charges do we have for him at school filed at
6 Swansea -- five or six charges? Finally, they had
7 to expel him so many times -- that time on the bus
8 down there, they had to call the cops on him before
9 they could let kids get home on the bus.

10 Then I talked about the Pizza Hut
11 incident. I talked about the two boys being in a
12 coma, one two weeks and one four or five days. I
13 talked about the young lady inside saying she saw
14 Johnny Bennett drag one of them's lifeless body by
15 the hair across the parking lot.

16 I talked about Mr. Dugans, and I
17 talked with the jury about what had gone on there.
18 And during that comment, analogized in that
19 testimony, in the record, the incident at the jail
20 with Mr. Dugans, the incident at the parking lot --
21 the Pizza Hut parking lot -- the two guys, both of
22 them dragged along.

23 And I said, "You know" -- I was
24 talking about the young lady that saw him in that
25 Pizza Hut -- "Johnny was even pulling one of them by

1 the hair, kind of like an old caveman dragging him
2 by his hair, and the guy is motionless."

3 And I even said something to the
4 effect that the Pizza Hut and Mr. Dugans -- well,
5 that's a comment on the facts in the record. But
6 somehow they take that and in their twisted analogy
7 and their twisted zeal to distort things, to grab
8 that issue de jour of racism, they said somehow that
9 brought in racism. It's beyond me. It's just a
10 figment of defense counsel's imagination to try to
11 somehow say that was racist.

12 You know, I read *B.C.* in the funny
13 paper, and I like *The Flintstones*, but I've never
14 seen a black caveman. I've seen a lot of white
15 ones, but I've never seen a black one. *Alley Oop*
16 was going on back when I was in high school. I
17 don't know how they come into play in any of that.

18 It also went to substantiate
19 aggravation, because in our notes on aggravation, we
20 told them we're going to present evidence and
21 testimony of the defendant's characters, his acts of
22 violence, his violation of laws, rules, regulations,
23 both before the murder of Benton Smith and after,
24 and his propensity for violence. And it also went
25 against their unmitigated circumstance that he had

1 no significant prior history involving the use of
2 violence against another person.

3 We only mentioned that word "caveman"
4 one time. And, here again, it's so bad now, but it
5 wasn't bad then, because they sat there dumb as a
6 mule and didn't object or say a thing, because they
7 knew I was commenting on the evidence. Just like
8 the other so-called racial allegations, just like
9 the King Kong allegation, the caveman allegation.

10 THE COURT: Mr. Graham, do you want to add
11 anything?

12 MR. GRAHAM: No, Your Honor.

13 THE COURT: All right.

14 Any response, Mr. Floyd?

15 MR. FLOYD: Yes, Your Honor. The way the
16 State, in this case, not that the defendant's --
17 well, what the figment of the imagination in this
18 argument is, is the Solicitor's belief that he was
19 not -- or his statement -- that he's not attempting
20 to inject race into this case, is incredible.
21 That's what's the figment of the imagination is.

22 There wasn't a single person in this
23 courtroom who didn't listen and know that race was
24 what was going on. There's not a single person
25 that's in this courtroom who doesn't know that King

1 Kong was a giant gorilla and that what the Solicitor
2 was doing was trying to put in the jurors' minds
3 that this is not a man, he's just a big ape, so you
4 can kill him because he's not human, just a big, old
5 black ape. That's what he was arguing.

6 He didn't have to use King Kong. He
7 can use "vile." He can use "murderer." He can use
8 all those things and their not racial. But there
9 ain't nobody that uses the term "King Kong" who
10 doesn't have in their mind a gigantic gorilla. And
11 that's racial, and it's sub-human, also.

12 And to sit up and here say that's not
13 racial, that defies credibility, is what that does.
14 And to say that "I'm just trying to identify Judy by
15 asking him whether or not she was blonde," that
16 defies credibility also.

17 And to say that "When I put a white
18 boy on the stand to say what I woke up to, of
19 nightmares, of black Indians chasing me," and they
20 knew that's what was coming, to say that's not
21 racial, that defies credibility also.

22 There is no way that the State can
23 avoid the impact of what they did in this trial,
24 which was to turn it into a racial issue in front of
25 an all-white jury.

1 THE COURT: Mr. Young, did you want to add
2 anything else?

3 MR. YOUNG: I think Mr. Floyd has covered
4 it, Your Honor.

5 THE COURT: All right.

6 THE COURT: Anything else, Mr. Myers?

7 MR. MYERS: Yes, sir. It's ironic to me,
8 King Kong is racial but a big teddy bear isn't. I
9 know they had a movie on television one time about
10 this big, old gorilla, bigger than King Kong,
11 probably related, but that's their allegation.

12 THE COURT: Anything else, Mr. Graham?

13 MR. GRAHAM: No, Your Honor.

14 THE COURT: All right. Okay, let's move
15 to your next argument, Mr. Floyd.

16 MR. FLOYD: Thank you, Your Honor. Your
17 Honor, the next argument we'd like to address is our
18 position that the fact that it got before the jury
19 that Mr. Bennett was on Death Row somehow impacted
20 upon the verdict and deprived him of a fair trial.
21 This would be under the *Paine v. Tennessee* type of
22 argument in which the jury is not supposed to have
23 any diminished responsibility.

24 Your Honor, we would first point out
25 that this came out three different times, twice

1 through defense, once through the State. However,
2 the source of the comment is not dispositive. The
3 question is the impact upon the jury.

4 Your Honor, we would suggest that
5 Your Honor was in a unique position being the actual
6 trial judge who weighed the evidence and could see
7 the impact of different factors upon the jury. And
8 we feel that the fact that it did get out to this
9 jury that, in fact, he was already on Death Row
10 affected the jury deliberation.

11 There is some case law -- and both
12 sides refer to various cases in their brief -- where
13 it has been allowed in front of the jury that the
14 defendant was, in fact, serving a death sentence
15 from another murder but not the one he was on trial
16 for. *Romano versus Oklahoma* is the one both sides
17 argued, and there's the Jones case in South
18 Carolina. We talked about that.

19 However, in a case like this, it's
20 different, because what we're talking about is the
21 fact that he was on Death Row for this particular
22 murder, not for some other murder. So what the jury
23 had in their minds and in front of them was that
24 some other jury had already placed him on Death Row.

25 So their natural inclination would

1 be, "Why should we do something different?" It
2 really diminishes their responsibility, because they
3 can put it off on some other jury regarding placing
4 him on Death Row. For this reason, we feel that he
5 was possibly damaged.

6 THE COURT: Mr. Graham, you're going to
7 argue this one?

8 MR. GRAHAM: Yes, Your Honor, thank you.

9 Your Honor, it's the State's position that
10 that we have looked at that and this is not the
11 appropriate venue for their argument. That is
12 better suited for post-conviction relief. And
13 there's a lot of cases that deal with comments
14 solicited by and matching statement by defense are
15 PCR issues and not direct appeal or post-trial
16 motions would be appropriate for.

17 Specifically, Your Honor, in the
18 heart of the matter, what the jury heard lessened
19 their sense of responsibility by claiming that that
20 responsibility rested on themselves. In their
21 brief, they cited *Caldwell versus Mississippi*. And
22 in the cases that they then cite in addition to
23 *Caldwell* itself, what happened in those cases were
24 that the jury was specifically told that it would be
25 their decision that would be reviewed either by the

1 trial judge or by an appellate court, and that's not
2 what happened in this case. It was never implied
3 that their decision would not stand.

4 Their argument really is nothing more
5 than mere allegations that the sense of
6 responsibility is lessened. And if you notice, Mr.
7 Floyd jumped straight from the fact that the jury
8 heard mention of Death Row straight from the mention
9 that he was on Death Row to the conclusion that he
10 had been sentenced by a prior jury. And that's a
11 leap that he can't make accurately, because that's
12 not what the jury heard. The jury didn't hear that
13 he was sentenced to death and on Death Row for this
14 murder.

15 In the brief, Your Honor, you will
16 notice that the State cites *Jones v. State* as
17 controlling, and we feel that it is. That was very
18 similar in facts to the case before Your Honor, when
19 the jury heard comments elicited through testimony
20 that the defendant was on Death Row.

21 In discussing that case, Your Honor,
22 the South Carolina Supreme Court in 1998 made
23 several points, one being that there was no formal
24 introduction of a prior death sentence and that the
25 jury may have inferred the defendant previously was

1 sentenced to death. But, however, there was no
2 proof in this case that the jury knew that he had
3 been sentenced to death.

4 Secondly, Your Honor, the jury may
5 have assumed that the defendant's presence on Death
6 Row was the result of a death sentence for another
7 crime. They stated that in Jones, and that's again
8 applicable here in this trial.

9 Finally, Your Honor, in the *State v.*
10 *Jones*, the South Carolina Supreme Court discusses
11 *Romano versus Oklahoma*, a U.S. Supreme Court case in
12 1994, where there was evidence that a death sentence
13 for another murder was introduced. And they stated
14 the fact that evidence of another murder and
15 sentence to death did not lessen the jury's
16 responsibility.

17 The question is not whether the jury
18 knew that the defendant had been sentenced to die.
19 It is whether they were led to believe that someone
20 else would review their decision. And there's
21 nothing that lends any credence to that argument.

22 Finally, Your Honor, another alternate
23 explanation of what the jury might be thinking comes
24 from direct examination by Mr. Young of Chaplain
25 Brown.

1 In asking Mr. Brown the question "And
2 how do you know him?" referring to Mr. Bennett. "I
3 know him through my two years I was with him. I was
4 primarily chaplain to Death Row inmates." That was
5 the answer.

6 Question by Mr. Young, "Do they keep
7 inmates who are awaiting trial in that area also?"
8 The answer was, "Yes."

9 He primarily explained to the jury
10 that not only a person's presence on Death Row was a
11 result of being convicted and sentenced to death but
12 the fact that you were awaiting sentencing. And
13 that's exactly how this case was framed and put to
14 the jury, as far as resentencing, that Mr. Bennett
15 had been convicted of murder.

16 THE COURT: Mr. Floyd, anything else?

17 THE COURT: I'm sorry, Mr. Myers.

18 MR. MYERS: Your Honor, if I may.

19 THE COURT: Sure.

20 MR. MYERS: They relied on *Caldwell versus*
21 *Mississippi*, in their brief saying somehow based on
22 that case that the jury's sense of responsibility
23 was diminished. In *Caldwell versus Mississippi*, the
24 prosecutor for Mississippi in closing argument told
25 the jury, "It makes no difference what your verdict

1 is. This is going to be reviewed by the Trial
2 Judge. It's going to be reviewed by the Supreme
3 Court of Mississippi, and it's going to be reviewed
4 by the United States Supreme Court. So it makes no
5 difference if y'all give him the death penalty.

6 Ironically, the United States Supreme
7 Court in *Caldwell versus Mississippi* came close to
8 saying there was nothing wrong with that.
9 Ironically, in that case, it's a plurality of
10 opinions. And because Justice O'Connor wrote a
11 concurring opinion. So the Supreme Court almost
12 said that that was right. In any event, we don't
13 have anything close to that, because we haven't told
14 the jury anything to diminish their sense of
15 responsibility.

16 We didn't raise this with witness
17 Green. On cross-examination, Mr. Floyd is who
18 brought up the Death Row thing, and he did it in a
19 context such as when Mr. Green was testifying about
20 Johnny Bennett having sex with the guard in prison.
21 I had specifically told Mr. Green not to mention
22 that.

23 But on cross-examination of Mr.
24 Green, the investigator of the sexual activity in
25 the prison, Mr. Floyd was bringing out where he was

1 then. That's not as secure as where he is now. And
2 where he was on Death Row then, Mr. Floyd said,
3 that's not the same place as where Death Row would
4 be. He kind of analogized back then. I believe he
5 said something about conjugal visits -- had conjugal
6 visits -- to get the jury to think where he was back
7 in '96 and '97. That might have been a tactical
8 decision on his part.

9 As a matter of fact, there are cases
10 that came up before the Fourth Circuit Court of
11 Appeals last week. And the Fourth Circuit Court of
12 Appeals said that might have been a tactical
13 decision, the defense bringing up Death Row.

14 But in any event, all of this comes
15 down through the *Romano versus Oklahoma* by the
16 United States Supreme Court, a 1994 case. And in
17 *Romano versus Oklahoma*, in the penalty phase of that
18 trial, they brought out that Romano was already on
19 Death Row and had received the death penalty by
20 another jury. And that was entered into evidence.

21 On appeal, the defense said that that
22 lessened the jury's responsibility. And it went up
23 to the Supreme Court after it was affirmed.

24 And here's what the Supreme Court
25 said. They granted certiorari based on the

1 following question: Does admission of evidence that
2 a capital defendant already had been sentenced to
3 death implicitly undermine the jury's sense of
4 responsibility for determining the appropriateness
5 of the defendant's death in the particular case on
6 trial in violation of the Eighth and Fourteenth
7 Amendments?

8 And the answer loud and clear was,
9 "No." And the sentence was upheld because, first of
10 all -- "We do not believe that the admission of
11 evidence regarding the defendant's prior death
12 sentence affirmatively misled the jury regarding its
13 role in the sentence process so as to diminish its
14 sense of responsibility. The admission of this
15 evidence therefore would not contravene the
16 principle established in Caldwell, and wasn't
17 grounds for reversal."

18 And they did it on several reasons.
19 They said, number one, the Judge instructed the jury
20 what it should base its verdict on, this case on
21 trial. They said the Judge told the jury this:
22 "You are the determiners of facts -- you decide. I
23 have made rulings during the second part of this
24 trial. In ruling, I have not in any way suggested
25 to you or intimated in any way what you should

1 decide.

2 I did not express any opinion whether
3 or not aggravated circumstances or mitigating
4 circumstances did or did not exist, nor did I
5 suggest to you in any way the punishment to be
6 imposed by you. You must not use any kind of chance
7 to reach a verdict. You must rest it on the belief
8 of each of you."

9 The Judge also instructed the jury
10 this. The Judge instructed the jury that it had the
11 responsibility for determining whether the death
12 penalty should be imposed. It was never conveyed or
13 intimidated in any way by the Court or by the
14 attorneys that the jury should shift its
15 responsibility or that its role in any way." That's
16 exactly what we have here.

17 We in no way minimized the jury's
18 responsibility in this case. And even though the
19 defense brought it up, they didn't minimize it.
20 They didn't minimize it at all. And as soon as it
21 was brought up, you stopped and said, "Let me give
22 the jury a charge." Here's what you charged the
23 jury, right after Mr. Green had testified.

24 You said this: "Ladies and gentlemen
25 of the jury, let me be sure to give you an

1 instruction that the fact that the witness has
2 testified this occurred on Death Row should not have
3 anything to do with this. Remember, the sentence
4 that you give in this case is going to be only on
5 the evidence that you hear and only on those
6 aggravating circumstances or mitigated
7 circumstances." Your last five words are, "Be sure
8 to remember that."

9 And in your final charge, I was
10 squirming in my seat because you told them so many
11 times "beyond a reasonable doubt." They had to find
12 aggravating circumstances. They had to consider
13 mitigating circumstances that were based only on
14 this case and in no way would their responsibility
15 be minimized.

16 Now, I'm glad that they cited *Romano*
17 *versus Oklahoma* too, because I don't have to get any
18 clearer than what the United States Supreme Court
19 ruled.

20 The Court concluded by saying this:
21 "As the jurors follow the trial court's
22 instruction..." which we presume they did, "...this
23 evidence about the prior death sentence should have
24 had little, if any, effect on their deliberation.
25 Those instructions by the Judge fairly and properly

1 describe to jurors' paramount role in determining
2 the defendant's sentence, and they also explicitly
3 limited the jurors' consideration of aggravating
4 factors..." -- there were four involved in that case
5 -- "...which the State had to prove."

6 This is about as clear as you can get
7 anything. In Romano, they brought up that the
8 defendant had been sentenced to death before. That
9 wasn't brought here. And Mr. Young did a very good
10 job, and he had the chaplain up there, after Green
11 and everything else. And when Chaplain Brown
12 testified on direct examination, and the first time
13 he said, the first time the chaplain said about him
14 getting to know Johnny Bennett, he was primarily the
15 chaplain for the Death Row inmates.

16 Mr. Young said, "Do they keep inmates
17 who are awaiting trial in that area also?" And the
18 chaplain said, "Yes." So it's inferable from that
19 the jury thought he was on Death Row awaiting trial
20 not being separated.

21 Not only that, the chaplain mentioned
22 the two words "Death Row" after that one -- two,
23 three times, and he was talking about his duties.
24 Mr. Young didn't bring it up, the chaplain did.

25 And when you said, "Cross-examination

1 by the State?" I said, "No questions." So the fact
2 that the defense brought up the defendant was on
3 Death Row, the jury could have understood that that
4 he was there awaiting trial. There is no suggestion
5 whatsoever to the jury, not in this record, that he
6 had a prior death sentence. Based on Romano and our
7 case and the Jones case in South Carolina, this
8 lacks merit now and will lack merit on PCR.

9 THE COURT: All right, counsel. I
10 understand the jury has a verdict. Let's see if we
11 can finish this issue up before we do.

12 Do you have much more argument on it,
13 Mr. Floyd?

14 MR. FLOYD: Yes, Your Honor, but I'll be
15 very brief.

16 THE COURT: Well, do you want to go ahead
17 and let us take the verdict first?

18 MR. FLOYD: Whatever you want.

19 THE COURT: All right. Let's go ahead and
20 take the verdict, and then we'll come back to this,
21 okay?

22 (Whereupon, there was a
23 break in motions hearing to receive the verdict in
24 another case.)

25 THE COURT: All right, back on the record

1 in the matter of the State versus Bennett.

2 Mr. Floyd, on the Death Row issue, I
3 believe you were going to respond?.

4 MR. FLOYD: Yes, Your Honor, just
5 briefly.

6 First of all, Romano versus Oklahoma
7 is not dispositive of this issue because it dealt
8 with the fact that the jury found out that the
9 defendant in that case had received the death
10 penalty for an entirely separate crime. That's not
11 what we're here to appeal.

12 Yes, they can introduce evidence of
13 other criminal activities. Had there been another
14 death penalty, then it would be okay for the jury to
15 know about it. The problem in this case is that
16 what they found out about is that there's a death
17 penalty here on this particular case by another
18 jury. And therefore we feel that his rights were
19 violated.

20 Plus the State's witness also
21 introduced it, and we brought it out with one
22 witness. The next witness was a State witness, who
23 was the other investigator. I don't know which was
24 which, then brought it out about the other death
25 penalty also.

1 MR. MYERS: I hate to interrupt you, but
2 who was that? That's not in the record. It's not in
3 the transcript.

4 MR. FLOYD: I believe it was in the
5 transcript.

6 MR. MYERS: There were two witnesses for
7 the State, Mr. Green, who brought it up on cross,
8 and Chaplain Brown, the other witness. There were
9 no other witnesses.

10 MR. FLOYD: Your Honor, the transcript
11 will show Tillman brought it up also. And, Your
12 Honor, when Tillman brought it up, Your Honor
13 stopped the proceeding, and that's when you gave the
14 instruction to the jury. And then we objected at
15 that time to the instruction, because we thought it
16 just brought it home. But the transcript will show
17 that, that Investigator Tillman brought up the death
18 penalty also.

19 MR. MYERS: Your Honor, it was Mr. Brown
20 that they are talking about -- not Mr. Brown, Mr.
21 James Green that talked about it, not Mr. Tillman --
22 because that's when you instructed the jury, was Mr.
23 James Green.

24 And not only that, if they don't like
25 Romano, then they sure don't like Jones, because

1 *Jones versus South Carolina*, 332 SC 229 504 SE2nd
2 822 1998 is directly on point. And by the way, in
3 *Jones*, the United States Supreme Court denied the
4 certiorari.

5 MR. FLOYD: Your Honor, *Jones* is an
6 ineffective assistance of counsel case. And the
7 opinion went down to the fact that the first prong
8 of the test as to whether or not there was any
9 prejudice. *Jones* is not a dispositive case. And we
10 stand on our statement, and we suggest that if
11 that's an issue the transcript be compared about the
12 Death Row. That's when Your Honor stopped the
13 proceeding and told the jury about -- gave your *su*
14 *esponde* instruction and there was a second
15 investigator after it had come out through us with
16 the first investigator.

17 THE COURT: Mr. Young, did you have
18 anything else? Mr. Young, anything you want to add
19 to this?

20 MR. YOUNG: Your Honor, the only thing
21 that I would add to it is that the argument was made
22 by the State that the jury did not have any
23 indications that Mr. Bennett had been sentenced to
24 Death Row on a previous occasion. I believe there
25 were at least two witnesses that were interviewed at

1 a later time that indicated that they had figured
2 out, based on hearing the words "Death Row," that he
3 had been previously sentenced.

4 Your Honor, because of the law that
5 gives the jurors the option to discuss cases and not
6 discuss cases, we have not been able to get the
7 jurors to discuss the case with us regarding whether
8 or not it played a part in their decision. But we
9 are aware that there are two jurors who at least
10 knew that he had been sentenced on an earlier date.

11 MR. MYERS: And they certainly don't like
12 that the Supreme Court said in Jones. First, there
13 was no formal introduction of evidence of his
14 previous death sentence. There was only a passing
15 reference to Death Row, from which the jury may have
16 inferred the gentlemen had been sentenced to death
17 before.

18 Second, the State did not state that
19 he was on Death Row for committing the crime against
20 the victim in this case. It may have been construed
21 by the jury as a death sentence for a previous crime
22 and this was a new sentencing trial. And they can't
23 talk to jurors, because jurors can't give affidavits
24 or anything else as to what went on during
25 deliberation. And I know they've been in contact

1 with some jurors because one called me upset about
2 it, and I know the juror rules prohibit them from
3 doing that.

4 THE COURT: Mr. Graham, do you have
5 anything to add?

6 MR. GRAHAM: No, Your Honor, I thank you.

7 THE COURT: Okay. Mr. Floyd, Mr. Young,
8 anything else?

9 MR. FLOYD: Not on that point, Your Honor.
10 But I do have some other argument.

11 THE COURT: Okay. I did have
12 communication that there was one juror who had been
13 contacted, and I talked with him personally. And
14 basically he was a little bothered about talking
15 about the case, I guess more than anything. He
16 indicated that he talked with an investigator. I
17 forget who the investigator was. But he told me
18 that the investigator didn't harass him and that
19 when he told the investigator that he had talked
20 about it enough, the investigator didn't pursue the
21 conversation. So he was okay with that.

22 Apparently, he indicated that it was such
23 a bad experience, going home to his wife afterward,
24 that he didn't want to have to go through that
25 again. And that's why he just didn't want to talk

1 about it too much.

2 THE COURT: Okay, anything else on that
3 issue?

4 All right, any other issues to raise, Mr.
5 Floyd?

6 MR. FLOYD: Yes, Your Honor, another
7 important issue. Your Honor, during the trial, the
8 State introduced statements of the defendant in
9 which he admitted having sex on Death Row. We
10 objected to the introduction of this evidence on two
11 points.

12 First of all, we felt that the
13 statements should not be allowed in without a
14 *Jackson v. Denno* hearing, because under *Jackson v.*
15 *Denno*, even though a statement is voluntary, the
16 Court is obligated to conduct a hearing to make sure
17 that the defendant was aware of and advised of his
18 Miranda rights prior to giving a statement.

19 Your Honor, we feel on that issue the
20 Court ruled against us on that point and we ask the
21 Court to revisit that at this time because we feel
22 that that's an important issue. And we know of no
23 law that would allow such a statement in,
24 particularly when it's used so strongly against Mr.
25 Bennett in this case. Because that was the only

1 incident that the State had in the last five years
2 or so where Mr. Bennett allegedly broke any kind of
3 a rule. So we ask the Court to revisit that issue.

4 Secondly, we feel that it's improper,
5 and we objected to it at that time, of the State's
6 introduction of the evidence at all, because
7 whatever conduct was engaged in, it was allowed by
8 the guard. So the State allowed the conduct, that
9 he didn't go behind anybody's back, but allowed it.
10 And it's improper for the State to allow conduct
11 like that.

12 To participate in the conduct, it's
13 against the rules and it's misconduct. And to allow
14 him to participate in it and then come and use it
15 against him at trial -- we think it would be
16 contrary to our Supreme Court's ruling in *State v.*
17 *Quattlebaum*, where the State did not profit from its
18 own misconduct as they did in this case regarding
19 the activity.

20 THE COURT: Mr. Young, did you want to add
21 anything to it?

22 MR. YOUNG: No, sir, Your Honor.

23 THE COURT: All right, Mr. Myers?

24 MR. MYERS: Because it's been to trial,
25 the statement relating to the defendant's admission

1 of having sex while in jail contributed to his
2 character. It did not go to guilt or innocence.
3 The case is already pleaded. It's pleaded in, I
4 think, *State versus Howard*, that you can have
5 evidence as to character, misconduct, even prior
6 crimes, but you do not have to go into a *Jackson vs.*
7 *Denno* hearing.

8 I think *State versus Gaskins* also
9 touches on that, in which Gaskins's admission of
10 killing ten other people was brought out during the
11 penalty phase. *Jackson versus Denno* does not apply
12 to character evidence. It doesn't have to be shown
13 by fair and convincing or by preponderance of
14 evidence, it goes to truthfulness. And in *State*
15 *versus Matthews* that is brought out.

16 Also, I think in the *State versus*
17 *Pough* last year -- and I may have that confused with
18 another case -- that while the defendant was in jail
19 for a murder for which he was on trial, he murdered
20 another inmate while he was jail awaiting trial.
21 That was brought out in the penalty phase. Now, if
22 you can bring out that the defendant murdered
23 somebody in jail awaiting trial, you certainly can
24 bring out the defendant having sex while in the
25 jail.

1 THE COURT: Mr. Graham, anything?

2 MR. GRAHAM: No, Your Honor.

3 THE COURT: All right. Anything else, Mr.
4 Floyd, Mr. Young?

5 MR. YOUNG: Nothing additional on that
6 point, Your Honor.

7 THE COURT: Okay. Any other grounds?

8 MR. FLOYD: Yes, Your Honor. The defense
9 objected during the trial to the introduction of the
10 victim impact evidence concerning the incident at
11 the Pizza Hut. Your Honor, the State was allowed to
12 introduce exhaustive evidence from the victims and
13 others about the extent of injuries suffered by
14 these two men in an incident that occurred at the
15 Pizza Hut when Johnny Bennett was 17 years of age.

16 We feel it was improper to allow this
17 testimony, which violated the *Paine v. Tennessee*.
18 And *Paine v. Tennessee*, which started allowing
19 victim impact evidence, basically said that what you
20 can do is give the jury a quick glimpse the life of
21 the victim. But it doesn't allow victim impact
22 evidence of other crimes for which he's not being
23 tried. And we feel that this evidence strongly
24 prejudiced against the defendant.

25 MR. MYERS: The South Carolina Supreme

1 Court has been very clear on that, as the United
2 States Supreme Court has. Details relating to prior
3 crimes are absolutely admissible. Not only that,
4 all of this testimony was brought out in the first
5 trial. *State versus Young* and *State versus Stewart*,
6 says that whatever was brought out in the guilt or
7 penalty phase of the first trial can be brought out
8 in the second trial, and the defense cannot move to
9 mitigate the admissibility of that.

10 THE COURT: Mr. Graham, anything else?

11 MR. GRAHAM: No, thank you, Your Honor.

12 THE COURT: Mr. Floyd?

13 MR. FLOYD: No, Your Honor, nothing
14 further on that.

15 THE COURT: Mr. Young?

16 MR. YOUNG: Nothing further, Your Honor.

17 THE COURT: All right, any other grounds?

18 MR. FLOYD: Your Honor, we will refer the
19 Court that there are various other grounds that are
20 in our brief that we feel that have been pled in the
21 brief.

22 THE COURT: Okay. Let me ask this. By
23 not doing any oral argument, are you abandoning any
24 of those issues?

25 MR. FLOYD: No, Your Honor.

1 THE COURT: You're not?

2 MR. FLOYD: We just feel that they're
3 adequately covered with the brief.

4 THE COURT: You'll just let me make it --

5 MR. FLOYD: And we'd ask that you consider
6 those.

7 THE COURT: All right. You'll just let me
8 make a decision based on what's in the briefs?

9 MR. FLOYD: Yes, sir.

10 THE COURT: All right.

11 MR. FLOYD: Nothing, Your Honor, other
12 than the fact that Mr. Bennett would like to address
13 the Court.

14 THE COURT: Okay. I'll let him have the
15 last say.

16 THE COURT: Mr. Young, do you have
17 anything else to add?

18 MR. YOUNG: No, sir, Your Honor.

19 THE COURT: Mr. Myers, Mr. Graham, do you
20 have anything else, any other grounds?

21 MR. MYERS: We likewise rely on our brief
22 to do that.

23 THE COURT: Okay.

24 THE COURT: All right, Mr. Bennett. We'll
25 have to put you under oath, okay?

1 Madam Clerk, put him under oath, please.

2 Well, you're already under oath, I'm
3 sorry. We did that before.

4 CLERK OF COURT: Yes, sir.

5 THE COURT: It's been a while.

6 MR. BENNETT: Yes, sir.

7 THE COURT: All right, go ahead.

8 MR. BENNETT: First of all, I just want to
9 say thank you to the Court, to Your Honor, for even
10 taking it under consideration of reviewing this
11 case.

12 And, second, my personal opinion about the
13 trial itself is that it went from professionalism to
14 sensationalism, especially with the media attention.
15 And I'm sure that you saw them do -- you read the
16 newspaper articles, and I took it as a personal
17 attack as well as my family, especially my mother
18 and father, because they did not give birth to an
19 ape or a caveman. Do you understand what I'm
20 saying?

21 THE COURT: Yes, sir.

22 MR. BENNETT: And, you know, I understand
23 that the State had a job to do, and I respect that.
24 But any time that it goes beyond the point of being
25 professional and interjecting your personal views

1 into it, then I feel that it's wrong.

2 And not only that, when this man sat up on
3 the stand and personally said that he was having
4 dreams about black Indians -- what black Indians
5 have you ever seen? Or if I was to make a reference
6 as in a blond lady, can you really tell me that you
7 would think of a black woman with colored hair or a
8 Hispanic person with colored hair? No, you're going
9 to think about blond hair, blue eyes, a white
10 person. And that's just blatant racism.

11 Now, he may not agree with what took
12 place. Many people may not agree with what took
13 place. But it happened. And the way that it was
14 presented to the jury, it was like there was a big
15 black man and there was a -- he who takes advantage,
16 who used anything by any means necessary to get
17 stuff, regardless of whether that person is male or
18 female.

19 But they did not use incidents where it
20 was like black on black things. Most of the things
21 that they brought up to attack my character before
22 the jury was black and white, black and white. And
23 they nailed that home throughout the whole trial,
24 Your Honor. And I felt that that was unfair. I
25 still feel that it was unfair.

1 But whatever your judgment is, I've got to
2 accept that, I've got to live with that. But I just
3 ask that you be fair in your decision, because
4 everything that we presented to you is based upon
5 facts. You was in this courtroom just like I was.
6 You heard it, and you saw it. And the only thing
7 I'm asking you to do now is just be fair. And I
8 thank you.

9 THE COURT: Yes, sir. Let me be sure and
10 note, Mr. Bennett, as you know, there are a number
11 of cases that have been introduced by both parties.
12 And my law clerk and I have both done some research.
13 Really, she's done a lot more than I have on it.
14 She's probably sick of these cases. But we've done
15 a good bit of research on it, and what we'll do is
16 -- and let me tell all of you this -- I'll take this
17 under advisement, obviously, and we'll get back
18 through everything and get something out with you as
19 quickly as we can. It may take a little while to do
20 it, because there's a good bit to go through. But
21 we'll do it as quickly as we can.

22 THE COURT: Everything else otherwise
23 going okay, Mr. Bennett, with you?

24 MR. BENNETT: Yes, sir.

25 THE COURT: Good, good. It's good to see

1 you again. All right, thank you. That's all, thank
2 you.

3 MR. FLOYD: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON THURSDAY, OCTOBER 26, 2000, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE SIXTH DAY OF JULY, 2004.

Reema K. Gantt

REMA K. GANTT
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 12/13/2003

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON) 11TH JUDICIAL CIRCUIT

THE STATE) PARTIAL TRANSCRIPT OF RECORD
-VS-) 93-GS-32-2354

JOHNNY OLANDIS BENNETT,)
DEFENDANT.)

JULY 16, 2000

LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE MARC H. WESTBROOK, JUDGE; AND A JURY.

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

DONNIE MYERS

DAYTON RIDDLE

SHAWN GRAHAM

ATTORNEYS FOR THE STATE

WAYNE FLOYD

HERVERY B.O. YOUNG

ATTORNEYS FOR THE DEFENDANT

SHARON L. VIZER

CIRCUIT COURT REPORTER

I N D E X

PAGE

SUNDAY, JULY 16, 2000

CLOSING ARGUMENT BY THE STATE - MR. MYERS

--3

CERTIFICATE OF REPORTER

-32

Sunday, July 16, 2000

1
2 MR. MYERS: Madam forelady, ladies and gentlemen of
3 the jury, everybody in the courtroom joins me in thanking
4 you; thanking you for being away from your families, being
5 away from your jobs, having to stay in a motel, listening to
6 all these witnesses. I think we put up about 45, and they
7 put up about 25 or so.

8 But I say one thing, you are a happy jury. And you
9 are an attentive jury. You have listened as closely as any
10 jury I've seen. And that's your duty, and you've fulfilled
11 it well. So we appreciate it.

12 And you know when all of you were here, it seems
13 like weeks ago, but we were asking you -- and you all sat in
14 this chair right there, and we were asking you on Monday and
15 Tuesday about what your positions where, and did you know
16 anything about the case, and what about the death penalty.

17 Every one of you said, I have to listen to the
18 facts. I have to listen to everything. And after I've heard
19 everything, if the death penalty is warranted, if the death
20 penalty is the appropriate sentence, if the death penalty
21 fits the crime I can sign my name. And I know that's an
22 impossible decision, nobody makes light of it, but in an hour
23 or so it's going to become your responsibility to do that.

24 You know, I told you in my opening statement
25 Wednesday that you'll see why we're seeking the death

1 penalty. And I just told you a little bit about it. And now
2 you've heard about murderer, Johnny Olandis Bennett, Jr.
3 You've heard about his character. And I submit to you, the
4 death penalty is warranted. The death penalty is
5 appropriate, and the death penalty is the punishment that
6 fits the crime.

7 Judge Westbrook is going to tell you about
8 aggravating circumstances. And I think he told you this and
9 we told you this, at the end of all the arguments and all the
10 evidence he's going to explain aggravating circumstances.
11 He'll give you a definition of it. He's going to tell you
12 what aggravating circumstances mean under the law.

13 He's going to list aggravating circumstances, going
14 to give it to you in writing on a sheet of paper. And he's
15 going to tell you that the State relies on four. He's going
16 to tell you we only have to prove one. But haven't we proved
17 four to you, ladies and gentlemen; That in the commission of
18 the murder also was committed kidnapping?

19 Benton Smith didn't go voluntarily to his death.
20 Johnny Bennett drug him to it with force, with violence. He
21 deprived Benton Smith of his freedom, and that's kidnapping.
22 If you don't think we've shown that to you, and the Judge is
23 going to charge you what kidnapping means under the law,
24 disregard that.

25 Robbery while armed with a deadly weapon. Haven't

1 we shown that to you? This, folks, as you know, is a deadly
2 weapon. This, folks, took the life of little Benton Smith.

3 And also, what else was taken from Benton Smith?
4 Those red lighted glasses; his key case; those pillows; those
5 floor mats; the walking cane; the little drinking glasses;
6 his wallet, which we never found; his Bible, which we never
7 found; the radar detector in the car; the speakers that were
8 missing; the money from where he cashed that check that
9 morning with Johnny Bennett with him; the black shaving kit.

10 And this is probably the reason behind all of this,
11 because what was in this black shaving kit on Monday? A wad
12 of money. Empty now. Benton was going to buy a car. You
13 know he was down in West Columbia looking at that white
14 Eldorado at the used car place. Ain't no money in this.

15 Johnny Bennett gave this empty shaving kit to his
16 girlfriend in Orangeburg, along with the pillows, along with
17 the little drinking glasses, along with the radar detector,
18 along with the camera that he tried to sell to Jackie
19 Robinson. Robbery while armed with a deadly weapon. If we
20 haven't proved that to you, folks, disregard it.

21 Larceny with the use of a deadly weapon. This is a
22 kin to armed robbery. But didn't he take Benton's car and
23 all these other things? The Judge is going to explain that
24 to you.

25 And physical torture. God, poor little Benton

1 Smith was tortured. Did you hear Dr. Sexton? Wasn't he
2 tortured? Physical torture is aggravated battery. Wasn't
3 what Johnny Bennett did to Benton Smith aggravated?
4 Aggravated battery comes when there's a difference in the
5 physical sizes and conditions of the two people. And I'm
6 going to talk with you a little bit more about old mountain
7 man Bennett and little, frail Benton Smith.

8 The Judge is going to say it's the infliction of
9 vile, cruel, painful, inhumane injuries to the body of
10 another. The pathologist can't even tell us how many stab
11 wounds was in the body of Benton Smith. He said it was 64,
12 then I got up to 70 and there wasn't no use to look no more.
13 And the condition Benton's body was in, isn't that physical
14 torture?

15 If we haven't shown that to you, disregard it, and
16 stop right there. And the Judge will say, come back with a
17 life sentence, if that's the truth in the case. I submit to
18 you not only have we shown one, we've shown four, but that's
19 your decision.

20 If you find that the murder was committed while in
21 the commission of these aggravating crimes, then you can
22 consider the death penalty. And the Judge is going to tell
23 you it doesn't all have to happen at one time. These can be
24 committed after he murdered Benton Smith. Because it's
25 pretty tough to rob him and murder him at the same time.

1 That's why the law is like that. The Judge is going to tell
2 you that.

3 A continuous series of acts, all about the same
4 place, same time, not separated substantially in anything.
5 And didn't all this happen during that time? Oh, Johnny had
6 fun for several days getting rid of his things and
7 everything, but he took them from Benton. And Benton was
8 left out in those woods.

9 The Judge is going to tell you about mitigating
10 circumstances, things on behalf of the defendant. He's going
11 to explain mitigating circumstances to you, and he's going to
12 give you a list of those. You'll have those to take to your
13 jury room. And here's what he's going to submit to you.

14 Now, these, folks, are things in favor of Johnny
15 Bennett. That's what mitigation means, to lessen, if it's
16 lessened. Number one, the defendant has no significant
17 history of prior criminal conviction involving the use of
18 violence against another person. The defendant has no prior
19 conviction of violence against another person.

20 1988, Shannon Gilbert, Aaron McGough. If you think
21 it was no violence used there, if you think Johnny Bennett
22 isn't a violent person and didn't use violence on these two
23 people in 1988, prior to killing Benton Smith, then you give
24 Johnny Bennett the benefit of the doubt and say, oh, yeah,
25 he's not a violent person and he didn't have a conviction of

1 violence against anybody else. Just toss these aside, if
2 that's what you find. That's your decision. That's for you
3 to decide.

4 Number two the Judge is going to tell you in
5 writing. The murder was committed while the defendant was
6 under the influence of mental or emotional disturbance. Now,
7 if you heard some psychiatrist or some doctor, or anybody who
8 testified under oath from this chair that the defendant was
9 under the influence on November the 27th of 1990 when he
10 murdered Benton Smith, then he was under the influence of
11 mental or emotional disturbance, then you give him that
12 benefit.

13 Maybe you heard something that I didn't. I heard
14 Johnny Bennett does what Johnny Bennett wants to do. He's
15 not mental, he's mean. He's a murderer. But if you want to
16 give that consideration, you folks do that.

17 And thirdly, considering his, his behalf, the age
18 or mentality of the defendant, Johnny Bennett, at the time of
19 the crime. When he was 20, Benton Smith was in his early
20 20's. That's something favorable to him? Or if you think
21 there was some mentality that you heard some testimony on, I
22 didn't, but if you did, you give it your consideration. Give
23 old Johnny Bennett that consideration, if you think that's
24 the truth, if you think that's supported by the evidence.

25 And then the Judge is going to say this. These are

1 written up in the law, in our books up here, those blue books
2 back over here behind the Judge's desk. And he's going to
3 tell you that's what the legislature enacted. You can
4 consider these.

5 But he's going to say this to you. You can
6 consider anything in favor of Johnny Bennett. They call
7 those nonstatutory mitigating circumstances, which means
8 those aren't listed in our law books or by the legislature,
9 but you give that what consideration you want.

10 And then he'll tell you this. You can give the
11 defendant life for any reason or no reason at all. You just
12 give him life, if that's justice, if that fits the crime, if
13 that fits the character of Johnny Bennett. That's for you to
14 decide.

15 And I told you folks that we were going to start
16 off while we're talking about character, about Johnny
17 Bennett, I told you it would be the circumstances surrounding
18 the crime and the character. Well, for this gruesome murder
19 and the character of Johnny Bennett there is but one
20 punishment, one punishment that's warranted, one punishment
21 that's appropriate, one punishment that fits the crime, and
22 that's the death penalty. And that's why we're asking for
23 it.

24 What kind of character? I told you we'd start when
25 he was in the -- I forgot what grade it was, fifth grade, I

2224

1 believe, and we showed you all that stuff, starting back in
2 the fifth grade. Fighting on the bus, fighting in the bus
3 area, assaulting a student, writing a girl a dirty letter,
4 fighting on the school bus, fighting in class, fighting in
5 the class, disrespecting a teacher, fighting in class,
6 fighting in class, fighting in class, continually disrupting
7 class, disrupting class, pushed a girl down. That went on
8 every year.

9 The next couple of things. Now we're up to the
10 ninth grade. Disrespects the teacher, arguing in class,
11 fighting in the rest room, disrupting class during a test,
12 disrupting class, has fireworks in the class, harassing the
13 students, yelling at a teacher, disrupting class, and it goes
14 on and on and on. I don't know how he got out of any of
15 these classes because he was suspended most of the time he
16 was in school.

17 It didn't stop there. Right on, disrupting class,
18 disrupting class, refused to leave the school bus. They had
19 to call the police that time. Do you remember that? Tied
20 those school buses up. Wouldn't listen to anybody because
21 Johnny Bennett does what Johnny Bennett wants to do. Had to
22 call the police. And Mr. Cooper says, All right, you stay
23 here because the police are on the way. And that's when he
24 left.

25 Expelled finally from school. They gave him

2295

1 chance, after chance, after chance, after chance but he
2 wouldn't take it. They tried to counsel him. They'd kick
3 him out of school, and finally they'd make him stay in school
4 and have in-school suspension. Didn't work. Tried to talk
5 with him, wouldn't listen. Until finally, so the other
6 students could get an education, expelled.

7 Then he corrected his ways then, didn't he? No,
8 sir. No, ma'am. The Pizza Hut. Pizza Hut. Shannon Gilbert
9 in a coma for 13 days. Aaron Mcgough in a coma for four or
10 five days, hanging on to life, boot print in one of them's
11 head. You remember Ms. Mcgough said she went there and she
12 didn't recognize her son because his face was so beaten up
13 and had that round U-shape up there.

14 And what did those people say when they pulled in
15 the Pizza Hut parking lot? What was that fellow doing?
16 Stomping on them when they're down. But, of course, now all
17 of this are other people's faults. It's not Johnny
18 Bennett's. Because the other students picked on him,
19 intimidated him. They started to fight with Johnny Bennett.

20 It's the teachers' fault. They didn't help Johnny
21 Bennett. They should have been more accommodating. It's the
22 school in Swansea's fault because they didn't have the
23 programs to teach Johnny Bennett right. Johnny does what
24 Johnny wants to do.

25 Do you remember this Mary Felder Rice, that nice

1 black lady that testified? Johnny Bennett does what Johnny
2 Bennett wants to do. And it's Shannon Gilbert's fault. He's
3 in a coma for 13 days. It's Aaron McGough's fault as he's in
4 a coma for four days when Johnny Bennett beats him to the
5 ground and stomps him nearly to death. It ain't old Johnny's
6 fault.

7 And, you know, I don't know whether it was the
8 young black lady that was inside eating with her boyfriend or
9 the tall white boy that was outside that drove through, said
10 that they looked out -- or one of them, I don't know which
11 one said it, Johnny was even pulling one of them by his hair.
12 Kind of like an old caveman, dragging him by his hair. And
13 the guy was motionless.

14 Same thing happened in jail over there to
15 Mr. Duggins when he went in that cell and moved that female
16 guard out of the way and he dragged Mr. Duggins out by his
17 hair. Mr. Riddle wouldn't have that problem, he don't have
18 any hair, couldn't pull on him.

19 But it's not Johnny's fault. It's everybody else's
20 fault. Not old, big old Johnny, not him. And, you know,
21 just before he's getting ready to come to court to be
22 sentenced to prison, does he clear up his ways? No, because
23 on the 14th of September the judge sentenced him to prison.

24 September the 2nd he's back down in school, school
25 just started. Suspended, five days. But you know when he is

1 sent to prison then I bet he'd straighten up then when they
2 explained to him the rules of being good. No, sir. No,
3 ma'am.

4 By the first part of December he's getting in
5 trouble down there at the Aiken facility. Assaulting
6 inmates, disrupting institution operations, interfering with
7 the duties of an officer. But it's not Johnny Bennett's
8 fault, it's those other inmates' fault. Not big old Johnny
9 because those little fellows intimidate him and pick on him.
10 If that's what you believe, if you think that's the truth.

11 He has to be transferred to another institution
12 back up in Columbia, put on lockup. And they extend his
13 sentence seven months. Then they try to get him in a school
14 over there. Do you remember Ms. Shealy that testified, a
15 schoolteacher? Won't pay any attention, unexcused absences,
16 disturbing class, left class without permission, left class
17 under false pretenses, repeatedly cutting class, repeatedly
18 cutting class.

19 They had to add on, on top of this seven months,
20 they had to add on another month to his sentence in prison,
21 and then another month. Nine more months they had to add on
22 to his sentence. But it ain't Johnny's fault. He's a little
23 meek fellow. He wouldn't intimidate anybody. He wouldn't
24 manipulate anybody. He'll obey the rules. Has he done it so
25 far? That's for you to decide.

1 Until finally, June 28th of 1990 they release him
2 on parole. And what did that lady say about parole? I sat
3 down with him and I explained the conditions of it, so let
4 him go. You can go Johnny. You still got your time hanging
5 out, but we're going to parole you, but you got to abide by
6 the rules. You got to get a job.

7 I have not heard a single witness from this stand
8 that has testified to one job Johnny Bennett has ever had in
9 his entire life. If you heard it, you give it the credit
10 that you think it's due. If you heard somebody say, oh,
11 yeah, as soon as Johnny got paroled he went out and got him a
12 job to live up to those conditions.

13 Did you hear that? I'm kind of hard of hearing
14 sometimes, but I didn't. Johnny, you can't break the law.
15 You've got to abide by the laws of this state like everybody
16 else. Oh, yeah, I'm going to do that. I'm going to do that.

17 Last June, first of July he's let out of prison.
18 October, he's stealing gas from Mr. Stillinger's gas station.
19 Probably not Johnny Bennett's fault. That gas, holding gas
20 can probably jumped up into his hand. It's the gas can's
21 fault, not his, if everybody else we're going to blame.

22 November the 27th, the day these folks won't
23 forget. It's the last day they saw their baby boy. Little,
24 frail Benton Smith, he trusted Johnny Bennett. Trusting
25 Benton Smith. Trusting Benton Smith. Johnny Bennett's

1 friend, Benton Smith. Because Johnny Bennett comes up to
2 Benton's house that morning. You heard his sister and his
3 father say the last time we saw Benton alive Johnny Bennett
4 was in the car with him.

5 Went to the bank, and Benton cashed that check.
6 We've never seen the money from that check. And then they
7 went to Columbia looking for jobs. Benton took Johnny
8 Bennett around looking for a job. Oh, he was going to get a
9 job then.

10 Came back through West Columbia over there by the
11 Kmart, and Benton was looking for a car, that white Eldorado
12 Cadillac at the used car place near the Kmart, because the
13 day before his brother-in-law, Melvin Harrison, had been with
14 him when he had that black shaving kit with a wad of money.
15 He talked about buying a car.

16 And they didn't go to Orangeburg. Benton Smith
17 didn't go to Orangeburg, and you know that. And how do you
18 know that? Nobody in Orangeburg knows Benton Smith. Bonita
19 didn't know him. Pam doesn't know him. Big old Jackie
20 Robinson knows him. He's his cousin. But Benton wasn't with
21 Johnny Bennett when Johnny Bennett was trying to sell
22 Benton's camera to Jackie Robinson.

23 Here's what happened. Johnny Bennett already had
24 his murderous plans in place. He knew that Benton had money.
25 Johnny Bennett wanted that money. Bonita had been on him for

1 a week or so about getting money. Johnny Bennett said he had
2 to pay his sister's rent. He needed money. He ain't got no
3 job, how do you do it? You kill and steal. And that's what
4 he did.

5 And he wasn't driving that car. Benton don't let
6 anybody drive his car or use his things. Somehow Johnny
7 Bennett talked Benton into stopping the car. I don't know
8 what he told him. He might have told him he had to use the
9 rest room. He might have said the front tire is acting
10 funny, let's get out and look at it.

11 That was the beginning. Because when Benton got
12 out, what did the doctor say? Three injuries to the chin.
13 Jaw loose. Broken up in here. That massive fist right up
14 under the bottom of Benton's chin. And it knocked him out.

15 And where does Johnny Bennett go then? Right back
16 to his home turf around Happy Town to that bar. Back over
17 there after awhile Benton gains conscious back. Remember
18 what the doctor said? That's painful. That lick is painful.
19 It will knock you out.

20 Then when Benton came in back Johnny had to knock
21 him out again. That's why he got three blows around his
22 chin. He knocked him out again, and then he took him down
23 behind his sister's trailer, back down that road where Johnny
24 Bennett knew was an old cemetery.

25 Benton came to. He drug Benton down that fire path

1 down past those logs in the woods, and he started and
2 completed his final plans. And Benton was alive and
3 fighting. Johnny Bennett drug him down there. Johnny
4 Bennett starts stabbing him in the chest, in the front, side
5 of the head, the back of the head, the back of the neck, on
6 his hands. And how do we know that was physical torture?
7 How do we know it was painful? How do we know it was
8 prolonged? Dr. Sexton told you.

9 The defense wounds. Defense wounds on Benton's
10 hand. How does that happen, Doctor? How does that happen,
11 Doctor? When a screwdriver is coming at you, what do you do?
12 You try to fend them off. How do we know he was alive?
13 Dr. Sexton told us.

14 Remember when he explained this mark here and this
15 one. He said there had to be movement. Benton Smith had to
16 be moving because that screwdriver drug down. There's
17 another mark over here. It had to be movement. He was
18 fighting for his life. He was trying to save himself, but
19 the little lamb was no match for a big old tiger.

20 He's not through yet. The shirt that Benton has
21 on, his death shirt, still has stab wounds in it, front and
22 back. The doctor said some of those wounds to his head could
23 have been when his head was down on a hard object, like the
24 ground. He's hitting him when he's down.

25 Remember those boys from the Pizza Hut? Kicking

2232

1 them when they're down. You don't just knock them down and
2 stab them you make it worse when they're on the ground when
3 they're out. Can you imagine Benton Smith fighting off this
4 monster? Can you imagine the pain he went through? Can you
5 imagine the torture that he suffered?

6 He's not through yet. He's not through yet because
7 you're going to have some photographs of where he drug his
8 body over by a tree. You just don't fall down dead with your
9 feet straddling a tree. Somebody has to drag a body over to
10 put it in that position.

11 He's not through yet, not nice, sweet Johnny
12 Bennett. He covers him up. Another grave in the old
13 cemetery. But you know he doesn't have the decency to even
14 bury him. He doesn't have the common decency to bury him so
15 the animals won't get to him. If that is a life sentence,
16 folks, give him life.

17 Benton Smith put his trust in Johnny Bennett.
18 Johnny Bennett responded with massive fists, an uppercut, a
19 screwdriver and another body for the old cemetery. And you
20 know why he knew he could go back there and do that behind
21 his sister's house, the last person to testify today?

22 I think I asked her two questions. One of them is,
23 Ma'am, at that the time you and your husband were working?
24 Yes. So Johnny Bennett knew that nobody would be in that
25 trailer. He knew he could carry out his murderous plans. He

1 knew he could go behind that trailer down that break into
2 those woods, murder, and leave the body of Benton Smith.
3 That's what happened, folks. If you don't think it happened
4 that way, you decide from the facts. You decide from the
5 facts.

6 And now the fun begins, because he's now got him a
7 car, Benton's little blue car. He's now got him a wad of
8 money. He's got some possessions. And where does he go?
9 Straight to Orangeburg. Straight to Orangeburg. That's when
10 he starts seeing Pam down there and Pam's sister, his
11 girlfriend, Bonita.

12 That's when he starts giving away things, selling
13 things. We don't know what happened to the speakers, they're
14 gone. He wanted to sell the radar detector to Pam but they
15 took it from him. He wanted to sell the camera to Jackie
16 Robinson. Jackie said, Man, what you doing with that camera.
17 You don't need to know about that, Johnny Bennett said.

18 Giving away the little glasses, giving away the
19 camera, giving away the pillows. It's not his, so why
20 doesn't he give it to his friends? That's exactly what he
21 did. Leave that car behind the school right at the door of
22 the cafeteria where his mother was.

23 And what does Johnny Bennett tell Detective Freddie
24 Hamer over here? I always knew I'd kill somebody but I
25 thought it would be a family member. Now, how bad is that?

2234

1 Always knew I'd kill somebody but I thought it would be a
2 family member.

3 If you want to know the character of Johnny
4 Bennett, go back to Stillinger's station. That morning old
5 Mr. Paul Smith right here is looking for his son. He's been
6 looking for his son since Tuesday. And the last person he
7 saw his son alive with was Johnny Bennett.

8 Mr. Paul Smith walks up to big old Johnny Bennett,
9 that old, little man with enough spunk, with enough love for
10 his son to confront mountain man Bennett. And what's Johnny
11 Bennett got in his hand? His dead son's cane. That would
12 show you the gall of this murderer.

13 What did Mr. Smith say? You heard several people
14 testify to this. Johnny, where's my boy? Where's Benton?
15 And what's sweet, loving, caring Johnny Bennett's response?
16 I don't know where he is and I don't give a damn where he is.
17 You got it on the calender right here. A couple people
18 testified to it. Bennett tells Mr. Smith, I don't know where
19 his son is and I don't give a damn where he is.

20 That's Johnny Bennett for you, with Mr. Smith's son
21 in Happy Town behind Johnny Bennett's sister's house near an
22 old cemetery out there with animals eating on him. You know,
23 it rained all Tuesday night. Remember that weather man? All
24 day Wednesday it's raining on him and the animals are out
25 there; and I don't know where he is and I don't give a damn

2235

1 where he is.

2 That's Johnny Bennett for you, folks. That's what
3 he thinks about another person, another human being. There
4 ain't no joy in Happy Town. He turned it into gruesomeville.
5 It's boo hill. That's Johnny Bennett for you.

6 And, of course, when Detective Hamer and the
7 officers start talking with him -- you know, he got that
8 warrant because he was tried in his absence, didn't show up
9 for stealing the gas. They bring him down to jail. Of
10 course Johnny Bennett tells them then. Not on your life.
11 Doesn't know what happened to Benton Smith.

12 Of course the next day when Johnny Bennett gets out
13 of jail and the officers talk with him, of course he tells
14 them what happened. Not on your life. Johnny Bennett
15 doesn't know what happened to Benton Smith.

16 And then that Saturday night after Bennett leading
17 them all over Swansea and out to Reeves Club and everywhere
18 else, and after, they tell him, Look, Johnny, we know Benton
19 is dead. They've been in this business too long to know
20 what's happened after that time.

21 Tuesday, Tuesday night, Wednesday, Wednesday night.
22 Finding his car. Mr. Smith getting the pillows from
23 Orangeburg. Him having Benton's cane. Telling Mr. Smith, I
24 don't give a damn where he is.

25 Wednesday night, Thursday, Thursday night, Friday,

1 Friday night, Saturday, Saturday afternoon, Saturday night.
2 Then they say, Look, we know he's dead, but these folks need
3 to have the body of their son back. They need to give him a
4 proper burial.

5 Okay, drive. Takes them out behind his sister's
6 house. These officers don't even know where they are going,
7 Johnny Bennett is directing them. And when he takes them to
8 the mangled body of Benton Smith of course he tells them what
9 happened. Not on your life. Bennett says, check out these
10 other guys.

11 And then earlier that morning when they talk with
12 him Bennett is now starting to blame other people. Check
13 these other guys out. Does that sound familiar? It's
14 somebody else's fault. Not Johnny Bennett, somebody else did
15 it. Not old Johnny Bennett.

16 I took you to the body, someone else did it. I
17 just had this seance. Like a psychic, I just happened to
18 know where the body was. Just happened to be behind my
19 sister's trailer, but these other guys did it. The officers
20 know right then he's lying, but they don't stop. They go
21 right on and they talked to all these other people.

22 And they go on down to Orangeburg and they get the
23 camera back from Bonita. They get the two little drink
24 glasses. They get that black shaving kit. The money is
25 gone. The wad of money is gone. And they come back and they

2237

1 start talking with good old truthful, honest Johnny Bennett
2 again. And what does he do? He's still blaming other
3 people.

4 Until finally they said, Johnny, we ain't taking
5 any more of your lies. The gig is up. We've talked to too
6 many people. What you're telling us ain't checking out.
7 Then when he knows the gig is up and he knows officers have
8 the goods on him he gives this taped confession. And he's
9 still lying in that. He's still lying in that.

10 You can read this over. He and Benton didn't go to
11 Orangeburg. He wasn't driving Benton's car. Even though he
12 admits he killed Benton Smith he's still squiggling around
13 and squirming around and lying, just like he always does,
14 manipulating, because that's Johnny Bennett.

15 Not only that, he signs a confession the next day.
16 Then on a tip he takes them out on that road and shows him
17 where to find those red glasses. He takes them out and shows
18 them where to find Benton's key case, Benton's driver's
19 license. And he takes them back to the crime scene.

20 Now, how do we know that Johnny Bennett murdered
21 Benton Smith behind his sister's house? Because they found
22 this right where the body was. If you kill somebody
23 somewhere else you don't take the murder weapon with you,
24 dispose of the body and just throw it down. That's why the
25 murder weapon was right where the body was.

2238

1 And that's why they needed a metal detector to find
2 it, because it was up under all those leaves when he was
3 scratching around for leaves, and limbs, and trees, and
4 everything else he could find to put on top of Benton's body.

5 They would return with the body that night. Sure
6 enough, when Johnny goes back out there on Wednesday with the
7 metal detector they find the murder weapon. Then the
8 following Thursday he shows him where the floor mats are. Of
9 course, somebody else saw the floor mats.

10 Remember the gentlemen that testified he was
11 walking down the road? He saw them. Did he touch them? No,
12 sir. No, ma'am. Mr. Lucius Martin. The fellow went in and
13 told him while Lucius called the police. But who took them
14 to the same exact spot? The murderer, Johnny Olandis
15 Bennett.

16 Now he's in jail again. Of course he's going to be
17 good now. No, sir. No, ma'am. Because he's in jail on
18 December the 2nd and December the 20th, he's already got some
19 contraband. And it keeps going, and it keeps going, and it
20 keeps going. But you know what? It's the other inmates'
21 fault, not Johnny because he's in jail.

22 And what did that paperman say this morning? I
23 call him the paperman, Mr. Aiken, they pay him six or seven
24 thousand dollars to come here and read papers. He said, Oh,
25 well, Johnny was intimidated by these other little inmates.

2239

1 And a shank. Well, a shank is not anything in prison.

2 That's not a threat to other people.

3 Well, Mr. Aiken, if it's not a threat to other
4 people, why does Johnny Bennett got it? He's got it for self
5 protection because he's intelligent and he said a shank
6 doesn't mean anything because it wasn't a gun. Well, it
7 wasn't a stick of dynamite but I haven't heard them passing
8 out guns and dynamite in jail.

9 But inmates get shanks. They make them out of
10 anything. Well, why does old Johnny Bennett got himself a
11 weapon for protection? Because he's being intimidated by
12 others. He's being manipulated by others. You believe that,
13 folks? Do you believe that for a second?

14 Well, here's a man, you know, rather than paperwork
15 he needed a crystal ball to open up a psychic shop down there
16 on Highway 1. He'd do just as good. Wouldn't make as much
17 money, but that's what he says. Of course, he's never even
18 talked with Johnny Bennett. At least a psychic talks with
19 you.

20 He's never talked with the guards. He's never
21 talked with anybody. He's never talked about doctors or
22 guards. He hasn't had a talk with the guards. He's hasn't
23 talked with anybody. Nobody at jail, not Johnny Bennett. He
24 talked with the lawyer, and that's it. The paperman.

25 In and out of prison. All these charts I'm not

1 going to go over with you, you know. And he says, well, you
2 know, old Johnny, you got to understand here that around this
3 time there old Johnny is doing all right, then we don't have
4 any problems with him.

5 Do you remember in 1995 over there at the
6 penitentiary? And that large lady, Ms. Mazeek, said when
7 Johnny came in I sat him down and I gave him the rules and
8 said this is how it is, and this is what you got to do.
9 Well, of course Johnny is going to follow ground. No, sir,
10 no, ma'am.

11 Because they said Johnny was what? Johnny was
12 manipulating. Johnny was smart. A smart, intelligent person
13 who is a manipulator and con artist. That's a dangerous
14 person, folks, and that's what Johnny Bennett is. And they
15 said, well, you know, he was all right. He was okay.

16 And then all those guards that came in here
17 yesterday, the bus load of them that came from Lieber, he's a
18 good fellow. Oh, he's a model fellow. We call him a big old
19 teddy bear. He's a gentle giant. He's the secretary of
20 defense. He knows all the changes.

21 And we change our rules at the Department of
22 Corrections every day, and Johnny keeps up with it. He
23 teaches other inmates the changes. He lets them know how it
24 is. He makes sure they understand it. Kind of gaining those
25 guards' confidence. You see here from '95 to '97 he was

1 gaining some guards' confidence then.

2 He was gaining some guards' confidence at the
3 Edisto Prison. You know why? Because that's when he was
4 having sex with the lady who used to be the guard over here
5 at Lexington County Jail, because he had been having sex with
6 a guard at Lexington County Jail before he left there.

7 But, oh, that's the guard's fault. That's that
8 woman's fault because she came in and made him have sex.
9 That's the other guards' fault because they let Johnny do it.
10 Johnny manipulates them. He controls people. And that's
11 what he's doing now.

12 You know how I know that? By his own handwriting.
13 After he's caught in '97, and after the investigation shows
14 he's been having sex with the female guard at the Lexington
15 County Jail, he's been having sex with the same female guard
16 at the Department of Corrections, where you can't even get
17 near people, can't touch them. He's having sex with a female
18 guard, and he's manipulating them.

19 And you know why he's doing it now? Because of
20 you. Because he knows he's coming to court, because he said
21 so. And he talks about it in here. He's manipulating again.

22 And the last thing down here when he's talking
23 again about why did you all suspend my female visitor. We
24 don't know why. We don't know who did it. And how long is
25 the suspension for? Here's a man that knows all the rules

1 and they're changing as soon as they happen, but we don't
2 know why she was suspended.

3 And he makes up lies about that in some of the
4 documents. Said she didn't have permission from a supervisor
5 to visit. Says that something else -- somebody else's fault.
6 It says right down here, I want to talk to you. And this is
7 to the warden, Warden Weldon, down at Lieber.

8 He says I would very much like to speak with you
9 about these things as soon as you find the time. He wants to
10 talk with him. Because anything in my jacket could very well
11 have an impact on me when I go back to court; May 27th, 1997.
12 What did all those guards yesterday testify? I've been with
13 Johnny since 1997. He's been good since '97. Every one of
14 them.

15 I don't think any of them went past '97, because I
16 wrote it down. I didn't ask them hardly any questions. But
17 every one of them; I've been with Johnny since '97. Oh, he's
18 the secretary of defense now. He's good. He goes to Bible
19 class. He sings down there. He helps the preacher. The
20 preacher is his best friend in the world.

21 Has he manipulated anybody? Because I know if
22 anything bad is in my jacket, in my file, it could very well
23 impact me when I go to court and see 12 men and women on a
24 jury panel. So I think I'll be nice to some guards and get
25 them to testify for me. That's why I asked one of them, is

1 anybody working today because you all seem to be up here in
2 Columbia testifying. And they were.

3 You give him life, the real Johnny will come back.
4 You give him life and he'll come back out. Meeting him again
5 will be like meeting King Kong on a bad day. Vile Johnny.
6 Mean Johnny. Manipulating Johnny. Murderous Johnny. You
7 give him life those guards better button up their vests
8 because he's coming back out before us.

9 Because he's got what he wants. He's got the
10 people to testify, trying to pull the wools over his eyes,
11 trying to pull the wools over your eyes. Being smart, being
12 intelligent, being manipulative and being a con man, that's a
13 dangerous combination. And that's an explosive package
14 wrapped up in him, all six-foot-seven, 300 pound of him. And
15 that's for you to decide.

16 You know, what did Benton Smith, what did he do to
17 deserve what he went through? Five-foot-seven and a half,
18 135 pounds. What did frail old Benton do? He had some
19 money. He trusted Johnny Bennett.

20 The last picture. The last picture that these
21 folks over here get to hold. That's his handiwork. How
22 could a human being do something like that to another living,
23 breathing, fragile, little person like that? That's Johnny
24 Bennett for you, folks. He turns happiness, Happy Town,
25 grief, destruction, pain and murder, and then he leaves the

1 body out for animals to dine on. That's Johnny Bennett for
2 you.

3 One of them -- I heard the doctor say one of them
4 went all the way through some bones, down into the brain.
5 Tremendous amount of force, I think the doctor called it.
6 Painful, vile, cruel, inhuman, everywhere. Everywhere.
7 Everywhere. The beast of burden.

8 Here's old Johnny Bennett. We gave him the benefit
9 of the doubt, that's only about six-five or six-six. That's
10 his booking photograph that's in evidence. Here is Johnny
11 Bennett. Everybody intimidates him. It's never his fault.
12 It's everybody else's fault.

13 And now he's so good because the guards told you
14 so. Of course, he was good for a two year time from '95 to
15 '97, wasn't he? Having sex with a woman that you can't even
16 touch. His family can't even touch him they told you.

17 Here's little Benton Smith. That's a picture in
18 evidence taken from his prom. And here's Johnny Bennett's
19 handiwork on him. That's Johnny Bennett for you. That's
20 what you're dealing with, folks. That's what you've heard.

21 And they're going to say, oh, but Johnny is good
22 now. He can do some good. He's down there singing. Benton
23 got an award for being in the chorus. Where is his sweet
24 little voice today? Can you hear him singing?

25 And, of course, Johnny's family says they get to

1 see him. Where do these folks go to see Benton? Where do
2 they visit him? Where do they touch him or where do they
3 look at him? That's what we're dealing with.

4 Every one of you, every one of you said after I
5 hear it, after I hear about the crime, after I hear about the
6 person who committed it I can sign my name. But if you don't
7 sign your name for Benton Smith his life would have been a
8 nothing. And if you don't sign your name for that, what will
9 you sign it for?

10 Now you see. Now you see why I'm asking for the
11 death penalty. It's warranted. It's appropriate. It's the
12 punishment that fits this crime and that callous murder.

13 (WHEREUPON, the requested proceedings were
14 concluded.)

15

16

17

18

19

20

21

22

23

24

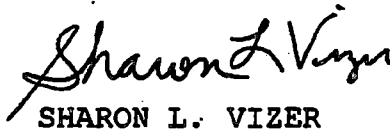
25

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete partial transcript of record of all the proceedings had and the evidence introduced in the proceedings requested of the captioned case in Circuit Court on the 16th day of July 2000.

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

July 21, 2000



SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON) 93-GS-32-2354

STATE OF SOUTH CAROLINA,)
 PLAINTIFF)
)
 VS.) TRANSCRIPT OF RECORD
)
JOHNNY O. BENNETT,)
 DEFENDANT.)

JUNE 30, 2000
LEXINGTON, SOUTH CAROLINA

BEFORE:

HONORABLE MARC WESTBROOK, JUDGE

APPEARANCES:

DONNIE MYERS, SOLICITOR
DAYTON RIDDLE, ASST. SOLICITOR
SHAWN GRAHAM, ASST. SOLICITOR
ATTORNEYS FOR THE PLAINTIFF

WAYNE FLOYD, ESQ.
HERVEY YOUNG, ESQ.
ATTORNEYS FOR THE DEFENDANT

KAREN TRACY
OFFICIAL COURT REPORTER

2248

I N D E XEXHIBITSSTATE'S EXHIBITS:

(THERE WERE NO STATE'S EXHIBITS)

DEFENDANT'S EXHIBITS:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	JUROR QUESTIONNAIRE	79

1 THE COURT: ALL RIGHT. THIS IS IN THE MATTER OF
2 THE STATE VS. JOHNNY BENNETT. PRESENT IS MR. BENNETT
3 WITH COUNSEL. ON BEHALF OF THE STATE, MR. RIDDLE, AND
4 IS MR. MYERS GOING TO BE HERE?

5 MR. RIDDLE: YES, SIR.

6 THE COURT: AND MR. GRAHAM IS HERE. HE'LL BE HERE
7 LATER ON, I GUESS?

8 MR. RIDDLE: HE'LL BE HERE SOON. HE'S RIGHT OUT
9 IN THE JURY ROOM.

10 THE COURT: OKAY. FINE, FINE.

11 MR. BENNETT, LET ME ASK YOU TO STAND, PLEASE, JUST
12 A MINUTE, SIR. RAISE YOUR RIGHT HAND, PLEASE.

13 MADAM CLERK, PLACE HIM UNDER OATH, PLEASE.

14 THE CLERK: RAISE YOUR HAND AS BEST YOU CAN, SIR,
15 OKAY?

16 THE COURT: I'D ADVISE THAT THEY COULD TAKE THE
17 SHACKLES OFF OF HIM.

18 THE DEPUTY: OKAY.

19 THE COURT: MY POLICY IS THAT AS LONG AS THE
20 DEFENDANT DOES NOT HAVE ANY PROBLEMS IN THE COURTROOM,
21 AND IT'S MY UNDERSTANDING --

22 THE DEPUTY: NO PROBLEM.

23 THE COURT: I UNDERSTAND THAT MR. BENNETT HAS
24 NEVER HAD ANY PROBLEMS, SO LET'S TAKE CARE OF THAT
25 FIRST, OKAY?

1 (WHEREUPON, THE SHACKLES WERE REMOVED FROM THE
2 DEFENDANT.)

3 THE CLERK: NOW, IF YOU'LL RAISE YOUR HAND FOR ME,
4 PLEASE.

5 (WHEREUPON, THE DEFENDANT JOHNNY O. BENNETT WAS
6 DULY SWORN.)

7 JOHNNY O. BENNETT, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 THE CLERK: HAVE A SEAT. PLEASE STATE YOUR FULL
10 NAME FOR THE RECORD.

11 THE DEFENDANT: JOHNNY BENNETT.

12 THE CLERK: THANK YOU.

13 THE COURT: THANK YOU.

14 MR. BENNETT, DO YOU UNDERSTAND WHAT THESE HEARINGS
15 ARE ABOUT TODAY?

16 THE DEFENDANT: YES, YOUR HONOR.

17 THE COURT: ALL RIGHT. YOU'VE HAD A CHANCE TO
18 TALK WITH YOUR LAWYERS ABOUT THEM?

19 THE DEFENDANT: YES, SIR.

20 THE COURT: YOU UNDERSTAND -- AND I ALWAYS DO THIS
21 AT THE BEGINNING. I HAVEN'T HAD A CHANCE, I KNOW
22 YOU'VE HAD THE CASE HERE BEFORE, AND I'VE NOT HAD A
23 CHANCE TO WORK WITH YOU BEFORE, BUT DO YOU UNDERSTAND
24 THAT THIS IS A CASE IN WHICH THE STATE IS ASKING FOR
25 THE DEATH PENALTY?

1 THE DEFENDANT: YES, SIR.

2 THE COURT: AND YOU UNDERSTAND THAT BECAUSE OF
3 THAT THERE ARE CERTAIN PROCEDURES THAT WE USE AND WE'RE
4 GOING TO GO BY THOSE PROCEDURES?

5 THE DEFENDANT: YES, SIR.

6 THE COURT: ALL RIGHT. YOU'VE BEEN SATISFIED WITH
7 YOUR LAWYER'S SERVICES UP TO THIS POINT?

8 THE DEFENDANT: YES, SIR.

9 THE COURT: ALL RIGHT. AT THIS TIME -- THIS
10 SOUNDS LIKE A STUPID QUESTION, BUT I ALWAYS TRY TO BE
11 SURE -- ARE YOU UNDER THE INFLUENCE OF ANY KIND OF
12 DRUGS OR ALCOHOL OR MEDICATION OF ANY KIND?

13 THE DEFENDANT: NO, SIR.

14 THE COURT: ALL RIGHT. DO YOU FEEL LIKE YOU KNOW
15 WHAT'S GOING ON HERE TODAY?

16 THE DEFENDANT: YES, SIR.

17 THE COURT: ALL RIGHT. COUNSELOR, WE HAD
18 ORIGINALLY SET THIS TO TAKE UP JURY EXCUSES. I
19 UNDERSTAND THERE MAY BE SOME MOTIONS TO BE HEARD AS
20 WELL. IS THERE ANY REASON TO NOT GO AHEAD AND TAKE UP
21 THE JURY EXCUSES FIRST? IS THAT OKAY WITH THE STATE?

22 MR. MYERS: THAT'S FINE WITH THE STATE.

23 MR. FLOYD: THAT'S FINE WITH US AS WELL, YOUR
24 HONOR.

25 THE COURT: OKAY. MADAM CLERK, I NOTICE THAT

1 THERE ARE SEVERAL OF THEM WHO ARE STILL LISTED AS NON-
2 SERVICE UNABLE TO LOCATE. WHAT PROCEDURE HAVE YOU USED
3 ON THOSE?

4 THE CLERK: JUDGE, WE NOTIFIED THE SHERIFF'S
5 DEPARTMENT WHEN WE DID NOT RECEIVE ANY INFORMATION
6 BACK. THEY HAVE GONE OUT PERSONALLY TO THE ADDRESSES
7 AND THEY HAVE ALSO RUN DRIVER'S LICENSE AND ANY
8 INFORMATION THAT THEY COULD TO SEE IF THEY COULD LOCATE
9 A NEW ADDRESS. WE'VE ALSO CONTACTED THE POSTAL SERVICE
10 FOR ALL OF THOSE, AND THE ONES THAT ARE LISTED AS
11 UNABLE TO LOCATE, WE'VE HAD NO LUCK WITH THOSE.

12 THE COURT: OKAY. ALL RIGHT. COUNSEL, YOU'VE
13 HEARD THE CLERK'S INDICATION OF THE EFFORTS THAT
14 THEY'VE MADE ON THE ONES WHO HAVE BEEN UNABLE TO
15 LOCATE. WE CERTAINLY WILL TAKE THOSE UP AT THE
16 APPROPRIATE TIME. WE WON'T SPEND TOO MUCH TIME ON THEM
17 UNLESS THERE IS A NEED TO.

18 WHAT WE'RE GOING TO NEED TO DO IS TAKE UP JURY
19 EXCUSES. WHAT I'D LIKE TO DO IF WE POSSIBLY CAN AT
20 THIS TIME, WE'LL EXCUSE JURORS OR NOT EXCUSE JURORS, AT
21 LEAST MAKE A DECISION. IF WE HAVE TO, WE MAY HAVE TO
22 CHECK BACK ON OTHER THINGS, BUT WE'LL TRY TO GET A
23 DECISION TODAY. ONE THING WE WILL TRY TO DO IS TO
24 MAINTAIN CONSISTENCY AMONG ALL OF THOSE THAT WE TAKE
25 UP. I'M SURE THERE WILL BE SOME VACATION PROBLEMS FOR

1 EXAMPLE AND OUR POLICY IS IF IT'S A VACATION FOR WHICH
2 THE JUROR HAS MADE ANY REASONABLE COMMITMENT, THEN I
3 NORMALLY GO AHEAD GRANT IT AND LET THEM OUT, BUT WE'LL
4 TAKE THOSE WHEN WE COME TO THEM.

5 THE FIRST ONE, JUROR NUMBER 1, MS. ACTON INDICATES
6 PROBLEMS WITH WORK. THAT WOULD BE THE FIRST ONE WE
7 GET. SHE INDICATES THAT SHE HAS PROBLEMS WITH THE
8 MONTH-END CLOSING AND PAYROLL TRANSMISSION AND WANTS TO
9 IN ESSENCE BE TRANSFERRED TO ANOTHER TIME. WHAT'S THE
10 STATE'S POSITION ON THIS?

11 MR. MYERS: COURT'S DISCRETION.

12 THE COURT: DEFENSE?

13 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

14 THE COURT: ALL RIGHT. GIVEN THAT, UNDER THE
15 NORMAL CIRCUMSTANCES IN A STANDARD TERM OF COURT, I
16 WOULD NORMALLY TRANSFER THIS JUROR, SO I'LL DO SO IN
17 THIS CASE THEN. MADAM CLERK, JUST TRANSFER HER TO
18 WHATEVER TIME YOU FIND, OKAY?

19 THE CLERK: YES, SIR.

20 THE COURT: NUMBER 2 AND NUMBER 3 ARE UNABLE TO
21 LOCATE. I THINK AT THIS POINT, AGAIN THERE'S NO NEED
22 TO MAKE A RULING. WHAT WE'LL DO IS JUST BASICALLY
23 LEAVE THEM AS THEY ARE AND LET THE CLERK JUST LEAVE
24 THEM OPEN IN CASE THEY DO FIND OUT SOMETHING ABOUT
25 THEM. FROM WHAT I GATHER, THERE'S NOTHING ELSE THAT

1 THE CLERK CAN DO ON THESE PARTICULAR CASES. ANY
2 EXCEPTION ON THAT FROM THE STATE?

3 MR. MYERS: NO, SIR.

4 THE COURT: FROM THE DEFENSE?

5 MR. FLOYD: NO, YOUR HONOR.

6 THE COURT: OKAY. MADAM CLERK, WHAT WE'LL DO ON
7 THE UNABLE TO LOCATE IS LEAVE THEM AS THEY ARE. JUST
8 BASICALLY, I JUST ASK THAT IF THERE'S ANYTHING ELSE YOU
9 CAN DO CERTAINLY I KNOW YOU'LL DO IT.

10 THE CLERK: YES, SIR.

11 THE COURT: BUT THE EXPLANATION YOU'VE GIVEN
12 INDICATES YOU'VE DONE EVERYTHING YOU CAN UP TO THIS
13 POINT.

14 ALL RIGHT. NUMBER 8 WISHES AN EXCEPTION BECAUSE
15 OF AGE. WHAT'S STATE'S POSITION?

16 MR. MYERS: NO OBJECTION.

17 THE COURT: DEFENSE?

18 MR. FLOYD: NO OBJECTION.

19 THE COURT: ALL RIGHT. WITHOUT OBJECTION THAT
20 JUROR IS EXCUSED.

21 NUMBER 9 SHOWS WORK PROBLEMS INDICATING SHE IS THE
22 MANAGER AND SHE IS AT THE POINT OF CONVERSION OF THE
23 FISCAL YEAR BEGINNING JULY 1 AND HAS WORK PROBLEMS DUE
24 TO THAT. WHAT'S THE STATE'S POSITION ON THAT?

25 MR. RIDDLE: YOUR HONOR, WE THINK THAT'S PROBABLY

1 THE SAME AS NUMBER ONE. WE JUST WANT YOU TO BE
2 CONSISTENT THROUGHOUT THIS PROCESS ON HOW YOU DEAL WITH
3 THESE PROBLEMS.

4 THE COURT: ALL RIGHT. DEFENSE?

5 MR. YOUNG: YOUR HONOR, WE WOULD AGREE WITH THE
6 STATE AS FAR AS THE COURT BEING CONSISTENT, BUT WE
7 WOULD BRING TO THE COURT'S ATTENTION ALSO THAT IN
8 REGARDS TO JUROR NUMBER 1 IN THAT THEY STATED A ROLE
9 THAT THEY PLAYED WHERE THAT WORK PROBLEM OCCURRED.
10 THIS JURY JUST STATED CLEARLY THAT SHE IS A MANAGER AND
11 WITHOUT KNOWING WHAT ROLE SHE PLAYS IN THE CONVERSION
12 OF THE FISCAL YEAR, I DON'T KNOW IF THE COURT COULD
13 TRULY CONSIDER IT THE SAME AS THE LAST ONE, SO WE WOULD
14 SAY THE COURT'S DISCRETION.

15 THE COURT: WELL, I THINK IT'S FAIR TO ASSUME THAT
16 A MANAGER WOULD BE PRETTY LARGELY INVOLVED IN WORK
17 CONVERSION, SO WE'LL GRANT THE TRANSFER. AGAIN, MADAM
18 CLERK, WE'LL JUST TRANSFER -- IN CASES WHERE SOMEBODY
19 REQUESTS TO BE EXCUSED, IS IT EASIER FOR YOU TO
20 TRANSFER THEM OR EXCUSE THEM?

21 THE CLERK: IT'S EASIER TO EXCUSE THEM, JUDGE,
22 THAT WAY WE WON'T HAVE TO DEAL WITH THEM AGAIN.

23 THE COURT: OKAY. THIS ONE ASKS TO BE EXCUSED, SO
24 WE'LL JUST EXCUSE THEM.

25 NUMBER 13, MS. AVINGER INDICATES THAT SHE'S A

1 TEACHER PREPARING FOR THE SCHOOL YEAR, BUT DOESN'T GIVE
2 A PARTICULAR REASON WHY SHE HAS TO HAVE THIS WEEK FREE.

3 WHAT'S THE STATE'S POSITION ON THIS JUROR?

4 MR. RIDDLE: SHE PROBABLY NEEDS TO COME, YOUR
5 HONOR.

6 THE COURT: DEFENSE?

7 MR. YOUNG: I AGREE.

8 THE COURT: I AGREE WITH THAT. WE'LL HAVE TO DENY
9 THAT REQUEST.

10 OKAY. NUMBER 14 IS DECEASED. ANYBODY DISPUTE
11 THAT? DOES THE STATE DISPUTE THAT?

12 MR. RIDDLE: NO, SIR.

13 THE COURT: DEFENSE?

14 MR. FLOYD: NO, YOUR HONOR.

15 THE COURT: ALL RIGHT. 16 HAS A SMALL CHILD AND
16 WORK PROBLEMS, BUT --

17 THE CLERK: BASICALLY, JUDGE, IT SAYS THAT SHE'S
18 RECENTLY BEEN LAID OFF FROM CHARTER RIVERS, AND SHE
19 JUST FOUND A NEW JOB AND STARTS JULY 10TH. SHE ALSO
20 HAS THREE CHILDREN AGES EIGHT, SIX, AND SIX MONTHS.
21 HER HUSBAND IS ALSO A S.L.E.D. AGENT.

22 THE COURT: OKAY. WHAT'S THE STATE'S POSITION?

23 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

24 THE COURT: DEFENSE?

25 MR. FLOYD: WE HAVE NO OBJECTION TO HER BEING

1 EXCUSED, YOUR HONOR.

2 THE COURT: I'M SURE YOU DON'T. ALL RIGHT. WE'LL
3 EXCUSE THIS JUROR FOR SMALL CHILD PROBLEMS; HER
4 CHILDREN ARE UNDER THE STATUTORY AGE.

5 NUMBER 17 ALSO IS A TEACHER WHO INDICATES SHE HAS
6 A CHILD 20 MONTHS OLD. WHAT'S THE STATE'S POSITION ON
7 THIS ONE?

8 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

11 THE COURT: ALL RIGHT. AGAIN, WE'LL EXCUSE HER.

12 AS YOU KNOW, I THINK ALL OF YOU KNOW MY POLICY ON THE
13 SMALL CHILDREN. IF IT'S SMALL CHILDREN, A MOTHER WITH
14 SMALL CHILDREN, IF WE CAN GET THAT RESOLVED IT'S BETTER
15 TO DO THAT.

16 NUMBER 18 IS UNABLE TO LOCATE AND NUMBER 19
17 INDICATES WORK PROBLEMS AND PERSONAL PROBLEMS. WHAT'S
18 THE STORY ON THAT, MADAM CLERK?

19 THE CLERK: JUDGE, BASICALLY SHE HAS A HOME DAY
20 CARE WITH NO ONE TO HELP HER. ALSO, SHE HAS A DAUGHTER
21 IN KENTUCKY WHO IS EXPECTING TWINS, AND SHE NEEDS TO BE
22 FREE TO GO AT ANY TIME. THE DAUGHTER IS ALREADY AT 33
23 WEEKS.

24 THE COURT: OKAY. WHAT'S THE STATE'S POSITION?

25 MR. RIDDLE: YOUR HONOR, THE COURT'S DISCRETION ON

1 THAT.

2 THE COURT: DEFENSE?

3 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

4 THE COURT: ALL RIGHT. AGAIN, THAT'S A JUSTIFIED
5 EXCUSE. WE'LL EXCUSE THAT JUROR THEN.

6 NUMBER 20 IS NOT LOCATED. NUMBER 22 IS AGE 75.

7 WHAT'S THE STATE'S POSITION ON THAT?

8 MR. RIDDLE: THEY'RE EXEMPT, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: YES, YOUR HONOR, WE AGREE WITH THAT.

11 THE COURT: ALL RIGHT. EXCUSED.

12 OKAY, AND NUMBER 25 IS IN THE NURSING PROGRAM AT
13 MIDLANDS TECH. IT DOES NOT SAY WHETHER -- DO YOU KNOW
14 WHETHER SHE'S ACTUALLY IN CLASSES, MADAM CLERK?

15 THE CLERK: YES, SIR. JUDGE. I HAVE A SCHEDULE
16 HERE. SHE'S IN THE SUMMER SEMESTER THAT GOES FROM 5/22
17 TO 8/27.

18 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
19 POSITION?

20 MR. RIDDLE: I THINK SHE'S EXEMPT, YOUR HONOR.

21 THE COURT: DEFENSE?

22 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

23 THE COURT: ALL RIGHT. WE'LL EXCUSE THIS JUROR.

24 NUMBER 26 IS IN THE NAVY. WHAT'S THE STATE'S
25 POSITION?

1 MR. RIDDLE: IT'S AT YOUR DISCRETION, YOUR HONOR.

2 THE COURT: DEFENSE?

3 MR. FLOYD: SAME, YOUR HONOR.

4 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR.

5 NUMBER 27 APPARENTLY HAS VACATION PLANS. IT SAYS
6 THEY'VE ALREADY RENTED A CONDOMINIUM AT LITCHFIELD FOR
7 THE WEEK.

8 THE CLERK: WE DO HAVE A CONFIRMATION ON THAT,
9 JUDGE.

10 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
11 POSITION THAT?

12 MR. RIDDLE: YOUR HONOR, I THINK THAT FALLS
13 SQUARELY UNDER YOUR POLICY.

14 THE COURT: AND THE DEFENSE?

15 MR. FLOYD: SAME, YOUR HONOR.

16 THE COURT: ALL RIGHT. IT DOES, AND WE'LL EXCUSE
17 THAT JUROR.

18 NUMBER 29 HAS A STATEMENT FROM THE DOCTOR, I
19 BELIEVE?

20 THE CLERK: YES, SIR. SHE'S THE PRINCIPLE
21 CAREGIVER FOR HER HUSBAND. ACCORDING TO -- HE IS A
22 PARAPLEGIC AND ALSO HAD A RECENT HEART ATTACK AND
23 SEVERAL MINI STROKES, AND WE DO HAVE A DOCTOR'S
24 STATEMENT.

25 THE COURT: ALL RIGHT. WHAT'S THE STATE'S

1 POSITION ON THAT?

2 MR. RIDDLE: IN THE COURT'S DISCRETION, YOUR
3 HONOR.

4 THE COURT: DEFENSE?

5 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

6 THE COURT: ALL RIGHT. THAT WOULD JUSTIFY
7 EXCUSING THAT JUROR, AND WE WILL DO THAT.

8 NUMBER 31 INDICATES A MEDICAL DISABILITY.

9 THE CLERK: BLINDNESS, YOUR HONOR.

10 THE COURT: OH. ALL RIGHT. AS YOU KNOW, WE
11 CANNOT EXCUSE BLIND JURORS UNLESS THEY ACTUALLY REQUEST
12 IT, AND I UNDERSTAND THIS ONE IS REQUESTING IT; IS THAT
13 CORRECT?

14 THE CLERK: YES, SIR.

15 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
16 POSITION.

17 MR. RIDDLE: IT'S IN THE COURT'S DISCRETION, YOUR
18 HONOR.

19 THE COURT: DEFENSE?

20 MR. YOUNG: COURT'S DISCRETION.

21 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.
22 NUMBER 32 IS AGE 72, STATE?

23 MR. RIDDLE: EXEMPT.

24 THE COURT: DEFENSE?

25 MR. FLOYD: EXEMPT.

1 THE COURT: ALL RIGHT. AND 34 IS NOT LOCATED.
2 36 INDICATES THREE CHILDREN, ONE OF THEM TWO YEARS
3 OF AGE. IT INDICATES THAT SHE STAYS HOME WITH THE
4 CHILDREN. SHE CAN'T AFFORD A NURSERY AND THE MOTHER IS
5 THE ONLY OTHER ONE WHO CAN CARE FOR THE CHILDREN.
6 WHAT'S THE STATE'S POSITION?

7 MR. RIDDLE: I THINK SHE PROPERLY FALLS UNDER THE
8 STATUTE, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. YOUNG: I THINK SHE IS EXEMPT, YOUR HONOR.

11 THE COURT: ALL RIGHT. SHE IS EXEMPT. I FIND
12 THAT SHE IS.

13 ALL RIGHT. NUMBER 37 IS AGE 75. WHAT'S THE
14 STATE'S POSITION?

15 MR. RIDDLE: EXEMPT.

16 THE COURT: DEFENSE?

17 MR. FLOYD: EXEMPT.

18 THE COURT: SHE IS EXEMPT.

19 NUMBER 38 IS NOT LOCATED. 40 INDICATES VACATION
20 PLANS, AND HAS ALREADY MADE THE RESERVATIONS.

21 THE CLERK: AND WE DO HAVE A CONFIRMATION ON THAT,
22 JUDGE.

23 THE COURT: OKAY. IT'S CONFIRMED BY THE CLERK.
24 STATE?

25 MR. RIDDLE: YOUR HONOR, THAT'S THE SAME AS THE

1 PREVIOUS JUROR. SHE SHOULD BE EXCUSED.

2 THE COURT: ALL RIGHT. DEFENSE?

3 MR. FLOYD: SAME, YOUR HONOR.

4 THE COURT: OKAY. WE'LL EXCUSE THAT JUROR.

5 COUNSEL, LET'S INTERRUPT AT THIS POINT AND NOTE

6 THAT AS FAR AS I CAN TELL, THERE ARE A NUMBER OF JURORS

7 ON HERE WHO INDICATE THAT THEY ARE OVER THE AGE OF 65.

8 IS THERE ANY NEED TO TAKE THOSE UP? DO YOU DISPUTE ANY

9 OF THOSE AT ALL?

10 MR. RIDDLE: THE STATE DOES NOT, YOUR HONOR.

11 THE COURT: DEFENSE?

12 MR. FLOYD: NO, YOUR HONOR.

13 THE COURT: OKAY. WELL, WHAT WE'LL DO IS THIS, IF

14 YOU WANT TO HAVE A CHANCE TO GO BACK AND GO THROUGH

15 YOUR RECORDS LATER TO RE-DETERMINE THAT YOU CAN, BUT WE

16 WON'T TAKE UP THE -- WE'LL JUST GO AHEAD AND EXCUSE ALL

17 OF THEM WHO INDICATE AN AGE PROBLEM AND TAKE IT UP

18 LATER IF YOU NEED TO.

19 NUMBER 42 INDICATES THEY ARE A STUDENT.

20 THE CLERK: THEY'RE DOING AN INTERNSHIP FOR

21 CLEMSON UNIVERSITY, JUDGE, THIS SUMMER.

22 THE COURT: OKAY.

23 THE CLERK: IT HAS TO DO WITH THEIR MAJOR.

24 THE COURT: IF THEY'RE AT CLEMSON WE MIGHT WANT TO

25 EXCUSE THEM ANYWAY. STATE'S POSITION?

1 MR. MYERS: WE MOVE TO EXCUSE THEM.

2 THE COURT: DEFENSE?

3 MR. FLOYD: THE COURT'S DISCRETION.

4 THE COURT: A JUROR DOES HAVE A RIGHT TO BE
5 EXCUSED OR TRANSFERRED. BASED ON THAT WE WILL DO SO.

6 NUMBER 44 INDICATES NO TRANSPORTATION. STATE'S
7 POSITION ON THAT? .

8 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: YOUR HONOR, WE WOULD ASK THAT THE
11 COURT PROVIDE TRANSPORTATION IF THAT'S THE PROBLEM.

12 THE COURT: CERTAINLY. WE'LL DENY THE REQUEST AND
13 MADAM CLERK, PLEASE JUST ADVISE THE JUROR THAT WE CAN
14 PROVIDE TRANSPORTATION FOR HER.

15 THE CLERK: YES, SIR.

16 THE COURT: THANK YOU, MA'AM. NUMBER 45 INDICATES
17 THEY ARE A RESIDENT OF THE STATE OF OHIO AND SENDS A
18 COPY OF THEIR DRIVER'S LICENSE. WHAT'S THE STATE'S
19 POSITION ON THIS JUROR?

20 MR. RIDDLE: THEY'RE EXCUSED.

21 THE COURT: DEFENSE?

22 MR. FLOYD: SAME, YOUR HONOR.

23 THE COURT: EXCUSED.

24 OKAY. 52 INDICATES WORK PROBLEMS, INDICATING, "I
25 CAN'T AFFORD TO BE OFF WORK. I SUPPORT MYSELF. I WAS

1 CALLED FOR JURY IN SWANSEA LAST YEAR. IT WOULD CAUSE
2 FINANCIAL PROBLEMS." THIS IS A JUROR WHO -- IT SHOWS
3 FIVE CHILDREN, NO SPOUSE, AND SHE IS A WAITRESS OR HE
4 IS -- WELL. THIS IS A MAN ACTUALLY.

5 MR. YOUNG: IT'S A FEMALE, YOUR HONOR.

6 THE COURT: NUMBER 52?

7 MR. YOUNG: YES, SIR.

8 THE COURT: I SHOW A JURY NAMED HAROLD D. BROWN.

9 THE CLERK: CORRECT.

10 THE COURT: THAT'S A FEMALE?

11 THE CLERK: THAT'S WHAT THE JURY LIST HAS.

12 MR. RIDDLE: THAT CAN'T BE RIGHT.

13 THE COURT: IT SAYS SHE'S A WAITRESS AT LIZARDS
14 THICKET.

15 THE COURT: ALL RIGHT. EITHER WAY, WHAT'S THE
16 STATE'S POSITION ON THIS JUROR?

17 MR. RIDDLE: YOUR HONOR, I THINK YOU HAVE THE
18 AUTHORITY UNDER 14-7860, IF YOU CHOOSE TO EXERCISE IT.

19 THE COURT: DEFENSE?

20 MR. FLOYD: YOUR HONOR, WE DON'T THINK THAT'S A
21 LEGAL EXCUSE UNDER THE STATUTE. WE WOULD OBJECT.

22 THE COURT: YES. I AGREE. I UNDERSTAND THAT
23 LEGALLY IT'S NOT NECESSARILY, BUT I THINK THERE'S A
24 DISCRETIONARY ASPECT INVOLVED. THIS IS A WAITRESS --
25 AGAIN, I GUESS IT'S A WOMAN, I DON'T KNOW, BUT IT

1 INDICATES A WAITRESS SUPPORTING FIVE CHILDREN. I THINK
2 THAT WOULD BE A HARDSHIP EXCEPTION. I'M GOING TO
3 EXCUSE THAT JUROR. THAT'S NUMBER 52, AGAIN.

4 56 INDICATES HE IS A RESIDENT OF CHARLESTON, AND
5 APPARENTLY HAS SENT ALONG A COPY OF THE DRIVER'S
6 LICENSE. OUR CLERK HAS DONE A GOOD JOB ON THIS
7 INFORMATION. WHAT'S THE STATE'S POSITION ON THIS
8 JUROR?

9 MR. RIDDLE: THEY SHOULD BE EXCUSED, YOUR HONOR.

10 THE COURT: DEFENSE?

11 MR. FLOYD: AGREE, YOUR HONOR.

12 THE COURT: ALL RIGHT. EXCUSED.

13 ALL RIGHT. NUMBER 57 INDICATES A SMALL CHILD TWO
14 YEARS, TWO GIRLS, TWO YEARS AND NINE YEARS AND A BOY
15 THAT'S SEVEN YEARS OLD. WHAT'S THE STATE'S POSITION?

16 MR. RIDDLE: THEY'RE EXCUSED, YOUR HONOR.

17 THE COURT: DEFENSE?

18 MR. FLOYD: WE AGREE, YOUR HONOR.

19 THE COURT: ALL RIGHT. EXCUSED.

20 NUMBER 58 BY STIPULATION IS EXCUSED AND 59 IS NOT
21 LOCATED, 62 INDICATES CAREGIVER FOR A HUSBAND.

22 THE CLERK: THIS GENTLEMAN IS ALSO PARALYZED FROM
23 THE WAIST DOWN, JUDGE. WE DO HAVE A DOCTOR'S
24 STATEMENT.

25 THE COURT: OKAY. WHAT'S THE STATE'S POSITION ON

1 THIS JUROR?

2 MR. RIDDLE: YOUR HONOR, WE THINK THEY WOULD BE
3 EXCUSED.

4 THE COURT: DEFENSE?

5 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

6 THE COURT: OKAY. IT WOULD BE APPROPRIATE TO
7 EXCUSE THIS JUROR. WE'LL DO SO. NUMBER 63 WAS MOVING
8 GREENVILLE, LET'S SEE...

9 THE CLERK: YES, SIR. WE HAVE TRIED TO CONTACT
10 THEM SINCE WE HAVE RECEIVED THIS INFORMATION AND
11 THEY'RE OBVIOUSLY GONE.

12 THE COURT: OKAY. WHAT'S THE STATE'S POSITION ON
13 THIS JUROR?

14 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR. I'M
15 NOT SURE WE COULD FIND THEM IF WE WANTED TO.

16 THE COURT: PROBABLY NOT. DEFENSE?

17 MR. FLOYD: YOUR HONOR, WE WOULD ASK THAT IT BE
18 VERIFIED THAT THEY HAVE MOVED, MAYBE BY HAVING A POLICE
19 OFFICER TO GO BACK OUT THERE AND SEE IF THEY HAVE
20 MOVED.

21 THE COURT: I THINK THAT'S WHAT THE CLERK WAS
22 SAYING.

23 THE CLERK: YES, SIR. WE TRIED TO CONTACT THEM.
24 WE'VE SENT PEOPLE OUT THERE, WE'VE TRIED EVERY PHONE
25 NUMBER THAT WE HAD. THEY'RE GONE.

1 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR.
2 NUMBER 64 EXCUSED BY VIRTUE OF AGE, 66 INDICATES
3 BEING A STUDENT IN CHARLESTON, AND I BELIEVE IS
4 ENROLLED IN THE SUMMER PROGRAM; IS THAT RIGHT?

5 THE CLERK: YES, SIR.

6 THE COURT: STATE'S POSITION?

7 MR. RIDDLE: EXCUSED.

8 THE COURT: DEFENSE?

9 MR. FLOYD: SAME, YOUR HONOR.

10 THE COURT: ALL RIGHT. EXCUSED.

11 OKAY, 68 HAS A DOCTOR'S EXCUSE THAT SAYS THE JUROR
12 IS UNABLE TO SIT FOR JURY DUTY. STATE?

13 MR. RIDDLE: EXCUSED, YOUR HONOR.

14 THE COURT: DEFENSE?

15 MR. YOUNG: NO OBJECTIONS, YOUR HONOR.

16 THE COURT: ALL RIGHT. EXCUSED.

17 NUMBER 69 IS EXCUSED BY VIRTUE OF AGE, 70 IS NOT
18 LOCATED, 71 IS EXCUSED BY AGE.

19 74 INDICATES A BUSINESS TRIP. WHAT'S THE STATE'S
20 POSITION?

21 MR. RIDDLE: YOUR HONOR, I THINK A BUSINESS TRIP
22 IS A LOT LIKE WORK PROBLEMS. WHATEVER THE COURT'S
23 DISCRETION IS, JUST BE CONSISTENT.

24 THE COURT: OKAY. WHAT'S THE DEFENSE'S POSITION?

25 MR. YOUNG: COURT'S DISCRETION.

2263

1 THE COURT: ALL RIGHT. THAT IS OUT OF THE NORMAL
2 RANGE OF BUSINESS OR WORK PROBLEMS, AND THE JUROR HAS A
3 PH.D. IN NUCLEAR ENGINEERING, SO APPARENTLY HE'S
4 PROBABLY INVOLVED IN A GREAT DEAL OF TRAVEL WITH THAT.
5 HE SAYS HE'LL BE IN EUROPE. WE'LL EXCUSE THE JUROR
6 THEN.

7 JUROR 76 NOT LOCATED, 78 INDICATES THEY ARE A
8 RESIDENT OF RICHLAND COUNTY.

9 THE CLERK: JUDGE, NO, SIR, WE CONTACTED HIM AGAIN
10 TODAY AND HE IS SUPPOSED TO BE FAXING THAT -- MAILING
11 THAT TO US. HE HAD NO ACCESS TO A FAX MACHINE. SO
12 HE'S SUPPOSED TO BE MAILING THAT TO US.

13 THE COURT: OKAY, WELL, DO WE WANT TO GO AHEAD AND
14 JUST ALLOW THE CLERK TO EXCUSE THAT JUROR WHEN THE
15 JUROR SENDS THE DRIVER'S LICENSE, IF THE JUROR SENDS
16 THE DRIVER'S LICENSE?

17 MR. RIDDLE: THAT'S ACCEPTABLE TO THE STATE, YOUR
18 HONOR.

19 THE COURT: DEFENSE?

20 MR. YOUNG: THAT IS ACCEPTABLE TO US AS WELL, YOUR
21 HONOR.

22 THE COURT: MADAM CLERK, WHAT WE'LL DO IS, WE'LL
23 LET YOU EXCUSE THE JUROR IF HE SENDS THE DRIVER'S
24 LICENSE.

25 THE CLERK: THANK YOU, JUDGE.

1 THE COURT: THANK YOU, MA'AM.
2 NUMBER 80 INDICATES BEING A RESIDENT OF ALABAMA.
3 STATE'S POSITION?
4 MR. RIDDLE: EXCUSED, YOUR HONOR.
5 THE COURT: DEFENSE?
6 MR. FLOYD: SAME, EXCUSED, YOUR HONOR.
7 THE COURT: ALL RIGHT. 81 IS EXCUSED BY VIRTUE OF
8 AGE, AND 82 AFFIDAVIT OF NON-SERVICE; I UNDERSTAND IS
9 IN MICHIGAN. NUMBER 84 -- WELL, WHAT'S IS THE STATE'S
10 POSITION ON 82?
11 MR. RIDDLE: YOUR HONOR, I THINK HE'S EXCUSED.
12 THE COURT: ALL RIGHT. DEFENSE?
13 MR. YOUNG: NO OBJECTIONS, YOUR HONOR.
14 THE COURT: ALL RIGHT. EXCUSED.
15 84 INDICATES THAT HE IS A RESIDENT OF
16 PENNSYLVANIA.
17 THE CLERK: WE HAVE A LETTER FROM THE ATTORNEY WHO
18 CLOSED ON THEIR HOUSE IN PENNSYLVANIA, JUDGE.
19 THE COURT: OKAY. I SEE THAT. WHAT'S THE STATE'S
20 POSITION ON THIS JUROR?
21 MR. RIDDLE: EXCUSED, YOUR HONOR.
22 THE COURT: DEFENSE?
23 MR. FLOYD: EXCUSED, YOUR HONOR.
24 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR.
25 NUMBER 85 EXCUSED BY AGE, 86 IS NOT LOCATED.

2270

1 NUMBER 90, IT INDICATES IS DECEASED. ANY DISPUTE
2 AS TO THIS JUROR BEING DECEASED?

3 MR. RIDDLE: NO, SIR.

4 MR. FLOYD: NO, YOUR HONOR.

5 THE COURT: OKAY. NUMBERS 95 AND 98 ARE BOTH
6 EXCUSED BY AGE.

7 NUMBER 99 INDICATES SHE IS A RESIDENT OF RICHLAND
8 COUNTY AND HAS SENT A DRIVER'S LICENSE. STATE'S
9 POSITION?

10 MR. RIDDLE: BE EXCUSED, YOUR HONOR.

11 THE COURT: DEFENSE?

12 MR. FLOYD: EXCUSED, YOUR HONOR.

13 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR
14 ALSO.

15 JUROR 100 INDICATES BEING A RESIDENT OF NEW YORK.
16 STATE'S POSITION?

17 MR. RIDDLE: EXCUSED, YOUR HONOR.

18 THE COURT: DEFENSE?

19 MR. FLOYD: EXCUSED, YOUR HONOR.

20 THE COURT: ALL RIGHT. EXCUSED.

21 NUMBER 102 INDICATES HE WILL BE IN A SCOUT MEETING
22 IN NORTH CAROLINA. APPARENTLY HE'S THE ADULT LEADER
23 FOR THE TROOP. WHAT'S THE STATE'S POSITION ON THIS
24 JUROR?

25 MR. RIDDLE: YOUR HONOR, WE WOULD THINK THAT'S

1 ANALOGOUS WITH A VACATION.

2 THE COURT: I NOTICE HE SENT THE FORMS ALSO
3 INDICATING THAT. WHAT'S THE DEFENSE POSITION?

4 MR. YOUNG: YOUR HONOR, WE WOULD HAVE NO OBJECTION
5 TO THIS -- OBVIOUSLY, HE'S BEEN PLANNING IT SINCE MARCH
6 OF THIS YEAR.

7 THE COURT: I THINK THAT'S APPROPRIATE. WE'LL
8 EXCUSE THIS JUROR.

9 103 IS EXCUSED BY AGE. 104 INDICATES WORK
10 PROBLEMS. I THINK THE JUROR IS A DOCTOR, AS I
11 UNDERSTAND. WHAT'S THE STATE'S POSITION ON THIS JUROR?

12 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

13 THE COURT: DEFENSE?

14 MR. FLOYD: YOUR HONOR, IT'S OUR POSITION THAT A
15 PHYSICIAN IS NOT AUTOMATICALLY EXCUSED.

16 THE COURT: THE ADMINISTRATOR INDICATES SHE HAS A
17 PATIENT LOAD THAT'S BEEN SET. THE LETTER WAS DATED
18 JUNE 6TH. OF COURSE, MADAM CLERK, YOU SENT THESE OUT
19 IN MAY, I THINK, DIDN'T YOU?

20 THE CLERK: THE VERY END OF MAY, YES, SIR.

21 THE COURT: I'M GOING TO HAVE TO DENY THE REQUEST.
22 THEY'VE HAD AMPLE TIME TO ADJUST THEIR SCHEDULES.

23 NUMBER 105 IS NOT LOCATED, 106 EXCUSED BY AGE, AND
24 107 AND 109 ARE NOT LOCATED.

25 NUMBER 115 INDICATES HAVING A FELONY CONVICTION.

1 WHAT'S THE STATE'S POSITION?

2 MR. RIDDLE: THEY WOULD BE DISQUALIFIED, YOUR
3 HONOR.

4 THE COURT: DEFENSE?

5 MR. FLOYD: WE AGREE THAT THEY BE DISQUALIFIED.

6 THE COURT: ALL RIGHT. EXCUSED.

7 OKAY, 117 IS A NIGHT SCHOOL STUDENT. WERE YOU
8 ABLE TO DETERMINE WHETHER THEY'RE IN CLASSES, MADAM
9 CLERK?

10 THE CLERK: YES, SIR, AND IT LOOKS LIKE THEY ALSO
11 WORK FOR S.L.E.D.

12 THE COURT: STATE'S POSITION?

13 MR. RIDDLE: WE OBJECT.

14 THE COURT: DEFENSE?

15 MR. FLOYD: WE HAVE NO OBJECTION TO THEIR BEING
16 EXCUSED.

17 THE COURT: ALL RIGHT. WE'LL EXCUSE THIS JUROR.

18 120 IS EXCUSED BY VIRTUE OF AGE. 121 INDICATES
19 THEY HAVE NO TRANSPORTATION. WHAT'S THE STATE'S
20 POSITION ON THAT?

21 MR. RIDDLE: YOUR HONOR, IT'S PROBABLY THE SAME AS
22 THE PREVIOUS JUROR WHO HAD NO TRANSPORTATION. I THINK
23 THAT WAS JUROR NUMBER 44. I THINK YOU NEED TO BE
24 CONSISTENT.

25 THE COURT: DEFENSE?

1 MR. FLOYD: SAME. WE'LL AGREE WITH THAT, YOUR
2 HONOR.

3 THE COURT: ALL RIGHT. WE'LL DENY THAT
4 APPLICATION AND ASK THAT YOU HAVE -- JUST NOTIFY THEM,
5 MADAM CLERK, THAT WE CAN ARRANGE TRANSPORTATION FOR
6 THEM.

7 THE CLERK: YES, SIR.

8 THE COURT: NUMBER 122 IS IN JAPAN WITH THE NAVY,
9 ACCORDING TO THE DEPUTY. WHAT'S THE STATE'S POSITION?

10 MR. RIDDLE: I THINK THEY'RE PROBABLY EXCUSED.

11 THE COURT: DEFENSE?

12 MR. FLOYD: WE WOULD AGREE WITH THAT, YOUR HONOR.

13 THE COURT: IT WOULD BE EXPENSIVE GETTING THEM
14 HERE, WOULDN'T IT?

15 ALL RIGHT, 124, 127, AND 129 ARE EXCUSED BY VIRTUE
16 OF AGE.

17 NUMBER 130 INDICATES THAT HE HAS ONLY COMPLETED A
18 SIXTH GRADE EDUCATION. IT'S HARD TO READ AND
19 UNDERSTAND. I WOULD THINK WE NEED TO KNOW MORE THAN
20 THAT BEFORE WE CAN DETERMINE WHETHER OR NOT TO EXCUSE
21 THIS JUROR. WHAT'S THE STATE'S POSITION ON THAT?

22 MR. RIDDLE: WE WOULD LEAVE IT TO THE COURT.

23 THE COURT: DEFENSE?

24 MR. FLOYD: WE THINK HE SHOULD SHOW UP SO HE CAN
25 BE EXAMINED.

1 THE COURT: ALL RIGHT. WE'LL DENY THE REQUEST.
2 THIS JUROR WILL NEED TO COME IN.

3 JUROR 131 INDICATES A FELONY CONVICTION. WERE YOU
4 ABLE TO CONFIRM THAT?

5 THE CLERK: YES, SIR. WE DO HAVE IT OUT OF YORK
6 COUNTY, SEVEN YEARS.

7 THE COURT: RIGHT. STATE'S POSITION?

8 MR. RIDDLE: THEY'RE DISQUALIFIED, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: WE WOULD AGREE TO DISQUALIFY THEM.

11 THE COURT: ALL RIGHT. THE JUROR IS DISQUALIFIED.
12 JUROR 134 ALSO INDICATES A FELONY CONVICTION. ANY
13 CONFIRMATION, MADAM CLERK?

14 THE CLERK: WELL, JUDGE, THIS IS THE ONLY THING --
15 THIS IS OUT OF MISSOURI. THE ONLY THING WE COULD
16 CONFIRM WAS THROUGH HIS FATHER. HE'S BEEN PUT BACK IN
17 JAIL FOR A PAROLE VIOLATION, AND HE'S IN THE
18 CORRECTIONAL CENTER IN JEFFERSON CITY, MISSOURI.

19 THE COURT: ALL RIGHT. STATE'S POSITION?

20 MR. RIDDLE: I THINK THEY'RE GOING TO BE EXCUSED.

21 THE COURT: ALL RIGHT. DEFENSE?

22 MR. FLOYD: OUTSIDE OF THE FATHER'S WORD THAT THIS
23 PERSON IS IN PRISON, IS THERE ANY VERIFICATION?

24 THE CLERK: NO. THAT'S ALL WE HAVE. WE TALKED TO
25 THE FATHER AND THE FATHER GAVE US THAT INFORMATION. HE

1 SAID HE WAS IN MISSOURI AND IN PRISON.

2 MR. FLOYD: COURT'S DISCRETION.

3 THE COURT: ALL RIGHT. WE'LL HAVE TO EXCUSE THE
4 JUROR AT THIS POINT THEN.

5 JUROR 139 WAS NOT LOCATED. I UNDERSTAND HE ALSO
6 HAS A FELONY CONVICTION. APPARENTLY THERE IS A
7 SENTENCING SHEET SIGNED BY JUDGE EPPS WHERE HE GOT FIVE
8 YEARS.

9 THE CLERK: YES, SIR.

10 THE COURT: WHAT'S THE STATE'S POSITION?

11 MR. RIDDLE: DISQUALIFIED, YOUR HONOR.

12 THE COURT: DEFENSE?

13 MR. FLOYD: DISQUALIFIED, YOUR HONOR.

14 THE COURT: ALL RIGHT. THE JUROR IS DISQUALIFIED.

15 140 AND 141 WERE NOT SERVED. JUROR 142 INDICATES
16 RELIGIOUS PROBLEMS. WHAT'S THE STATE'S POSITION ON
17 THIS JUROR?

18 MR. RIDDLE: WE WOULD LIKE -- WE WANT TO HEAR MORE
19 ABOUT WHAT THE JUROR SAID.

20 THE CLERK: THAT'S ALL IT SAYS IS RELIGIOUS.

21 THE COURT: HE SAYS I DESIRE EXEMPTION BECAUSE OF
22 "RELIGIOUS."

23 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

24 THE CLERK: IT DOES SAY HE IS A PASTOR OF THE
25 ST. JAMES UPPER ROOM HOLINESS CHURCH.

1 THE COURT: DEFENSE?

2 MR. FLOYD: WE WOULD OBJECT TO EXCUSING HIM JUST
3 BECAUSE HE SAYS HE'S RELIGIOUS.

4 THE COURT: YES. I'LL HAVE TO DENY THE REQUEST.
5 HE'LL HAVE TO COME IN, AND CERTAINLY WE MAY BE ABLE TO
6 EXAMINE HIM AND MAKE SOME DETERMINATIONS FROM THERE.

7 143 INDICATES. -- OH, THIS IS OFFICER GRICE. HE
8 INDICATES HE HAS FEDERAL CHARGES PENDING. WHAT'S THE
9 STATE'S POSITION ON THIS?

10 MR. RIDDLE: YOUR HONOR, WE THINK HE OUGHT TO BE
11 EXCUSED.

12 THE COURT: DEFENSE?

13 MR. FLOYD: WELL, YOUR HONOR, WE DON'T THINK JUST
14 HAVING THE CHARGES WOULD AUTOMATICALLY EXCUSE HIM, I
15 DON'T THINK. IT REQUIRES A CONVICTION.

16 MR. MYERS: IT'S A MATTER I'M GOING TO HAVE TO
17 TAKE UP LATER ON IF YOU WANT TO WAIT, BUT HE WAS A PART
18 OF THE INVESTIGATION IN THIS CASE.

19 THE COURT: OKAY. DO YOU WANT TO AGREE TO EXCUSE
20 HIM, OR DO YOU WANT TO JUST WAIT AND TAKE IT UP LATER
21 ON?

22 MR. FLOYD: YEAH, WE'LL WAIT.

23 THE COURT: OKAY. WE WILL.

24 NUMBER 144 INDICATES BEING A RESIDENT OF RICHLAND
25 COUNTY.

1 THE CLERK: AND WE DO HAVE A DRIVER'S LICENSE,
2 JUDGE.

3 THE COURT: WE DO HAVE A DRIVER'S LICENSE, OKAY.
4 WHAT'S THE STATE'S POSITION?

5 MR. RIDDLE: EXCUSED, YOUR HONOR.

6 THE COURT: DEFENSE?

7 MR. FLOYD: NO OBJECTION, YOUR HONOR.

8 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR.
9 WE'RE GOING TO HAVE TO HAVE THIS CLERK GO AROUND TO
10 SOME OF THE OTHER COUNTIES THAT I'VE BEEN TO AND PUT ON
11 A CLINIC ON HOW TO SET THESE THINGS UP.

12 NUMBER 145 INDICATES SERVICES FOR THE MOTHER --
13 THE MOTHER DIED LAST FALL?

14 THE CLERK: YES, SIR, OCTOBER OF '99 AND THEY'RE
15 GOING TO HAVE THE SERVICES JULY OF 2000 BECAUSE THEY
16 COULDN'T GET EVERYBODY TOGETHER. I DON'T KNOW WHAT THE
17 HOLDING PATTERN FOR THAT WAS, BUT...

18 THE COURT: WHAT DID THEY DO WITH THE MOTHER IN
19 THE MEANTIME?

20 THE CLERK: IT DOESN'T SAY, JUDGE, AND I REALLY
21 DON'T KNOW.

22 MR. YOUNG: I GUESS SHE'S JUST HANGING AROUND,
23 YOUR HONOR.

24 THE COURT: WHAT'S THE STATE'S POSITION ON THIS,
25 INTERESTING AS IT MAY BE?

1 MR. MYERS: COURT'S DISCRETION.

2 THE COURT: IT SAYS THE SERVICES ARE SCHEDULED FOR
3 JULY 11TH, RIGHT, IN FLORIDA?

4 THE CLERK: YES, SIR. YES, SIR.

5 THE COURT: OKAY. WHAT'S THE DEFENSE POSITION?

6 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

7 THE COURT: OKAY. LET'S SEE. ALL RIGHT. FOR
8 HARDSHIP REASONS, IF NOTHING ELSE, I'LL EXCUSE THIS
9 JUROR THEN.

10 146 WAS NOT LOCATED. 147 WORKS FOR THE RICHLAND
11 COUNTY PUBLIC DEFENDER'S OFFICE WITHIN THE RICHLAND
12 COUNTY COURTHOUSE. WHAT'S THE STATE'S POSITION?

13 MR. RIDDLE: HE'D BE DISQUALIFIED, YOUR HONOR.

14 THE COURT: OKAY. DEFENSE?

15 (PAUSE)

16 THE COURT: SHE ALSO SAYS THAT SHE IS IN RECOVERY
17 FROM A HEAD INJURY WHICH KEEPS HER FROM WORKING
18 FULL-TIME.

19 MR. FLOYD: YOUR HONOR, WE RECOGNIZE THE STATUTE
20 SAYS ANYBODY WHO WORKS WITHIN THE WALLS OR CONFINES OF
21 THE COURTHOUSE IS EXEMPT. WE WOULD ARGUE THAT THAT
22 STATUTE REALLY IS ONLY INTENDING TO COVER COURTHOUSE
23 EMPLOYEES AND NOT LAWYERS, PUBLIC DEFENDERS.

24 THE COURT: ALL RIGHT. LET'S DO THIS AT -- AS YOU
25 KNOW, IN MY STANDARD QUESTIONS I GENERALLY ASK IF

2273

1 JURORS ARE EMPLOYED IN ANY COURTHOUSE ACTIVITY. I
2 ASSUME THAT'S WHAT IT IS.

3 WHAT I'LL DO FOR THE TIME BEING IS DENY IT AND
4 WHEN I GET A BREAK HERE IN A SECOND, I'LL TAKE A LOOK
5 AT IT AND SEE. I THINK IT MAY COVER OTHER COURTHOUSE
6 EMPLOYEES --

7 MR. RIDDLE: YOUR HONOR, ARE YOU TALKING ABOUT 14-
8 8720?

9 THE COURT: YES.

10 MR. RIDDLE: NO CLERK OF COURT, DEPUTY CLERK OF
11 COURT, CONSTABLE, SHERIFF, PROBATE JUDGE, COUNTY
12 COMMISSIONER, MAGISTRATE OR OTHER COUNTY OFFICER OR ANY
13 PERSON EMPLOYED WITHIN THE WALLS OF ANY COURTHOUSE IS
14 ELIGIBLE.

15 THE COURT: OKAY. I THINK THAT TAKES THE JUROR
16 OUT. WE'LL EXCUSE THE JUROR. YOU SAVED US THE TROUBLE
17 OF HAVING TO FIND IT. THANK YOU.

18 ALL RIGHT, 151. THE FAMILY DOES NOT KNOW THE NEW
19 ADDRESS. UNABLE TO LOCATE. WHAT DID THEY DO, JUST
20 LEAVE AND NOT TELL THE FAMILY?

21 THE CLERK: BASICALLY, THE FAMILY DOESN'T HAVE A
22 CLUE, JUDGE. THEY DON'T KNOW WHERE THEY ARE AND DON'T
23 SEEM TO WANT TO KNOW.

24 THE COURT: OKAY. WELL, WHAT'S THE STATE'S
25 POSITION?

1 MR. RIDDLE: THEY'RE PROBABLY EXCUSED, YOUR HONOR.

2 THE COURT: OKAY. DEFENSE?

3 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

4 THE COURT: WE'LL EXCUSE THE JUROR.

5 153 HAS A FELONY CONVICTION. THIS IS STEVE

6 HAMPTON. WHAT'S THE STATE'S POSITION?

7 MR. RIDDLE: DISQUALIFIED, YOUR HONOR.

8 THE COURT: DEFENSE?

9 MR. YOUNG: DISQUALIFIED, YOUR HONOR.

10 THE COURT: HE GOT FIVE YEARS BY JUDGE EPPS. THAT
11 JUROR IS DISQUALIFIED.

12 155 INDICATES HE HAS CANCER AND A SMALL CHILD AND
13 HE'S SELF-EMPLOYED. WHAT'S THE STATE'S POSITION ON
14 THIS JUROR? BY THE WAY, WERE WE ABLE TO GET ANY
15 MEDICAL INFORMATION ON THIS JUROR?

16 THE CLERK: JUDGE, WE SPOKE TO SOMEONE JUST TODAY
17 BECAUSE THEY HAD NOT SENT WHAT WE ASKED THEM TO SEND,
18 AND WE CALLED THEM AGAIN AND ASKED THEM AGAIN TO PLEASE
19 BE SURE HE GOT A DOCTOR'S STATEMENT. WE STILL HAVE NOT
20 HEARD FROM THEM ON THAT YET.

21 THE COURT: WHY DON'T WE JUST HOLD OFF ON THIS ONE
22 UNTIL WE FIND SOMETHING OUT. WHAT'S THE STATE'S
23 POSITION ON THIS?

24 MR. RIDDLE: THAT'S FINE WITH US, YOUR HONOR.

25 THE COURT: DEFENSE?

1 MR. FLOYD: WE AGREE WITH THAT DECISION.

2 THE COURT: OKAY. WE'LL JUST HOLD OFF UNTIL WE
3 FIND SOMETHING MORE OUT.

4 THE CLERK: OKAY.

5 THE COURT: 156 INDICATES HEARING PROBLEMS, BUT
6 DOES NOT HAVE A DOCTOR'S EXCUSE. WHAT'S THE STATE'S
7 POSITION?

8 MR. RIDDLE: NO OBJECTION EITHER WAY, YOUR HONOR.

9 THE COURT: ALL RIGHT. DEFENSE?

10 MR. FLOYD: WELL, YOUR HONOR, WE WOULD THINK THAT
11 WITH NO DOCTOR'S EXCUSE, THEY SHOULD BE HERE, YOU KNOW.

12 THE COURT: WHAT I'M GOING TO DO AT THIS POINT IS
13 DENY THE REQUEST, AND IF THEY CAN GET A DOCTOR'S EXCUSE
14 WE'LL TAKE ANOTHER LOOK. WE CAN ALSO OBVIOUSLY
15 QUESTION THE JUROR WHEN HE COMES.

16 157 INDICATES THAT HE HAS A DISABILITY.

17 THE CLERK: YES, SIR, AND WE HAVE A -- HE'S ALSO
18 IN A WHEELCHAIR, AND HE DID -- WE SPOKE WITH HIM AND
19 AFTER WE DESCRIBED THE COURTHOUSE TO HIM, HE REQUESTED
20 TO BE EXCUSED BECAUSE HE DID NOT THINK THAT HIS
21 WHEELCHAIR WOULD BE COMPATIBLE WITH THE COURTHOUSE.

22 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
23 POSITION?

24 MR. RIDDLE: NO OBJECTION.

25 THE COURT: DEFENSE?

2282

1 MR. FLOYD: NO OBJECTION, YOUR HONOR.

2 THE COURT: WE'LL EXCUSE THAT JUROR FOR A
3 DISABILITY THEN.

4 158 WAS NOT LOCATED, 160 IS EXCUSED FOR AGE, 161
5 INDICATES NO TRANSPORTATION. WHAT'S THE STATE'S
6 POSITION?

7 MR. RIDDLE: WE JUST NEED TO BE CONSISTENT, YOUR
8 HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: I'D ASK THE COURT TO PROVIDE
11 TRANSPORTATION.

12 THE COURT: ALL RIGHT. WE'LL DENY THE REQUEST AND
13 MADAM CLERK IF YOU'LL JUST ADVISE HER THAT WE CAN
14 ARRANGE TRANSPORTATION.

15 THE CLERK: YES, SIR.

16 THE COURT: 163 INDICATES BEING A RESIDENT OF
17 VIRGINIA. WHAT'S THE STATE'S POSITION ON THAT? WE
18 HAVE A DRIVER'S LICENSE. THE STATE'S POSITION?

19 MR. RIDDLE: THEY'RE EXCUSED.

20 THE COURT: DEFENSE?

21 MR. FLOYD: EXCUSED.

22 THE COURT: 165 APPARENTLY IS DECEASED. ANY
23 DISPUTE OF THAT FROM THE STATE?

24 MR. RIDDLE: NO, SIR.

25 THE COURT: DEFENSE?

1 MR. FLOYD: NO DISPUTE, YOUR HONOR.

2 THE COURT: ALL RIGHT. 166 IS NOT LOCATED.

3 167 IS HELPING MOVE A CHILD OUT OF STATE.

4 OKAY. THAT'S A TEACHER. OKAY. LET'S SEE.

5 THE CLERK: JUDGE, I THINK THIS IS A DAUGHTER WHO
6 IS GOING TO COLLEGE.

7 THE COURT: RIGHT.

8 THE CLERK: AND SHE IS MOVING HER TO COLLEGE AND
9 GETTING HER SETTLED IN, OR GETTING HER AN APARTMENT
10 WHERE SHE'S GOING TO COLLEGE.

11 THE COURT: SHE'S IN COLLEGE ALREADY?

12 THE CLERK: SHE MIGHT BE GETTING AN APARTMENT. I
13 JUST -- I DO REMEMBER HER SAYING HER DAUGHTER WAS GOING
14 TO COLLEGE.

15 THE COURT: WHAT'S THE STATE'S POSITION ON THIS?

16 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

17 THE COURT: DEFENSE?

18 MR. FLOYD: WELL, WE WOULD SUGGEST THAT SHE SHOULD
19 BE HERE.

20 THE COURT: I'M GOING TO DENY THE REQUEST. MADAM
21 CLERK, WHAT YOU MIGHT DO IS TELL HER THAT WE DENIED IT.
22 IF SHE CAN PRESENT ANY FURTHER INFORMATION OR
23 DOCUMENTATION THAT SHE HAS COMMITTED FUNDS OR VACATION
24 TIME OR SOMETHING LIKE THAT, WE WILL DEFINITELY TAKE
25 ANOTHER LOOK AT IT.

2284

1 THE CLERK: YES, SIR.

2 THE COURT: WE MIGHT LET HER OFF, IF IT'S
3 SOMETHING SHE CAN ADJUST, WE WILL LET HER ADJUST IT.

4 THE CLERK: ALL RIGHT.

5 THE COURT: ALL RIGHT. 170 INDICATES HE HAS A
6 BUSINESS TRIP PLANNED IN WASHINGTON. APPARENTLY
7 ALREADY HAS A PLANE TICKET. WHAT'S THE STATE'S
8 POSITION?

9 MR. RIDDLE: COURT'S DISCRETION.

10 THE COURT: DEFENSE?

11 MR. FLOYD: COURT'S DISCRETION.

12 THE COURT: ALL RIGHT. WE WILL EXCUSE THE JUROR
13 THEN. THERE'S A COPY OF THE PLANE TICKET ATTACHED
14 HERE.

15 171 INDICATES SHE HAS A -- SHE'S A STAY AT HOME
16 MOTHER WITH THREE SMALL CHILDREN. HER CHILDREN ARE
17 SIX, FIVE, THREE-AND-A-HALF. WHAT'S THE STATE'S
18 POSITION ON THIS?

19 MR. RIDDLE: SHE FITS THE STATUTE, YOUR HONOR.

20 THE COURT: DEFENSE?

21 MR. FLOYD: WE AGREE WITH THAT, YOUR HONOR.

22 THE COURT: ALL RIGHT. SHE IS EXCUSED.

23 172 IS NOT LOCATED. 173 INDICATES SHE HAS A SICK
24 CHILD WITH CYSTIC FIBROSIS.

25 THE CLERK: SHE'S ALSO -- THE CHILD IS HAVING A

1 SPINAL FUSION ON THE 29TH, THAT'S YESTERDAY.

2 THE COURT: ALL RIGHT. I SEE. WHAT'S THE STATE'S
3 POSITION?

4 MR. RIDDLE: YOUR HONOR, I THINK THAT'S PROBABLY
5 HARDSHIP.

6 THE COURT: DEFENSE?

7 MR. FLOYD: COURT'S DISCRETION.

8 THE COURT: THAT IS A HARDSHIP. WE'LL EXCUSE THAT
9 JUROR.

10 174 ALSO INDICATES SHE HAS A SICK CHILD AND NO
11 CHILDCARE. SHE HAS A DOCTOR'S STATEMENT INDICATING THE
12 NATURE OF THE CHILD'S PROBLEMS BEING ALLERGIC,
13 RHINITIS, ASTHMA, CHRONIC SINUSITIS. SHE DOESN'T SAY
14 THAT THE CHILD -- TO WHAT DEGREE THE JUROR HAS TO
15 MAINTAIN CARE OF THE CHILD. LET'S SEE, THE CHILD --
16 APPARENTLY THE JUROR DOES NOT HAVE A SPOUSE AT HOME; IS
17 THAT CORRECT?

18 THE CLERK: JUDGE, SHE DOES ONLY WORK, I THINK,
19 FOUR HOURS AND SHE IS ABLE TO LEAVE WHENEVER SHE IS
20 NEEDED TO GO TO THE CHILD.

21 THE COURT: OKAY. WHAT'S THE STATE'S POSITION?

22 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

23 THE COURT: DEFENSE?

24 MR. FLOYD: WE WOULD REQUIRE PRESENCE.

25 THE COURT: SIR?

1 MR. FLOYD: WE WOULD OBJECT TO HER BEING EXCUSED
2 FOR THAT REASON.

3 THE COURT: ALL RIGHT. I THINK GIVEN THE
4 CIRCUMSTANCES AS DESCRIBED BY THE CLERK, IT WOULD BE
5 APPROPRIATE TO EXCUSE THE JUROR, AND WE'LL EXCUSE THE
6 JUROR FOR HARDSHIP REASONS. AGAIN, SHE'S IN A WORK
7 POSITION WHERE SHE CAN GET AWAY TO GO TAKE CARE OF THE
8 CHILD WHEN NECESSARY, BUT THIS WILL GIVE HER A MUCH
9 MORE DIFFICULT PROBLEM BECAUSE SHE WOULDN'T BE ABLE TO
10 GET AWAY TO GO AND TAKE CARE OF THE CHILD. SHE
11 WOULDN'T BE ABLE TO DO THAT. WE'LL EXCUSE THE JUROR.

12 NEXT IS 176 WHO IS EXCUSED FOR AGE REASONS.

13 177 INDICATES WORK PROBLEMS. THE JUROR IS
14 SELF-EMPLOYED, HAS -- HIS BROTHER IS WORKING WITH HIM.
15 WORKS TWO JOBS AND HAS DEADLINES. WHAT'S THE STATE'S
16 POSITION?

17 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

18 THE COURT: DEFENSE?

19 MR. FLOYD: YOUR HONOR, WE DON'T THINK THAT'S A
20 SUFFICIENT REASON TO BE EXCUSED.

21 THE COURT: I TEND TO AGREE WITH THAT. I'LL HAVE
22 TO DENY THE REQUEST. MADAM CLERK, IF YOU'LL ADVISE THE
23 JUROR OF THAT.

24 THE CLERK: YES, SIR.

25 THE COURT: 179 AND 180 ARE NOT LOCATED.

1 181 IS EXCUSED BY VIRTUE OF AGE.

2 182 INDICATES RELIGIOUS PROBLEMS. THIS JUROR IS A
3 JEHOVAH'S WITNESS AND CITES LUKE 6:37 TO STOP JUDGING.
4 IT SAYS "I CANNOT JUDGE AND CANNOT PASS A VERDICT ON
5 ANYONE." WHAT'S THE STATE'S POSITION? THAT OBVIOUSLY
6 RAISES QUESTIONS AS TO BEING ABLE TO TAKE CARE OF
7 HIS -- TO COMPLY WITH HIS JUROR OATH, BUT I DON'T KNOW
8 THAT WE'VE DETERMINED THAT AT THIS POINT. STATE'S
9 POSITION?

10 MR. MYERS: YOUR HONOR, I THINK THE STATE VS.
11 JAMES NEAL TUCKER II, A CALHOUN COUNTY CASE, IT WAS
12 JAMES NEAL TUCKER, ON THE RE-SENTENCING, 512 S.E.2D
13 1999, A SIMILAR TYPE OF SITUATION WITH A JEHOVAH'S
14 WITNESS AND THAT WITNESS WAS EXCUSED. THE SUPREME
15 COURT UPHELD THE EXCUSING OF THAT JUROR'S JEHOVAH'S
16 WITNESS RELIGIOUS BELIEFS.

17 THE COURT: OKAY. WHAT'S THE DEFENSE POSITION ON
18 THAT?

19 MR. FLOYD: YOUR HONOR, OUR POSITION IS THAT THE
20 JUROR SHOULD BE REQUIRED TO COME IN SO THAT WE CAN
21 EXPLORE THE DEPTH OF HIS RELIGIOUS BELIEFS AND SEE
22 WHETHER OR NOT THEY WOULD INTERFERE WITH HIS ABILITY TO
23 SERVE AS JUROR.

24 MR. MYERS: YOUR HONOR, THE STATE VS. JAMES NEAL
25 TUCKER, II FROM CALHOUN COUNTY WAS A PRE VOIR DIRE

1 EXAMINATION. THE COURT SAID THAT IT IS WITHIN THE
2 JUDGE'S DISCRETION UNDER THE STATUTE TO DO SO WITHOUT
3 VOIR DIRE. THAT CASE IS PRETTY WELL ON POINT. HOW
4 EVER YOU WANT TO PROCEED.

5 THE COURT: OKAY. ANYTHING ELSE, MR. FLOYD?

6 MR. FLOYD: NOTHING FURTHER FROM US.

7 THE COURT: ALL RIGHT. COUNSEL, I AM GOING TO GO
8 AHEAD AND EXCUSE THE JUROR. HE DOES INDICATE HE CANNOT
9 JUDGE ANYONE AND COULD NOT PASS A VERDICT. IN FACT, I
10 MISSED SOME OF IT BEFORE WHERE IT SAYS, "I WILL NOT
11 PASS A VERDICT," SO I DON'T THINK THERE'S ANY QUESTION
12 HERE, I HAVE TO EXCUSE THIS JUROR.

13 ALL RIGHT, JUROR 182 IS EXCUSED.

14 184 IS EXCUSED BY AGE, 186 IS NOT LOCATED, 190
15 INDICATES BEING A RESIDENT OF NORTH CAROLINA AND THE
16 CLERK, IN HER USUAL STANDARD OF EXCELLENCE, HAS
17 ATTACHED A DRIVER'S LICENSE. STATE'S POSITION?

18 MR. RIDDLE: EXCUSED, YOUR HONOR.

19 THE COURT: DEFENSE?

20 MR. FLOYD: EXCUSED, YOUR HONOR.

21 THE COURT: EXCUSED.

22 JUROR 191 INDICATES THAT SHE HAS TO PICK UP HER
23 DAUGHTER FROM CAMP IN GREENVILLE AND THEY WILL THEN BE
24 ON VACATION. WERE WE ABLE TO CONFIRM THAT, MADAM
25 CLERK?

1 THE CLERK: YES, SIR. WE HAVE COPIES OF THE CAMP
2 REGISTRATION FORM SHOWING WHERE SHE'S THERE.

3 THE COURT: WHAT'S THE STATE'S POSITION?

4 MR. RIDDLE: EXCUSE HER, YOUR HONOR.

5 THE COURT: DEFENSE?

6 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

7 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

8 SHE ALSO DOES HAVE THE VACATION WITH IT.

9 193 INDICATES HE IS A STUDENT AT A PENDING SUMMER
10 SESSION AT CAROLINA. STATE'S POSITION?

11 MR. RIDDLE: IT'S NOT REALLY SCHOOL, YOUR HONOR,
12 BUT...

13 THE COURT: DEFENSE?

14 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

15 THE COURT: ALL RIGHT. SINCE WE'RE ENCOURAGING
16 STUDENTS GET AS HIGH A QUALITY OF EDUCATION AS WE CAN,
17 WE WANT TO EXCUSE THIS JUROR TO BE ABLE TO BETTER DO
18 THAT.

19 195 IS EXCUSED BY AGE. 197 INDICATES A MEDICAL
20 CONDITION HAVING SURGERY ON JUNE 21ST.

21 THE CLERK: NO, SIR, 197, THIS GENTLEMAN IS ALSO
22 DEAF. MR. CUMMERFORD BROUGHT THIS TO US, AND I --

23 THE COURT: OKAY.

24 THE CLERK: I DIDN'T SPEAK WITH HIM PERSONALLY.
25 MR. CUMMERFORD KNOWS HIM.

1 THE COURT: OKAY. WHAT'S THE STATE'S POSITION?

2 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

3 THE COURT: DEFENSE?

4 MR. FLOYD: YOUR HONOR, WE WOULD ASK THAT A

5 DOCTOR'S EXCUSE BE PROVIDED BEFORE EXCUSING HIM.

6 THE COURT: WELL, THE CLERK APPARENTLY TALKED WITH
7 HIS -- IT INDICATES ON HERE THE JUROR ALSO IS DEAF.
8 COUNSEL, I'M GOING TO GO AHEAD AND WE'LL EXCUSE THAT
9 JUROR.

10 199 INDICATES SHE IS DISABLED, BUT DOES NOT HAVE A
11 DOCTORS -- WELL, I THINK YOU HAVE IT NOW.

12 THE CLERK: NO, SIR. WE HAVE A LETTER WHERE WE
13 WROTE HER TELLING HER THAT WE NEEDED A DOCTOR'S
14 STATEMENT. WE HAVE NOT GOTTEN ANY RESPONSE FROM HER AT
15 ALL.

16 THE COURT: ALL RIGHT. STATE'S POSITION?

17 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

18 THE COURT: DEFENSE?

19 MR. FLOYD: SAME POSITION, YOUR HONOR. UNLESS
20 THERE'S A MEDICAL EXCUSE PROVIDED BY THE DOCTOR, WE'D
21 OBJECT TO EXCUSING HER.

22 THE COURT: ALL RIGHT. I'M GOING TO DENY THE
23 REQUEST THEN.

24 202 IS EXCUSED BY AGE, 203 INDICATES THE JUROR IS
25 DECEASED. ANY DISPUTE FROM THE STATE ON THAT?

1 MR. RIDDLE: NO, SIR.

2 THE COURT: DEFENSE?

3 MR. FLOYD: NO, YOUR HONOR.

4 THE COURT: ALL RIGHT. 204 REQUESTS EXCUSE BY
5 VIRTUE OF BRAIN STEM INFARCTIONS AND VARIOUS STROKES.
6 WE HAVE A DOCTOR'S EXCUSE. THE DOCTOR INDICATES THAT
7 THIS PATIENT COULD NOT SERVE ON THE JURY. WHAT'S THE
8 STATE'S POSITION?

9 MR. RIDDLE: NO OBJECTION.

10 THE COURT: DEFENSE?

11 MR. FLOYD: NO OBJECTIONS, YOUR HONOR.

12 THE COURT: ALL RIGHT. THIS JUROR IS EXCUSED.

13 JUROR 205 INDICATES SHE HAS A SMALL CHILD UNDER
14 SEVEN. IN FACT, THE CHILD IS AGE FOUR. WHAT'S THE
15 STATE'S POSITION?

16 MR. RIDDLE: THEY'RE EXEMPT, YOUR HONOR.

17 THE COURT: DEFENSE?

18 MR. FLOYD: COURT'S DISCRETION.

19 THE COURT: I BELIEVE SHE WOULD BE EXCUSED.

20 209 EXCUSED BY VIRTUE OF AGE; 212 AND 213 WERE NOT
21 LOCATED. 214 INDICATES WORK PROBLEMS, ANYTHING ELSE ON
22 THAT, MADAM CLERK?

23 THE CLERK: NO, SIR, JUST THE BASIC THAT IT'S A
24 HARDSHIP AND YOU KNOW, WANTS TO BE TRANSFERRED TO
25 DECEMBER OR JANUARY. I THINK, YOU KNOW, IT HAS TO DO

2292

1 WITH BOATS, AND THIS IS THEIR BIG TIME OF YEAR.

2 THE COURT: WHAT'S THE STATE'S POSITION?

3 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

4 THE COURT: DEFENSE?

5 MR. FLOYD: COURT'S DISCRETION.

6 THE COURT: ALL RIGHT. I GATHER HAVING A BOAT
7 BUSINESS RIGHT NOW WOULD BE KIND OF BUSY. WITH THIS
8 BEING THE MIDDLE OF SUMMER, WE'LL EXCUSE THE JUROR THEN
9 FOR THAT REASON.

10 NUMBER 215 HAS A DOCTOR'S EXCUSE AND A PLANE
11 TICKET. I'M NOT SURE WHAT THE TIE IS BETWEEN THE TWO.
12 LET'S SEE. HE INDICATES HE DOES HAVE HIS DOCTOR'S
13 STATEMENT. I BELIEVE THE DOCTOR DOESN'T SAY THAT HE
14 CAN'T SERVE ON THE JURY. WHAT IS THE PLANE TICKET FOR,
15 MADAM CLERK?

16 THE CLERK: JUDGE, TO BE HONEST WITH YOU, I THINK
17 HE JUST HAS A TRIP TO THE CAYMAN ISLANDS PLANNED.

18 THE COURT: OH, OKAY. WHAT'S THE STATE'S -- DID
19 HE SAY WHETHER IT'S BUSINESS OR NOT? I NOTICE HE'S AN
20 AUDITOR WITH THE DEPARTMENT OF SOCIAL SERVICES.

21 THE CLERK: JUDGE, HE DIDN'T SAY.

22 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
23 POSITION ON THIS?

24 MR. RIDDLE: YOUR HONOR, IT SOUNDS LIKE A
25 VACATION, BUT WHATEVER THE COURT DECIDES.

1 THE COURT: OKAY. I SEE. THEY HAVE THEIR PLANE
2 TICKETS ALREADY, APPARENTLY.

3 ALL RIGHT. WHAT'S THE DEFENSE POSITION?

4 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

5 THE COURT: WE'LL EXCUSE THE JUROR. IT APPEARS
6 THEY'VE ALREADY MADE A COMMITMENT TO THE TRIP.

7 JUROR 220 DRIVES HER HUSBAND TO WORK AND ALSO HAS
8 A SMALL CHILD. WELL, NINE YEARS OLD.

9 THE CLERK: THEY RUN A JANITORIAL SERVICE, JUDGE,
10 BOTH OF THEM WORK TOGETHER.

11 THE COURT: OKAY.

12 THE CLERK: AND I THINK SHE IS THE ONLY
13 TRANSPORTATION FOR THE TWO OF THEM.

14 THE COURT: ALL RIGHT. WHAT IS THE STATE'S
15 POSITION ON THIS?

16 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

17 THE COURT: DEFENSE?

18 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

19 THE COURT: OKAY. IT APPEARS TO BE A COMBINATION
20 OF CIRCUMSTANCES THAT COULD CAUSE THIS JUROR A
21 SUBSTANTIAL AMOUNT OF DIFFICULTY. WE'LL GO AHEAD AND
22 EXCUSE THE JUROR THEN.

23 JUROR 221 IS EXCUSED BY AGE, 223 IS NOT LOCATED,
24 224 IS EXCUSED BY AGE. JUROR 227 HAS A MEDICAL PROBLEM
25 AND HAS A DOCTOR'S STATEMENT SAYING SHE SHOULD NOT

1 SERVE ON JURY DUTY. WHAT'S THE STATE'S POSITION?

2 MR. RIDDLE: EXCUSED, YOUR HONOR.

3 THE COURT: DEFENSE?

4 MR. FLOYD: COURT'S DISCRETION.

5 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

6 228 NOT LOCATED, APPARENTLY IS IN MINNESOTA.

7 WHAT'S THE STATE'S POSITION ON THAT?

8 MR. RIDDLE: EXCUSED, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: SAME, YOUR HONOR.

11 THE COURT: ALL RIGHT. EXCUSED.

12 231 EXCUSED BY AGE, 233 AND 235 NOT LOCATED. 236

13 INDICATES SHE HAS TO CARE FOR A GRANDCHILD.

14 THE CLERK: ALSO, HER FATHER BROKE HIS LEG AND HE
15 CAN'T DRIVE FOR SIX WEEKS AND HER MOTHER DOESN'T DRIVE
16 SO SHE HAS TO SHOW CHAUFFEUR THEM AROUND.

17 THE COURT: OKAY. WHAT'S THE STATE'S POSITION ON
18 THIS?

19 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

20 THE COURT: DEFENSE?

21 MR. FLOYD: YOUR HONOR, WE DON'T THINK THAT'S A
22 SUFFICIENT REASON TO EXCUSE THE JUROR.

23 THE COURT: THE JUROR SAYS SHE WOULD HAVE TO BRING
24 THE GRANDSON WITH HER, BECAUSE SHE WATCHES HIM 7:30 TO
25 5:00. DOES SHE SAY WHY SHE WATCHES THE GRANDSON, MADAM

1 CLERK?

2 THE CLERK: NO, SIR. "DUE TO THE FACT I WATCH MY
3 GRANDSON EVERY DAY FROM 7:30 TO 5:00 AND WOULD HAVE TO
4 BRING HIM WITH ME." SHE ALSO SAYS THAT SHE MAY HAVE TO
5 GO BECAUSE THE FATHER BROKE HIS FOOT, THE MOTHER DOES
6 NOT DRIVE, AND SHE MAY NOT EVEN BE HERE AT THIS TIME
7 BECAUSE SHE MAY HAVE HAD TO GO TO FLORIDA TO TAKE CARE
8 OF HIM FOR SEVERAL WEEKS.

9 THE COURT: ALL RIGHT. OKAY. WELL, THE PROBLEM
10 IS THERE'S A LOT TENTATIVE WITH ALL THAT. WHAT I'M
11 GOING TO DO IS DENY IT AT THIS POINT. WHAT WE MAY HAVE
12 LATER ON IS HER TESTIMONY AND SHE CAN COME IN AND
13 CLARIFY IT SOME FOR US, BUT FOR NOW WE'LL HAVE TO DENY
14 IT.

15 THE CLERK: OKAY.

16 THE COURT: JURORS 238, 241, 242, AND 243 ARE
17 EXCUSED -- ARE NOT LOCATED, RATHER. 244 INDICATES WORK
18 PROBLEMS. IT SAYS HE WILL BE DRAWING SOCIAL SECURITY
19 AND CAN'T AFFORD TO MISS WORK. WHAT'S THE STATE'S
20 POSITION ON THIS JUROR?

21 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

22 THE COURT: DEFENSE?

23 MR. FLOYD: YOUR HONOR, WE DON'T FEEL LIKE THAT
24 EXCUSE IS SUFFICIENT TO SATISFY THE --

25 THE COURT: YEAH, I'M GOING TO HAVE TO DENY IT ON

1 THIS JUROR. SHE APPARENTLY IS NOT MARRIED AND HER
2 CHILDREN ARE ALL IN THEIR 30'S. I'LL HAVE TO DENY THIS
3 ONE THEN. MADAM CLERK, IF YOU COULD NOTIFY HER.

4 THE CLERK: YES, SIR.

5 THE COURT: 245 INDICATES SHE IS A RICHLAND COUNTY
6 RESIDENT AND -- WERE YOU ABLE TO GET A DRIVER'S
7 LICENSE?

8 THE CLERK: JUDGE, WE GOT A COPY OF HER PHONE
9 BILL.

10 THE COURT: NEXT BEST THING.

11 WHAT'S THE STATE'S POSITION?

12 MR. RIDDLE: SHE'S EXEMPT, YOUR HONOR.

13 THE COURT: DEFENSE?

14 MR. FLOYD: EXEMPT, YOUR HONOR.

15 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR
16 THEN.

17 JUROR 246 EXCUSED BY AGE, 247 IS THE CAREGIVER OF
18 HER HUSBAND AND HAS RELIGIOUS PROBLEMS. WHAT'S THE
19 STATE'S POSITION ON THIS?

20 MR. RIDDLE: YOUR HONOR, THAT'S IN THE COURT'S
21 DISCRETION.

22 THE COURT: DEFENSE?

23 MR. FLOYD: YOUR HONOR, WE DON'T FEEL THAT'S A
24 SUFFICIENT REASON TO EXCUSE THE JUROR.

25 THE COURT: ALL RIGHT. AT THIS POINT I'M GOING TO

1 HAVE TO DENY THE JUROR'S REQUEST. WHEN SHE COMES IN,
2 DEPENDING ON WHAT HER TESTIMONY IS, SHE MAY QUALIFY. I
3 THINK SHE ALSO DID NOT HAVE A DOCTOR'S STATEMENT
4 REGARDING THE HUSBAND. IF SHE COULD GET A DOCTOR'S
5 STATEMENT ON IT, MADAM CLERK, WE CAN TAKE ANOTHER LOOK
6 AT IT.

7 THE CLERK: YES, SIR.

8 THE COURT: OKAY, 248 AND 249 WERE NOT LOCATED.
9 250 WAS LOCATED, BUT JUST DIDN'T RESPOND; IS THAT
10 CORRECT?

11 THE CLERK: YES, SIR, JUDGE. THIS JUROR WAS
12 SERVED WITH THE NOTICE BY THE SHERIFF'S DEPARTMENT, BUT
13 FAILED TO RETURN ANY OF THE INFORMATION, AND WE HAVE
14 SENT SOMEONE BACK OUT THERE AGAIN TO TRY AND FIND OUT
15 WHY.

16 THE COURT: OKAY. ALL RIGHT. WE'LL LEAVE THIS
17 JUROR AS SHE IS FOR THE TIME BEING.

18 251 AND 252 ARE NOT LOCATED. 254 INDICATES BEING
19 A RESIDENT OF RICHLAND COUNTY AND WE HAVE A DRIVER'S
20 LICENSE. STATE'S POSITION?

21 MR. RIDDLE: EXCUSED, YOUR HONOR.

22 THE COURT: DEFENSE POSITION?

23 MR. FLOYD: EXCUSED.

24 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

25 255 IS EXCUSED BY AGE, 256 HAS A DOCTOR'S

1 STATEMENT NOTING A HEARING IMPAIRMENT. SAID IT WOULD
2 MAKE IT IMPOSSIBLE FOR HER TO PARTICIPATE IN THE
3 JURY -- WHAT'S THE STATE'S POSITION?

4 MR. RIDDLE: SHE SHOULD BE EXCUSED.

5 THE COURT: DEFENSE?

6 MR. FLOYD: COURT'S DISCRETION.

7 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR
8 BASED ON THE DOCTOR'S STATEMENT.

9 261 IS NOT LOCATED, 262 EXCUSED BY AGE. NUMBERS
10 263, 264, AND 265 ARE NOT LOCATED. 266 INDICATES
11 HAVING A FIVE WEEK OLD BABY. APPARENTLY SHE HAS
12 CHANGED HER NAME, AND IS NOW MARRIED. WHAT'S THE
13 STATE'S POSITION?

14 MR. RIDDLE: SHE PROPERLY FITS THE STATUTE, YOUR
15 HONOR.

16 THE COURT: DEFENSE?

17 MR. FLOYD: WE AGREE, YOUR HONOR.

18 THE COURT: ALL RIGHT. SHE'LL BE EXCUSED.

19 268 INDICATES HE IS NOW A RESIDENT OF RICHLAND
20 COUNTY AND HAS PRESENTED A DRIVER'S LICENSE. STATE'S
21 POSITION?

22 MR. RIDDLE: EXCUSED, YOUR HONOR.

23 THE COURT: DEFENSE?

24 MR. FLOYD: EXCUSED.

25 THE COURT: ALL RIGHT. EXCUSED. 269 IS NOT

1 LOCATED, 270 NOT LOCATED, 272 EXCUSED BY AGE. 273
2 APPARENTLY IS DECEASED. ANY DISPUTE FROM THE STATE ON
3 THAT?

4 MR. RIDDLE: NO, SIR.

5 THE COURT: DEFENSE?

6 MR. FLOYD: NO, YOUR HONOR.

7 THE COURT: ALL RIGHT. 275 INDICATES A DOCTOR'S
8 EXCUSE. THE DOCTOR AGAIN INDICATES SHE HAS -- WE HAVE
9 MORE PEOPLE WITH HEARING PROBLEMS THIS TIME, THOUGH.
10 WHILE HE DIDN'T SAY THAT SHE SHOULD NOT BE ON A JURY,
11 HE DID INDICATE A PRETTY SEVERE PROBLEM WITH HEARING.
12 WHAT'S THE STATE'S POSITION?

13 MR. RIDDLE: NO OBJECTION, YOUR HONOR.

14 THE COURT: DEFENSE?

15 MR. FLOYD: YOUR HONOR, WE MOVE -- THE MEDICAL
16 DOCTOR DOESN'T REALLY SAY SHE CAN'T SERVE AS A JUROR.
17 IT JUST SAYS SHE HAS SOME PROBLEMS WITH HER HEARING.
18 I'M NOT SURE IF SHE'S QUALIFIED OR NOT.

19 THE COURT: ALL RIGHT. WELL, BASED ON THE
20 DOCTOR'S STATEMENT I'M GOING TO EXCUSE HER. IT APPEARS
21 THAT SHE HAS A PRETTY -- THAT IT APPEARS TO BE A PRETTY
22 SUBSTANTIAL HEARING PROBLEM. IN FACT, HE INDICATES
23 SHE'S HAD A HEARING LOSS ALL OF HER LIFE. WE'LL EXCUSE
24 THE JUROR.

25 276 IS EXCUSED BY AGE, 277 IS NOT LOCATED, 278 HAS

1 A FAMILY REUNION.

2 THE CLERK: YES, SIR. WE ALSO HAVE CONFIRMATION
3 PAPERS FROM THE JUROR ON THE AIRLINE FLIGHTS AND THAT
4 KIND OF THING.

5 THE COURT: OKAY. I'M SORRY. WE HAVE WHAT? I
6 COULDN'T HEAR YOU.

7 THE CLERK: WE HAVE CONFIRMATION ON AIRLINE
8 FLIGHTS.

9 THE COURT: OH. OKAY.

10 THE CLERK: WE HAVE THOSE ATTACHED ALSO.

11 THE COURT: THAT WAS ONE OF THOSE THROUGH PRICE
12 LINE?

13 THE CLERK: YES, IT LOOKS LIKE IT, JUDGE.

14 THE COURT: THAT'S THE ONE WHERE SHATNER DOES
15 THOSE COMMERCIALS WHILE HE TALKS WHILE THEY PLAY?

16 THE CLERK: UH-HUH.

17 THE COURT: WHAT'S THE STATE'S POSITION?

18 MR. RIDDLE: YOUR HONOR, THAT FITS YOUR POLICY.

19 THE COURT: DEFENSE?

20 MR. FLOYD: IT'S IN THE COURT'S DISCRETION.

21 THE COURT: WE'LL EXCUSE THE JUROR. THEY HAVE A
22 COMMITMENT TO IT.

23 281 IS NOT LOCATED. 282 INDICATES A FELONY
24 CONVICTION. THERE IS A SENTENCING SHEET SIGNED BY
25 JUDGE KEESLEY WHERE HE GOT TWO YEARS, SO THAT WOULD

2301

1 EXCUSE THE JUROR THEN. LET'S SEE. THAT WAS 282, I
2 THINK.

3 THE CLERK: YES, SIR.

4 THE COURT: 283 INDICATES SHE IS A STUDENT IN
5 SUMMER SCHOOL. WHAT'S THE STATE'S POSITION?

6 MR. RIDDLE: SHE WOULD BE EXEMPT, YOUR HONOR.

7 THE CLERK: DEFENSE?

8 MR. FLOYD: COURT'S DISCRETION.

9 THE COURT: ALL RIGHT. EXCUSED.

10 285 INDICATES BEING A RESIDENT OF RICHLAND COUNTY.
11 WE ALSO HAVE THE NEXT BEST THING, WHICH IS AN INSURANCE
12 COMPANY FORM. WHAT'S THE STATE'S POSITION?

13 MR. RIDDLE: EXCUSED.

14 THE COURT: DEFENSE?

15 MR. FLOYD: EXCUSED.

16 THE COURT: ALL RIGHT. THE JUROR IS EXCUSED.

17 NUMBER 286 IS EXCUSED BY AGE, 287 INDICATES
18 CONFIRMATION OF RESERVATIONS TO DISNEY WORLD FOR
19 VACATION. WHAT'S THE STATE'S POSITION?

20 MR. RIDDLE: EXCUSED.

21 THE COURT: DEFENSE?

22 MR. FLOYD: COURT'S DISCRETION.

23 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

24 288 INDICATES WORK PROBLEMS. APPARENTLY THERE'S A
25 LETTER.

1 THE CLERK: YES, SIR. SOMEBODY ELSE IN THAT
2 DEPARTMENT THAT NORMALLY DOES SOMETHING REAL IMPORTANT
3 IS GOING TO BE ON VACATION AND IT FALLS ON THIS JUROR
4 TO DO THAT WHILE THEY ARE ON VACATION AND THEY'RE GOING
5 FROM THE 10TH TO THE 21ST.

6 THE COURT: OKAY. WHAT'S THE STATE'S POSITION?

7 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

8 THE COURT: DEFENSE?

9 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

10 THE COURT: ALL RIGHT. THAT AGAIN IS OUTSIDE THE
11 REALM OF NORMAL WORK PROBLEMS, SO WE'LL ALLOW THE JUROR
12 TO BE EXCUSED.

13 290 IS NOT LOCATED. NUMBER 291 INDICATES MEDICAL
14 PROBLEMS AND HAS A DOCTOR'S STATEMENT. THE DOCTOR SAID
15 SHE SHOULD NOT PARTICIPATE IN JURY DUTY. WHAT'S THE
16 STATE'S POSITION?

17 MR. RIDDLE: NO OBJECTION, YOUR HONOR.

18 THE COURT: DEFENSE?

19 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

20 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR
21 THEN. I THINK THAT'S A VALID REASON.

22 292 INDICATES A CHILD TEN MONTHS OLD. WHAT'S THE
23 STATE'S POSITION?

24 MR. RIDDLE: SHE FITS THE STATUTE, YOUR HONOR.

25 THE COURT: DEFENSE?

1 MR. FLOYD: YES, YOUR HONOR, I THINK THAT FITS THE
2 STATUTE.

3 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.
4 298 -- 296 RATHER, IS EXCUSED BY AGE.

5 298 INDICATES SHE IS MOVING TO GERMANY, THAT HER
6 HUSBAND IS IN THE MILITARY.

7 THE CLERK: AND WE DO HAVE A COPY OF THE ORDERS,
8 JUDGE.

9 THE COURT: RIGHT. OKAY. APPARENTLY SHE'S
10 ALREADY MOVED.

11 THE CLERK: YES, SIR.

12 THE COURT: WHAT'S THE STATE'S POSITION?

13 MR. RIDDLE: SHE'S EXCUSED.

14 THE COURT: DEFENSE?

15 MR. FLOYD: EXCUSED, YOUR HONOR.

16 THE COURT: ALL RIGHT. EXCUSED.

17 JUROR 299 GETS NERVOUS IN THE COURTHOUSE. OH,
18 THAT MIGHT APPLY TO ME SOMETIMES.

19 LET'S SEE, SHE SAYS "BECAUSE EVER SINCE MY
20 DIVORCE, BEING AROUND A COURTHOUSE MAKES ME VERY
21 NERVOUS."

22 WHAT'S THE STATE'S POSITION ON THIS JUROR?

23 MR. RIDDLE: I DON'T KNOW THAT THAT'S GOING TO
24 MAKE IT, JUDGE, BUT WE MIGHT FIND OUT MORE AT VOIR
25 DIRE.

1 THE COURT: I KNOW. WHAT'S THE DEFENSE POSITION?

2 MR. FLOYD: WELL, WE AGREE THAT'S PROBABLY GOING
3 TO COME UNDER THE STATUTE.

4 THE COURT: I'LL HAVE TO RELUCTANTLY DENY THE
5 REQUEST. MADAM CLERK, ARE YOU GOING TO BE THE ONE TO
6 TELL THE JUROR THEY HAVE TO COME?

7 THE CLERK: NO, SIR. I'M GOING TO LET TAMMY TO DO
8 THAT.

9 THE COURT: OKAY.

10 THE CLERK: PASS THE BUCK.

11 THE COURT: ALL RIGHT.

12 NUMBER 300 INDICATES SHE IS A RESIDENT OF ILLINOIS
13 AND HAS SENT THE NEXT NEXT BEST THING, WHICH IS A GAS
14 STATEMENT. WHAT'S THE STATE'S POSITION?

15 MR. RIDDLE: EXCUSED, YOUR HONOR.

16 THE COURT: ALL RIGHT. DEFENSE?

17 MR. FLOYD: EXCUSED, YOUR HONOR.

18 THE COURT: ALL RIGHT. JUROR 301 HAS
19 RESERVATIONS FOR -- THERE ARE A LOT OF REUNIONS GOING
20 ON, THEY HAVE A REUNION. I GUESS IT'S ABOUT THAT TIME.
21 WHAT'S THE STATE'S POSITION?

22 MR. RIDDLE: EXCUSED, YOUR HONOR.

23 THE COURT: DEFENSE?

24 MR. FLOYD: WAS THERE ANY DOCUMENTATION ON THAT
25 ONE, YOUR HONOR?

1 THE COURT: I DON'T SEE ANY.

2 THE CLERK: JUST HER LETTER AND HER NOTARIZED
3 STATEMENT SAYING SHE HAS TWO FAMILY REUNIONS, ONE IN
4 JULY AND ONE IN AUGUST AND THAT SHE'S DRIVING UP AND
5 STAYING WITH FAMILY.

6 THE COURT: OKAY. WHAT'S THE STATE'S -- DEFENSE
7 POSITION ON THAT?

8 THE CLERK: WE MIGHT BE ABLE TO GET GRANDMA TO
9 SEND A STATEMENT SAYING SHE'S COMING.

10 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

11 THE COURT: ALL RIGHT. SHE PRESENTS THIS IN A
12 SWORN STATEMENT, SO I'LL ACCEPT THAT AND WE'LL EXCUSE
13 THE JUROR THEN.

14 JUROR 302 INDICATES HE IS WORKING IN MISSISSIPPI,
15 AND WANTS TO --

16 THE CLERK: HE'S BEEN THERE SINCE JANUARY OF '99,
17 JUDGE, OR BEEN WITH THE COMPANY SINCE JANUARY OF '99
18 AND HE'S GOING TO BE WORKING THERE. THEY HAVE CELL
19 TOWERS BEING BUILT THERE.

20 THE COURT: RIGHT. HE HAS A LETTER FROM HIS
21 COMPANY.

22 WHAT'S THE STATE'S POSITION?

23 MR. RIDDLE: HE'S EXCUSED, YOUR HONOR.

24 THE COURT: DEFENSE?

25 MR. FLOYD: NO OBJECTION, YOUR HONOR.

2306

1 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

2 303 INDICATES THAT SHE IS A RESIDENT OF
3 CHARLESTON, AND SHE APPARENTLY SAYS THAT "I APPEARED
4 BEFORE SOMEBODY."

5 THE CLERK: YES, SIR. WE SAW THAT.

6 THE COURT: WE ALSO NOW HAVE THE FIFTH BEST THING
7 WHICH IS A VOIDED CHECK INDICATING A CHARLESTON
8 ADDRESS. SHE LIVES ON STRAIGHT STREET. OKAY. WHAT'S
9 THE STATE'S POSITION ON THIS JUROR?

10 MR. RIDDLE: SHE'S EXCUSED.

11 THE COURT: DEFENSE?

12 MR. FLOYD: SHE'S EXCUSED.

13 THE COURT: OKAY. EXCUSED. 306 IS NOT FOUND, 308
14 INDICATES SHE IS A STUDENT IN THE SUMMER TERM,
15 APPARENTLY THE CLERK HAS RECEIVED DOCUMENTS INDICATING
16 THAT.

17 THE CLERK: YES, SIR.

18 THE COURT: WHAT'S THE STATE'S POSITION?

19 MR. RIDDLE: EXEMPT, YOUR HONOR.

20 THE COURT: DEFENSE?

21 MR. FLOYD: COURT'S DISCRETION.

22 THE COURT: SHE'S WORKING FOR COACH HOLTZ, SO I
23 ASSUME SHE HAS HER HANDS FULL AT THIS POINT. I'M SURE
24 YOU'LL AGREE, MR. RIDDLE. WE'LL EXCUSE THE JUROR.

25 NEXT IS JUROR NUMBER 309, INDICATING SHE HAS A

1 SMALL CHILD, A ONE YEAR OLD. WHAT'S THE STATE'S
2 POSITION?

3 MR. RIDDLE: SHE WOULD BE EXEMPT.

4 THE COURT: DEFENSE?

5 MR. FLOYD: AGREED, YOUR HONOR.

6 THE COURT: ALL RIGHT. EXCUSED.

7 311 NOT LOCATED, 313 IS EXCUSED BY AGE, 317 HAS A
8 VACATION PLANNED AND HAS SENT A COPY OF HER AIRLINE
9 TICKETS WHICH HAVE ALREADY BEEN PURCHASED. WHAT'S THE
10 STATE'S POSITION?

11 MR. RIDDLE: EXCUSED.

12 THE COURT: DEFENSE?

13 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

14 THE COURT: WE'LL EXCUSE THE JUROR.

15 318 IS EXCUSED BY VIRTUE OF AGE. 320 INDICATES
16 MEDICAL PROBLEMS, TAKING CARE OF HER 89 YEAR OLD
17 FATHER-IN-LAW, AND APPARENTLY HAS HER OWN PROBLEMS ALSO
18 AS INDICATED BY -- NOW, THE DOCTOR DOESN'T SAY SHE
19 SHOULD BE EXCUSED, BUT INDICATES THAT SHE HAS
20 APPARENTLY SEVERE ARTHRITIS PROBLEMS THAT COULD BE
21 HARMFUL TO HER TO SIT FOR EXTENDED PERIODS OF TIME.
22 WHAT'S THE STATE'S POSITION ON THAT?

23 MR. RIDDLE: YOUR HONOR, WE HAVE NO OBJECTION.

24 THE COURT: DEFENSE?

25 MR. FLOYD: NO OBJECTION, YOUR HONOR.

1 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR FOR
2 MEDICAL REASONS.

3 323 ALSO INDICATES THE SAME THING, RHEUMATOID
4 ARTHRITIS AND HAS A DOCTOR'S STATEMENT INDICATING SHE
5 SHOULD NOT SERVE AS A JUROR. WHAT'S THE STATE'S
6 POSITION ON THAT?

7 MR. RIDDLE: EXCUSED, YOUR HONOR.

8 THE COURT: DEFENSE?

9 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

10 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

11 324 HAS A VACATION PLANNED. HAVE THEY SENT
12 ANYTHING ELSE, MADAM CLERK?

13 THE CLERK: JUDGE, THEY'RE DRIVING DOWN AND
14 STAYING WITH FAMILY.

15 THE COURT: WHAT'S THE STATE'S POSITION?

16 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

17 THE COURT: DEFENSE?

18 MR. FLOYD: THE ONLY CONCERN IS, LOOKING AT WHAT
19 WE HAVE, IT'S REALLY NOT SIGNED BY THE JUROR.

20 THE CLERK: THE AFFIDAVIT WAS DONE ON THE PHONE
21 WITH MS. BREWER.

22 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

23 THE COURT: OKAY. COUNSEL, AT THIS POINT WHAT I'M
24 GOING TO DO IS DENY THE REQUEST, BUT MADAM CLERK, WHAT
25 YOU CAN DO IS CONTACT HER. IF THEY -- IT APPEARS SHE'S

1 A TEACHER --

2 THE CLERK: YES, SIR.

3 THE COURT: BUT IF THERE'S ANY OTHER KIND OF
4 FINANCIAL OR COMMITMENT WITH VACATION TIME OR ANYTHING,
5 WE CAN TAKE A LOOK AT IT. THERE MAY BE SOME REASON --
6 IN ESSENCE, I GUESS THE ISSUE IS WHETHER OR NOT SHE CAN
7 CHANGE IT OR NOT. IF THERE'S ANY REASON SHE CAN'T
8 CHANGE IT, WE CAN TAKE A LOOK AT THAT.

9 THE CLERK: OKAY.

10 THE COURT: ALL RIGHT. THANK YOU. 326 IS NOT
11 LOCATED, 328 IS A RESIDENT OF GEORGIA. WE HAVE THE
12 DRIVER'S LICENSE. STATE'S POSITION?

13 MR. RIDDLE: EXCUSED.

14 THE COURT: DEFENSE?

15 MR. FLOYD: EXCUSED, YOUR HONOR.

16 THE COURT: ALL RIGHT. EXCUSED. 330 IS EXCUSED
17 BY AGE. 331 AND 332 ARE NOT LOCATED, 334 INDICATES
18 WORK PROBLEMS.

19 THE CLERK: THAT'S 333, JUDGE.

20 THE COURT: OH, I'M SORRY. EXCUSE ME, YOU'RE,
21 RIGHT. AGAIN, 331 AND 332 ARE NOT LOCATED. I WANT TO
22 BE SURE I GOT THAT. 333 HAS THE WORK PROBLEMS, BUT I
23 THINK THAT'S ALL IT SAYS.

24 THE CLERK: YES, SIR.

25 THE COURT: HE HAS A BUMPER STICKER THAT SAYS

1 "DON'T TAKE YOUR ORGANS TO HEAVEN BECAUSE HEAVEN KNOWS
2 YOU WON'T NEED THEM." WHATEVER.

3 APPARENTLY IT'S JUST BY A PHONE CONVERSATION HE
4 SAID HE JUST STARTED A JOB WITH A TEMPORARY SERVICE; IS
5 THAT RIGHT?

6 THE CLERK: YES, SIR.

7 THE COURT: ALL RIGHT. STATE'S POSITION?

8 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. FLOYD: WE DON'T THINK THAT'S A SUFFICIENT
11 REASON, YOUR HONOR.

12 THE COURT: I AGREE. I DON'T THINK THAT'S
13 SUFFICIENT. I'LL DENY THE REQUEST.

14 335 IS EXCUSED BY AGE, 336 IS NOT LOCATED, 337 IS
15 A STUDENT AT MIDLANDS TECH AND HAS SENT HER DOCUMENTS
16 INDICATING SHE APPARENTLY IS ENROLLED -- IN FACT, SHE
17 ENROLLED ON MONDAY THE TENTH. WHAT'S THE STATE'S
18 POSITION?

19 MR. RIDDLE: EXCUSED.

20 THE COURT: DEFENSE?

21 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

22 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.
23 SHE WOULD FIT THAT.

24 340 IS NOT LOCATED, 341 INDICATES THEY HAVE A
25 VACATION PLANNED AND HAVE THEIR RESERVATIONS MADE AND

2311

1 HAVE SENT A LETTER FROM THE CONDOMINIUM AT THE BEACH
2 INDICATING THAT. WHAT'S THE STATE'S POSITION ON THAT?

3 MR. RIDDLE: THEY WOULD BE EXCUSED, YOUR HONOR.

4 THE COURT: DEFENSE?

5 MR. FLOYD: COURT'S DISCRETION.

6 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR
7 THEN SINCE THEY'VE MADE A COMMITMENT TOWARD THE TRIP.

8 342 IS NOT LOCATED, 344 INDICATES HE IS A RESIDENT
9 OF RICHLAND COUNTY AND HAS SENT HIS DRIVER'S LICENSE.
10 WHAT'S THE STATE'S POSITION ON THAT?

11 MR. RIDDLE: EXCUSED, YOUR HONOR.

12 THE COURT: DEFENSE?

13 MR. FLOYD: EXCUSED, YOUR HONOR.

14 THE COURT: ALL RIGHT. WE'LL EXCUSE THAT JUROR.

15 JUROR 345 IS EXCUSED BY VIRTUE OF AGE. 347
16 INDICATES HAVING A CLASS AT FURMAN UNIVERSITY. WAS
17 THAT DURING THE SUMMER ALSO, MADAM CLERK?

18 THE CLERK: YES, SIR.

19 THE COURT: ALL RIGHT.

20 THE CLERK: IT STARTS JULY 10TH THROUGH JULY 21ST.

21 THE COURT: ALL RIGHT. WHAT'S THE STATE'S
22 POSITION ON THAT?

23 MR. RIDDLE: THEY WOULD BE EXEMPT, YOUR HONOR.

24 THE COURT: DEFENSE?

25 MR. FLOYD: COURT'S DISCRETION.

1 THE COURT: WE'LL EXCUSE THE JUROR.

2 349 AND 350 ARE NOT LOCATED.

3 THE CLERK: JUDGE, 350 WAS -- THAT SHOULD SAY
4 AFFIDAVIT OF SERVICE. 350 WAS HAND SERVED --

5 THE COURT: OKAY.

6 THE CLERK: -- BUT FAILED TO RETURN ANYTHING.
7 WE'VE SENT SOMEONE BACK OUT THERE TO TRY TO LOCATE THAT
8 PERSON.

9 THE COURT: OKAY. OBVIOUSLY, WE'LL NOT EXCUSE
10 THAT JUROR THEN.

11 351 IS EXCUSED BY VIRTUE OF AGE, JUROR 354
12 INDICATES A MEDICAL PROBLEM. APPARENTLY HAS SOME
13 SURGERY SCHEDULED?

14 THE CLERK: YES, SIR.

15 THE COURT: THAT'S BEEN CONFIRMED WITH THE DOCTOR.
16 THE SURGERY IS SCHEDULED ON AUGUST 1ST. DID SHE
17 INDICATE ANYTHING, MADAM CLERK, THAT WOULD MAKE HER
18 UNAVAILABLE BEFORE THAT?

19 THE CLERK: I BELIEVE SHE STATED DUE TO THE
20 SURGERY IT WOULD BE HARD FOR HER TO TAKE TIME OFF
21 PREVIOUS TO WORK.

22 THE COURT: I SEE. OKAY. SHE WORKS IN A
23 PHARMACY, I THINK.

24 THE CLERK: YES, SIR.

25 THE COURT: WHAT'S THE STATE'S POSITION ON THAT?

2313

1 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR. IT
2 DOES SEEM LIKE AN UNUSUAL WORK PROBLEM.

3 THE COURT: DEFENSE?

4 MR. FLOYD: YOUR HONOR, WE DON'T FEEL THERE'S BEEN
5 SUFFICIENT REASON GIVEN TO EXCUSE HER. I'D ASK THAT
6 SHE BE PRESENT.

7 THE COURT: I UNDERSTAND. THAT IS A FAIRLY CLOSE
8 CALL. I THINK IT'S OUT OF THE ORDINARY, BUT SUFFICIENT
9 TO ALLOW THE JUROR TO BE EXCUSED. I'M GOING TO GO
10 AHEAD AND EXCUSE THE JUROR WHAT WITH THE SURGERY.
11 AGAIN, I THINK IT INDICATED SHE'D BE OUT OF WORK FOR
12 SIX WEEKS AND CERTAINLY I UNDERSTAND SHE NEEDS TO GET
13 HER WORK STRAIGHTENED OUT BEFORE THAT. WE'LL EXCUSE
14 THE JUROR.

15 356 IS NOT LOCATED. 357 INDICATES WORK PROBLEMS.
16 IT SAYS HE'S SHARING IN THE CUSTODY OF THE CHILDREN,
17 HAS A NEW JOB IN THE LAST TWO WEEKS, AND PAYS CHILD
18 SUPPORT.

19 WHAT'S THE STATE'S POSITION?

20 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

21 THE COURT: DEFENSE?

22 MR. FLOYD: YOUR HONOR, WE DON'T THINK IT'S A
23 SUFFICIENT EXCUSE TO AVOID SERVICE.

24 THE COURT: AT THIS POINT I'M GOING TO DENY THE
25 REQUEST. A LITTLE LATER ON THERE MAY BE SOME OTHER --

1 WE'LL GIVE HIM A CHANCE TO -- HE'LL ALSO BE ABLE TO
2 TESTIFY LATER. BUT FOR NOW WE'LL DENY IT.

3 THE FOLLOWING ARE NOT LOCATED, 358, 359, 364, AND
4 367. NOW, 374 INDICATES CAREGIVER PROBLEMS. SHE IS
5 THE CAREGIVER TO AN 80 YEAR OLD LADY WHO HAS NUMEROUS
6 DISEASES, AND I BELIEVE SHE HAS A DOCTOR'S STATEMENT
7 INDICATING THAT.

8 WHAT'S THE STATE'S POSITION ON THAT?

9 MR. RIDDLE: YOUR HONOR, WE HAVE NO OBJECTION.

10 THE COURT: DEFENSE?

11 MR. FLOYD: YOUR HONOR, IS THIS -- THIS SHOWS A
12 1900 BIRTHDAY; IS THAT CORRECT?

13 THE COURT: WELL, SHE SAYS SHE'S -- ACCORDING TO
14 THE SHEET, IT SAYS SHE'S 57 YEARS OLD.

15 THE CLERK: YOU'LL HAVE TO ASK THE ELECTION
16 COMMISSION.

17 MR. FLOYD: OKAY.

18 THE CLERK: IT ALSO DOES SAY, JUDGE, IF SHE SERVES
19 IT WOULD BE NECESSARY FOR THE 80 YEAR OLD WOMAN TO
20 ACCOMPANY HER AND SHE WILL REQUIRE WHEELCHAIR
21 ASSISTANCE AT THE DOOR.

22 THE COURT: OKAY. I MISSED THAT.

23 THE CLERK: IT'S ON THE BACK SIDE.

24 MR. FLOYD: COURT'S DISCRETION.

25 THE COURT: OKAY. I'LL EXCUSE THE JUROR.

1 376 INDICATES SHE HAS A CONTINUING EDUCATION CLASS
2 IN NORTH CAROLINA FROM JUNE 9TH THROUGH THE 15TH AND
3 SHE HAS SENT ALONG DOCUMENTS APPARENTLY INDICATING SHE
4 IS COMMITTED TO THAT. WHAT'S THE STATE'S POSITION?

5 MR. RIDDLE: NO OBJECTION, YOUR HONOR.

6 THE COURT: DEFENSE? APPARENTLY SHE'S ALREADY
7 PAID HER TUITION, FROM WHAT I GATHER.

8 MR. FLOYD: COURT'S DISCRETION, YOUR HONOR.

9 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

10 380 INDICATES HE IS A RESIDENT OF RICHLAND COUNTY
11 AND SENDS ALONG ONE OF THE REALLY BEST VERIFICATIONS, A
12 STATEMENT FROM THE INTERNAL REVENUE SERVICE. WHAT'S
13 THE STATE'S POSITION ON THAT?

14 MR. RIDDLE: HE IS DISQUALIFIED, YOUR HONOR.

15 THE COURT: DEFENSE?

16 MR. FLOYD: EXEMPT, YOUR HONOR.

17 THE COURT: ALL RIGHT. HE'S EXCUSED.

18 383 SENDS A DOCTOR'S STATEMENT INDICATING THAT SHE
19 HAS PRENATAL TESTING DURING THAT PARTICULAR WEEK FOR
20 THE -- IT SAYS THE TENTH WEEK OF PREGNANCY.

21 WHAT'S THE STATE'S POSITION?

22 MR. RIDDLE: COURT'S DISCRETION, YOUR HONOR.

23 THE COURT: DEFENSE?

24 MR. FLOYD: COURT'S DISCRETION.

25 THE COURT: IS THAT SOMETHING THAT'S NORMALLY

1 COMMITTED TO A PARTICULAR TIME OR IS THAT SOMETHING SHE
2 CAN ADJUST?

3 THE CLERK: WELL, JUDGE, IT JUST DEPENDS ON WHAT
4 KIND OF TEST IT IS. IT LOOKS LIKE IT HAS TO BE DONE
5 DURING HER TENTH WEEK AND THAT TENTH WEEK HAPPENS TO BE
6 THE WEEK OF JULY 10TH.

7 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR
8 THEN.

9 385 HAS A FELONY CONVICTION, SAYS SHE HAS A
10 CONVICTION FOR POSSESSION OF MARIJUANA OVER AN OUNCE.
11 WHAT'S THE STATE'S POSITION?

12 MR. RIDDLE: NO OBJECTION, YOUR HONOR.

13 THE COURT: DEFENSE?

14 MR. FLOYD: YOUR HONOR, I'M NOT SURE THAT'S A
15 FELONY OR THAT IT CARRIES OVER A YEAR.

16 THE COURT: YES, I WAS JUST THINKING, ISN'T THAT
17 SIX MONTHS MAX?

18 MR. RIDDLE: IF THE OFFENSE WAS --

19 THE COURT: JUST POSSESSION OF MARIJUANA OVER AN
20 OUNCE.

21 MR. RIDDLE: YOUR HONOR, WE CAN ALWAYS SORT IT OUT
22 WHEN THEY COME IN.

23 THE COURT: RIGHT, THAT'S TRUE. ALL RIGHT, WE'LL
24 DENY THAT ON THIS JUROR, MADAM CLERK. WE NEED TO
25 ADVISE HER TO BE HERE.

1 THE CLERK: OKAY.

2 THE COURT: 386 INDICATES THAT SHE IS A RESIDENT
3 OF GREENVILLE COUNTY AND SENDS HER DRIVER'S LICENSE.
4 STATE?

5 MR. RIDDLE: EXEMPT.

6 THE COURT: DEFENSE?

7 MR. FLOYD: EXEMPT.

8 THE COURT: ALL RIGHT. I FIND SHE IS EXEMPT.

9 387 IS EXCUSED BY VIRTUE OF AGE. 391 INDICATES
10 WORK PROBLEMS. HE OWNS A RESTAURANT. IF HE'S OUT,
11 THAT WILL COST HIM MONEY, OR AT LEAST THAT IS HIS
12 INDICATION. IT SEEMS THAT WOULD BE A PROBLEM AT ANY
13 TIME, I GUESS. WHAT'S THE STATE'S POSITION ON THAT?

14 MR. RIDDLE: COURT'S DISCRETION ON THAT.

15 THE COURT: DEFENSE?

16 MR. FLOYD: YOUR HONOR, WE DON'T THINK THAT'S A
17 SUFFICIENT REASON TO BE EXCUSED.

18 THE COURT: ALL RIGHT. I TEND TO AGREE WITH THAT.
19 I'M GOING TO DENY THE REQUEST, AND WE'RE GOING TO
20 ADVISE THE JUROR THAT HE NEEDS TO BE HERE.

21 392 IS EXCUSED BY AGE, 393 HAS SENT A DOCTOR'S
22 STATEMENT INDICATING SHE SHOULD BE EXCUSED DUE TO FOOT
23 SURGERY. IT SAYS SHE'S NON-WEIGHT BEARING. WHAT'S THE
24 STATE'S POSITION?

25 MR. RIDDLE: SHE SHOULD BE EXCUSED.

1 THE COURT: OKAY. DEFENSE?

2 MR. FLOYD: YOUR HONOR, WE'D JUST NOTE THAT THE
3 DOCTOR'S STATEMENT WAS WRITTEN JUNE 6TH, SO WE COULD
4 ASSUME THAT HER CONDITION HAS DRAMATICALLY IMPROVED
5 SINCE THAT TIME AND THAT SHE COULD BE ACCOMMODATED BY
6 THE COURT IF SHE'S IN A WHEELCHAIR.

7 THE COURT: ALL RIGHT. I DON'T KNOW THAT THERE'S
8 ANY REASON I CAN ASSUME THAT. I'LL ACCEPT THE DOCTOR'S
9 STATEMENT AND GO AHEAD AND EXCUSE THE JUROR.

10 395 IS EXCUSED BY AGE, 398 INDICATES SHE HAS A
11 CHILD UNDER THE AGE OF SEVEN, SPECIFICALLY AGE FIVE.
12 WHAT'S THE STATE'S POSITION ON THAT?

13 MR. RIDDLE: FITS THE STATUTE.

14 THE COURT: DEFENSE?

15 MR. FLOYD: YOUR HONOR, WE AGREE.

16 THE COURT: ALL RIGHT. WE'LL EXCUSE THE JUROR.

17 APPARENTLY RECORDS INDICATE JUROR 399 IS DECEASED.
18 ANY DISPUTE BY THE STATE?

19 MR. RIDDLE: NO, SIR.

20 THE COURT: DEFENSE?

21 MR. FLOYD: NO, YOUR HONOR.

22 THE COURT: ALL RIGHT. COUNSEL, THAT CONCLUDES
23 THE MATTERS REGARDING JURY EXCUSES. LET ME GO BACK AND
24 NOTE IF I MIGHT THAT, AS I UNDERSTAND IT, THE FOLLOWING
25 WERE DENIED AND I WON'T GO OVER ALL THE OTHERS, BUT

1 JUST THOSE WE DENIED WHO WE INDICATE SHOULD BE HERE.

2 LET ME READ OUT THE NUMBERS AND PLEASE CORRECT ME
3 IF I MADE A MISTAKE. THE FOLLOWING, AS I UNDERSTAND,
4 WILL BE TOLD TO GO AHEAD AND APPEAR: NUMBER 13, NUMBER
5 44, NUMBER 104, NUMBER 121, NUMBER 130, NUMBER 156 --

6 THE CLERK: JUDGE, WE MISSED --

7 THE COURT: 161.

8 THE CLERK: YOU MISSED NUMBER 142.

9 THE COURT: I DID? DID I EXCUSE THAT ONE?

10 THE CLERK: NO, SIR.

11 MR. RIDDLE: 143, YOUR HONOR?

12 THE CLERK: WE WERE GOING TO REVISIT THAT ONE.

13 MR. RIDDLE: OH.

14 THE COURT: RIGHT. WE'RE GOING TO -- RIGHT. ALL
15 RIGHT. 142 THEN, 156, AND 155 WE'RE GOING TO CHECK
16 BACK ON LATER ON?

17 THE CLERK: YES, SIR.

18 THE COURT: 156, AGAIN WAS DENIED. 161, 167, 177,
19 199, 236, 244, 247, 324, 350, 385, AND 391.

20 THE CLERK: ALSO, 299, JUDGE.

21 THE COURT: OKAY. THE ONE -- OH, 299. THAT'S
22 RIGHT. I DENIED THAT. THAT'S THE ONE THAT WAS NERVOUS
23 IN THE COURTHOUSE.

24 THE CLERK: YES, SIR.

25 THE COURT: OKAY. ANY OTHERS THEN FROM THE STATE?

1 MR. RIDDLE: NO, SIR, YOUR HONOR.

2 THE COURT: DEFENSE?

3 MR. FLOYD: NO, SIR, YOUR HONOR.

4 THE COURT: ALL RIGHT. ANY OTHER MATTERS TO TAKE
5 UP AT THIS POINT REGARDING JURY MATTERS? I KNOW THE
6 CLERK HAS A FEW THINGS TO CHECK INTO, BUT OTHER THAN
7 THAT ANYTHING ELSE TO TAKE UP FROM THE STATE?

8 MR. RIDDLE: NOT FROM THE STATE, YOUR HONOR.

9 THE COURT: DEFENSE?

10 MR. YOUNG: NOT FROM THE DEFENSE.

11 THE COURT: LET'S DO THIS, LET'S TAKE A SHORT
12 BREAK FOR ABOUT TEN MINUTES AND GIVE YOU A CHANCE TO
13 MOVE AROUND AND THEN WE'LL TAKE UP THE MOTIONS AFTER
14 THAT, OKAY?

15 MR. RIDDLE: THANK YOU, YOUR HONOR.

16 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

17 THE COURT: OKAY. I BELIEVE, MR. FLOYD, YOU HAD
18 SOME MOTIONS THAT YOU AND MR. YOUNG HAD SENT? I DIDN'T
19 KNOW IF YOU WANTED TO HAVE ALL OF THEM HEARD NOW OR
20 WHAT.

21 MR. FLOYD: YOUR HONOR, WE HAVE SEVERAL THAT WE
22 BELIEVE SHOULD BE HEARD AT THIS POINT.

23 THE COURT: EXCUSE ME?

24 MR. FLOYD: WE HAVE SEVERAL THAT WE BELIEVE SHOULD
25 BE HEARD.

1 THE COURT: OKAY. GO AHEAD. JUST TAKE THEM ONE
2 AT A TIME.

3 MR. FLOYD: OKAY. THE FIRST THING I'M GOING TO
4 ARGUE, YOUR HONOR, IS A MOTION TO SENTENCE THE
5 DEFENDANT TO LIFE IMPRISONMENT. IN CONNECTION WITH
6 THAT, I NEED TO PASS UP TO YOUR HONOR THREE ITEMS.

7 YOUR HONOR, WHAT I'VE PASSED UP TO YOU IS THE
8 DECISION OF THE SUPREME COURT IN THIS CASE TO SEND IT
9 BACK DOWN FOR RE-SENTENCING, PROVISIONS OF SECTION
10 16-3-20, AND A COPY OF ARTICLE 5 SECTION 18 OF THE
11 SOUTH CAROLINA CONSTITUTION.

12 YOUR HONOR, THIS ARGUMENT IS TWOFOLD. FIRST OF
13 ALL, UNDER ARTICLE 5 SECTION 18, THE DEFENDANT IS
14 ENTITLED TO A JURY OF 12 PEOPLE. THAT'S A
15 CONSTITUTIONAL RIGHT BY THE SOUTH CAROLINA
16 CONSTITUTION.

17 UNDER -- IN HIS APPEAL, THE SUPREME COURT REVERSED
18 AND REMANDED FOR A NEW TRIAL AND THE BASIS FOR THE
19 REVERSAL WAS THAT ONE OF THE 12 JURORS WHO RENDERED A
20 SENTENCE AGAINST HIM WAS NOT DEATH PENALTY QUALIFIED
21 BECAUSE OF THE QUESTIONING IN THE VOIR DIRE.

22 UNDER 16-3, AND I'VE GOT IT HIGHLIGHTED, 16-3-20
23 IS ON PAGE 37 OF WHAT I'VE GIVEN TO YOU THERE.

24 THE COURT: I'VE GOT IT RIGHT HERE.

25 MR. FLOYD: YES, SIR. THE JURY -- BASICALLY IT

1 PROVIDES THAT THE ONLY WAY YOU CAN GIVE THE DEATH
2 PENALTY IS IF IT IS A UNANIMOUS JURY. SINCE THE
3 CONSTITUTION REQUIRES THAT A UNANIMOUS JURY CONSISTS OF
4 12 PEOPLE, WHEN ONLY 11 QUALIFIED JURORS VOTED FOR
5 DEATH, THEN HE'S ENTITLED TO A SENTENCE OF LIFE AND,
6 IT'S OUR POSITION HE SHOULD JUST HAVE A LIFE SENTENCE
7 WITHOUT HAVING TO GO BACK THROUGH THE SENTENCING
8 PROCEEDING. THAT'S ONE POINT.

9 THE SECOND POINT IS IF YOU GO TO THE OTHER PART OF
10 SECTION 16-325, IN THIS SECTION, SUBSECTION E, SUB-
11 SUBSECTION 2, THE STATUTE SAYS THAT IF THE COURT FINDS
12 ERROR PREJUDICIAL TO THE DEFENDANT IN THE SENTENCING
13 PROCEEDING CONDUCTED BY THE TRIAL JUDGE BEFORE THE
14 TRIAL JURY AS OUTLINED UNDER ITEM B OF 16-3-20, THEN
15 THE CASE SHOULD BE REMANDED FOR A NEW SENTENCING TRIAL.

16 HOWEVER, IF YOU GO BACK TO 16-3-20B AND YOU LOOK
17 AT WHAT THAT COVERS, AND THAT DOES COVER THE SENTENCING
18 HEARING OR THE SENTENCING PORTION OF THE TRIAL,
19 HOWEVER, THERE IS NOTHING IN 16-3-20 SUBSECTION B THAT
20 HAS TO DO WITH THE SELECTION OF THE JURY, SO WHAT THIS
21 STATUTE ACTUALLY SAYS IS THAT IF THERE ARE THESE
22 PROCEDURAL ERRORS COMMITTED IN THE SENTENCING PORTION
23 OF THE TRIAL WHICH ARE PREJUDICIAL TO THE DEFENDANT,
24 THEN THEY CAN VACATE THE SENTENCE AND SEND HIM BACK FOR
25 A SENTENCING HEARING, BUT THERE'S NOTHING IN THERE

1 ABOUT THE SELECTION OF THE JURY, SO THE ERROR IN THIS
2 CASE, IN MR. BENNETT'S CASE, WAS NOT DURING THE
3 SENTENCING TRIAL, PORTION OF THE TRIAL, BUT AT THE
4 COMMENCEMENT OF THE TRIAL BEFORE THE GUILT PORTION
5 BEGAN.

6 SINCE THERE WAS NO ERROR COMMITTED IN THE
7 SENTENCING PORTION OF THE TRIAL, THEN THERE IS NO
8 STATUTORY AUTHORITY TO REMAND THIS CASE BACK FOR A
9 SENTENCING HEARING. THE ONLY THING THAT THE COURT CAN
10 DO IS LET A LIFE SENTENCE -- IMPOSE A SENTENCE OF LIFE,
11 BECAUSE THE STATUTE DOES NOT PROVIDE FOR A NEW
12 SENTENCING PROCEEDING WHEN, IN EFFECT, THE IRREGULARITY
13 TAKES PLACE IN THE SELECTION PORTION OF THE JURY AND
14 NOT DURING THE SENTENCING PORTION ITSELF.

15 THE COURT: OKAY. I'M GOING TO DENY THE MOTION.
16 I BELIEVE THAT THE APPROPRIATE PROCEDURE HAS RESOLVED
17 THAT PROBLEM AS SET OUT BY THE SUPREME COURT AND THAT
18 IS TO ORDER A NEW TRIAL, SO AGAIN I WOULD DENY THAT
19 MOTION. MR. SOLICITOR, DID YOU WANT TO PUT ANYTHING ON
20 THE RECORD ABOUT THAT?

21 MR. MYERS: NO, SIR.

22 THE COURT: ALL RIGHT. WHAT IS THE NEXT MOTION?

23 MR. FLOYD: THANK YOU, YOUR HONOR, THE NEXT MOTION
24 IS A MOTION TO QUASH THE JURY PANEL. IN CONNECTION
25 WITH THIS MOTION, YOUR HONOR, I NEED TO BRIEFLY CALL A

2324

1 REPRESENTATIVE OF THE CLERK'S OFFICE, AND WE HAD
2 DISCUSSED THAT WITH HER BRIEFLY AT THE SHORT BREAK WE
3 HAD.

4 THE COURT: OKAY. MADAM CLERK, WILL YOU BE THE
5 CALLEE, AS IT WERE?

6 JERI LYN HARRISON, AFTER BEING DULY SWORN,
7 TESTIFIED AS FOLLOWS:

8 JERI LYN HARRISON

9 THE COURT: HAVE A SEAT. PLEASE STATE YOUR FULL
10 NAME FOR THE RECORD.

11 THE COURT: THANK YOU, MA'AM.

12 THE WITNESS: CAN I JUST STAND HERE?

13 THE COURT: THAT'S FINE. WHEREVER YOU WANT TO
14 STAND IS FINE.

15 MR. FLOYD: WOULD YOU STATE YOUR NAME FOR THE
16 RECORD, PLEASE?

17 THE WITNESS: JERI LYN HARRISON.

18 MR. FLOYD: AND WHAT IS YOUR POSITION?

19 THE WITNESS: DEPUTY CLERK FOR GENERAL SESSIONS.

20 MR. FLOYD: AND AS DEPUTY CLERK FOR GENERAL
21 SESSIONS, DID YOU HAVE ANY DUTIES IN RELATION TO THIS
22 PARTICULAR MATTER, MA'AM?

23 THE WITNESS: THE SELECTION OF THE JURY IN THIS
24 MATTER?

25 MR. FLOYD: YES.

1 THE WITNESS: OKAY. YES, SIR, MY OFFICE -- AFTER
2 THE JURY COMMISSIONER SELECTS THE JURY ON THE COMPUTER,
3 THEN MY OFFICE PREPARES THE SUMMONS AND THE JURY
4 QUESTIONNAIRES TO BE SENT OUT, AND WE MAIL THOSE.

5 MR. FLOYD: WERE THERE JUROR QUESTIONNAIRES SENT
6 OUT TO THE POTENTIAL JURORS IN THIS CASE?

7 THE WITNESS: YES.

8 MR. FLOYD: HAVE YOU BROUGHT WITH YOU A COPY OF
9 THAT QUESTIONNAIRE?

10 THE WITNESS: YES.

11 MR. FLOYD: THANK YOU.

12 I'D LIKE TO HAVE THIS MARKED AS A DEFENDANT'S
13 EXHIBIT.

14 THE COURT: ALL RIGHT. ANY OBJECTION?

15 MR. MYERS: NO, SIR.

16 THE COURT: ALL RIGHT. GO AHEAD AND MARK IT.

17 (WHEREUPON, DEFENDANT'S EXHIBIT 1 WAS MARKED FOR
18 IDENTIFICATION ONLY.)

19 MR. FLOYD: AT WHOSE REQUEST OR INSTRUCTIONS WAS A
20 JURY QUESTIONNAIRE SENT TO EACH JUROR?

21 THE WITNESS: PURSUANT TO THE INSTRUCTIONS OF OUR
22 JUDGE, JUDGE WESTBROOK, WE COPIED AND FORWARDED A COPY
23 OF EACH ONE OF THESE PAGES TO EACH JUROR.

24 MR. FLOYD: OKAY. WAS THE DEFENDANT,
25 MR. BENNETT -- WAS HIS ATTORNEY, MR. YOUNG OR ME ASKED

1 FOR ANY INPUT INTO THAT QUESTIONNAIRE?

2 THE WITNESS: I DON'T KNOW.

3 MR. FLOYD: OKAY, THANK YOU.

4 I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

5 THE COURT: ANY QUESTIONS FROM THE STATE?

6 MR. MYERS: IS THAT THE FORM THAT'S SIMILAR TO ALL
7 THE FORMS THAT HAVE BEEN SENT OUT TO JURORS IN CAPITAL
8 CASES SINCE YOU HAVE BEEN DOING THIS?

9 THE WITNESS: THIS FORM IS ACTUALLY THE FORM THAT
10 COURT ADMINISTRATION GAVE US MANY, MANY YEARS AGO THAT
11 THEY SET UP TO BE USED IN THESE KINDS OF CASES. THE
12 ONLY THING THAT'S BEEN CHANGED IS THAT WE HAVE RETYPED
13 IT ON THE COMPUTER AND REPRODUCED IT FROM THAT BECAUSE
14 THE ORIGINAL WAS DONE ON A TYPEWRITER AND WAS BECOMING
15 VERY FADED, SO WE RETYPED IT, BUT THIS IS THE ORIGINAL
16 FORM THAT COURT ADMINISTRATION PRESCRIBED FOR DEATH
17 PENALTY CASES.

18 MR. MYERS: AND WHEN COURT ADMINISTRATION SENT IT
19 OUT, IT WAS AT THE DIRECTION OF THE SUPREME COURT?

20 THE WITNESS: THAT'S CORRECT.

21 THE COURT: ANY OTHER QUESTIONS?

22 MR. FLOYD: NO FURTHER QUESTIONS, YOUR HONOR.

23 THE COURT: AND I WILL NOTE FOR THE RECORD THAT
24 NEITHER SIDE WAS NOTIFIED BEFORE I ORDERED THE CLERK TO
25 SEND THAT OUT.

1 MR. FLOYD: THANK YOU, YOUR HONOR.

2 THE COURT: ANYTHING ELSE ON THAT MOTION?

3 MR. FLOYD: I'D JUST LIKE TO ARGUE THE MOTION,
4 YOUR HONOR.

5 THE COURT: GO AHEAD.

6 MR. FLOYD: YOUR HONOR, AT THIS TIME, WE'D MOVE TO
7 QUASH THE JURY PANEL AND THE REASON, THE BASIS FOR THE
8 MOTION IS TWOFOLD. THERE ARE THREE QUESTIONS ON THIS
9 FORM THAT WE FEEL ARE OBJECTIONABLE AND PREJUDICIAL TO
10 THE DEFENDANT.

11 THE COURT: YOU'RE TALKING ABOUT THE SUPREME COURT
12 FORM NOW?

13 MR. FLOYD: YES, SIR.

14 THE COURT: OKAY.

15 MR. FLOYD: FIRST OF ALL, QUESTION NUMBER EIGHT
16 ASKS: "HAVE YOU EVER LIVED OUTSIDE THE SOUTHEASTERN
17 UNITED STATES?"

18 QUESTION NUMBER 27 ASKS: "WHAT CHURCH (NAME AND
19 DENOMINATION) DO YOU ATTEND?"

20 NUMBER 28: "DO YOU HOLD ANY POSITION OR OFFICE IN
21 THE CHURCH? YES, NO. IF YES, EXPLAIN."

22 YOUR HONOR, IT'S OUR POSITION THAT -- FIRST OF
23 ALL, I'D LIKE TO DISCUSS THE QUESTION: "HAVE YOU EVER
24 LIVED OUTSIDE THE SOUTHEASTERN UNITED STATES?" YOUR
25 HONOR, THE ONLY REASON -- THE BASIS FOR ASKING THAT

1 QUESTION IS TO DETERMINE WHETHER OR NOT A POTENTIAL
2 JUROR HAS EVER BEEN EXPOSED TO ATTITUDES OTHER THAN
3 THOSE PREVALENT IN THE SOUTHEASTERN UNITED STATES.
4 IT'S AN EFFORT TO DETERMINE, FOR EXAMPLE, WHETHER -- TO
5 SEEK OUT ANY -- THEIR ATTITUDES TOWARDS RACE, THEIR
6 ATTITUDES TOWARD THE DEATH PENALTY. AS SUCH, THE
7 QUESTION IS A MESSAGE TO POTENTIAL JURORS THAT THIS
8 COURT IS LOOKING FOR JURORS WITH PRECONCEIVED
9 ATTITUDES. I MEAN, THERE IS ABSOLUTELY NO BASIS TO ASK
10 THE QUESTION: "HAVE YOU EVER LIVED OUTSIDE THE
11 SOUTHEASTERN UNITED STATES?" THEY DON'T CARE ABOUT IF
12 YOU'VE LIVED IN GEORGIA, LOUISIANA, ANY OTHER SOUTHERN
13 STATE WHERE THERE ARE HISTORICALLY RACIALLY PREJUDICIAL
14 ATTITUDES AND THE SEEKING OUT OF THAT INFORMATION IS
15 CHILLING AND INTIMIDATING TO POTENTIAL JURORS WHEN THEY
16 SEE WHAT THE COURT IS LOOKING FOR. AS SUCH, IT
17 VIOLATES THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW,
18 EQUAL PROTECTION OF THE LAW, A RIGHT TO A FAIR TRIAL,
19 EFFECTIVE ASSISTANCE OF COUNSEL AND FUNDAMENTAL
20 FAIRNESS.

21 THE OTHER QUESTIONS, THE QUESTIONS ABOUT RELIGION,
22 ARE A VIOLATION OF THE CONSTITUTIONALLY PROTECTED
23 RIGHTS AGAINST THE SEPARATION OF CHURCH AND STATE. IN
24 FACT, INTERESTINGLY, IN MR. BENNETT'S EARLIER CASE, THE
25 STATE ITSELF OBJECTED -- THE SOLICITOR'S OFFICE

1 OBJECTED TO MR. BENNETT'S EFFORTS TO ARGUE RELIGION IN
2 HIS TRIAL, AND YET HERE THE COURT ON ITS OWN IS
3 BRINGING RELIGION INTO THIS MATTER AND AS SUCH IT'S A
4 VIOLATION OF THE SEPARATION OF STATE AND RELIGION
5 DOCTRINES.

6 FURTHERMORE, IT'S IMPERMISSIBLE FOR THE COURT TO
7 CONTACT JURORS TO ELICIT INFORMATION WITHOUT THE
8 DEFENDANT'S PRESENCE. THIS IS INFORMATION -- THE
9 DEFENDANT HAD NO INPUT INTO THIS INFORMATION
10 WHATSOEVER. IT'S OUR POSITION THAT THIS IS AN
11 IMPORTANT STAGE IN HIS PROCEEDING. BASICALLY, FROM THE
12 TIME HE'S INDICTED, EVERYTHING THE COURT DOES, THE
13 DEFENDANT HAS A RIGHT TO BE PRESENT AND HAVE INPUT
14 INTO. WHEN THE COURT MADE THIS CONTACT WITH POTENTIAL
15 JURORS WITHOUT PROVIDING THE DEFENDANT THE OPPORTUNITY
16 TO HAVE INPUT, IT DEPRIVES HIM OF HIS RIGHT TO COUNSEL,
17 HIS DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH
18 AND FOURTEENTH AMENDMENTS TO THE UNITED STATES
19 CONSTITUTION AND SOUTH CAROLINA LAW.

20 IN OUR BRIEF WE'VE CITED SEVERAL CASES IN SUPPORT
21 OF THIS, INCLUDING SOME SOUTH CAROLINA CASES OF
22 STATE V. ELMORE, STATE V. TAYLOR, AND STATE V. JAMES.
23 ALL THESE CASES, TOGETHER WITH THE UNITED STATES CASES
24 WE HAVE CITED IN THE BRIEF, IN THE MOTION, FIND THAT
25 IT'S REVERSIBLE ERROR FOR THERE TO BE ANYTHING GOING ON

1 IN A DEFENDANT'S CASE, IN A DEATH PENALTY CASE, WITHOUT
2 THE DEFENDANT'S PRESENCE OR INPUT.

3 ADDITIONALLY, YOUR HONOR, THE QUESTIONS ON
4 RELIGION IN EFFECT VIOLATE THE POTENTIAL JURORS RIGHTS
5 TO SEPARATION OF CHURCH AND STATE IN ADDITION TO THE
6 DEFENDANT'S RIGHTS.

7 YOUR HONOR, FOR ALL THESE REASONS, WE FEEL THAT
8 THIS JURY PANEL AS BEEN TAINTED, MR. BENNETT'S ABILITY
9 TO RECEIVE A FAIR TRIAL FROM THIS PANEL HAS BEEN
10 TAINTED, AND THAT THEREFORE THE ENTIRE PANEL SHOULD BE
11 QUASHED.

12 THE COURT: ALL RIGHT. COUNSEL, I'M GOING TO DENY
13 THE MOTION. AS YOU KNOW THAT'S BASED ON A FORM THAT IS
14 SENT DOWN BY THE SUPREME COURT AND, OBVIOUSLY, IT WOULD
15 BE -- THAT WOULD BE A JURISDICTIONAL MATTER FOR THEM IF
16 THEY WANTED TO AMEND THE MOTION, BUT I WILL DENY THAT
17 MOTION.

18 DOES THE STATE WANT TO ADD ANYTHING FROM THE
19 REGARD?

20 MR. MYERS: NO, SIR, EXCEPT TO SAY THAT IN
21 STATE VS. SMART OR STATE VS. SOUTH, I CAN'T REMEMBER
22 WHICH ONE, WHEN THE CLERK WAS ASKED TO DRAW THE NAMES
23 OF THE JURORS IN PANELS IN THE COURTROOM, I THINK IT
24 WAS PANELS OF FIVE, AND THEN BRINGING THOSE PANELS BACK
25 IN AND VOIR DIRE THEM, THE DEFENDANT WAS NOT PRESENT IN

1 THE COURTROOM AFTER THE JURY WAS BROUGHT IN THE
2 COURTROOM AND QUALIFIED, AND IN THE DRAWING OF THOSE
3 PANELS BY THE CLERK, THE SUPREME COURT SAID THAT WAS AN
4 ADMINISTRATIVE MATTER, AND IT WASN'T A CRITICAL STAGE
5 AND THERE WAS NO ERROR, SO AS TO THE CRITICAL STAGE,
6 THERE IS CASE LAW ON THAT THAT IT WAS ADMINISTRATIVE,
7 IT'S DISCRETIONARY WITH THE JUDGE, AND THERE WASN'T ANY
8 DENIAL OF ANY TYPE OF RIGHTS OF THE DEFENDANT.

9 IF WE THINK THAT'S NOT A DENIAL, THEN ANYTHING
10 PRETRIAL IS A LONG EXISTING PRECEDENCE ON JURY
11 QUESTIONNAIRE FORMS SANCTIONED AND DICTATED BY THE
12 SUPREME COURT.

13 THE COURT: OKAY. AGAIN, AS I'VE INDICATED, I
14 WOULD DENY THE MOTION.

15 LET ME NOTE ALSO YOU HAVE A MOTION FOR RAP SHEETS
16 ON THE JURORS. MY STANDARD PROCEDURE IS TO HAVE THE
17 STATE PROVIDE THOSE WHEN THEY GET THEM. DO YOU HAVE
18 ANY PROBLEM WITH DOING THAT, SOLICITOR?

19 MR. MYERS: NO, SIR.

20 THE COURT: OKAY. I NOTE ALSO THAT YOU HAVE
21 MOTIONS -- LET ME JUST KIND OF -- I'VE KIND OF GROUPED
22 THESE A LITTLE BIT, MR. FLOYD, I DON'T MEAN TO GIVE YOU
23 ANY PROBLEMS WITH THE ORDER ON THEM. WHAT I'LL DO --
24 LET ME JUST GO DOWN THEM AND LET YOU MAKE WHATEVER
25 STATEMENT YOU WANT TO, OKAY?

2332

1 MR. FLOYD: ALL RIGHT.

2 THE COURT: ONE IS A MOTION TO SET THE NUMBER OF
3 PEREMPTORY CHALLENGES AND YOU'VE ASKED FOR 15. AS YOU
4 KNOW THE STATUTE IS PRETTY STRICT ON THE REQUIREMENTS
5 AND IT SETS THE NUMBER. AND I DON'T HAVE THE AUTHORITY
6 TO INCREASE THAT NUMBER, SO I'LL HAVE TO DENY THAT
7 MOTION. DID YOU WANT TO ADD ANYTHING TO THAT? IS
8 THERE ANY REASON I SHOULD GRANT THAT MOTION THOUGH?

9 MR. YOUNG: YOUR HONOR, THE BASIS OF THAT MOTION
10 WAS THAT MR. BENNETT IS CHARGED WITH NUMEROUS OFFENSES,
11 AND WE BELIEVE THE STATUTE REQUIRES OR ALLOWS THAT WHEN
12 A DEFENDANT IS CHARGED WITH MURDER FOR TEN STRIKES AND
13 WHEN HE'S CHARGED WITH OTHER GENERAL SESSIONS LEVEL
14 OFFENSES THAT HE'S ENTITLED TO FIVE STRIKES. IT IS OUR
15 POSITION THAT HE SHOULD BE ENTITLED TO A TOTAL OF 15
16 STRIKES.

17 THE COURT: OKAY. AGAIN, I NOTE THAT FOR THE
18 RECORD AND AGAIN THE JURY -- THE STATUTE IS PRETTY
19 CLEAR ABOUT HAVING TEN FOR EACH DEFENDANT. DOES THE
20 STATE WANT TO PUT ANYTHING ELSE ON THE RECORD ABOUT
21 THAT?

22 MR. MYERS: IN STATE VS. GOULD, 268 S.E.2D 31,
23 STATE VS. YATES, 310 S.E.2D 805 , A DEFENDANT IS NOT
24 ENTITLED TO AN INCREASE IN THE NUMBER OF PREEMPTORY
25 CHALLENGES, SINCE THE LEGISLATURE DID NOT INCLUDE IN

2333

1 THE DEATH PENALTY STATUTORY COMPLEX A PROVISION FOR
2 ADDITIONAL STRIKES.

3 THE COURT: OKAY. THAT'S NOTED.

4 DEFENSE, YOU ALSO HAVE A MOTION TO REQUIRE THE
5 STATE TO PROVIDE THEIR DEFENSE LIST, THEIR WITNESS
6 LIST.

7 AS YOU KNOW THE RULES THAT WE -- UNDER WHICH WE
8 OPERATE DON'T REQUIRE THEM TO PROVIDE THAT LIST AHEAD
9 OF TIME. THERE ARE CERTAIN CIRCUMSTANCE WHERE THEY
10 HAVE TO PROVIDE DISCOVERY, BUT THE DISCOVERY, I THINK,
11 IS PRETTY CLEAR. GIVEN THAT, IS THERE ANY REASON WHY I
12 SHOULD GRANT THE MOTION TO REQUIRE THEM TO GIVE YOU THE
13 WITNESS LIST?

14 MR. YOUNG: YOUR HONOR, WE WILL STICK BY THE
15 CONTENT OF THE MOTION IN ORDER FOR US TO EFFECTIVELY
16 PREPARE THE DEFENSE, WE WOULD ASK THE COURT TO REQUIRE
17 THE STATE TO DIVULGE ITS WITNESSES.

18 THE COURT: AGAIN, SOLICITOR, DO YOU WANT TO ADD
19 ANYTHING TO THAT?

20 MR. MYERS: NO, SIR. WE DON'T THINK WE HAVE TO
21 PROVIDE IT PRETRIAL OR FOR QUALIFICATION OF THE JURY
22 UNDER THE STATE VS. POWERS.

23 THE COURT: YES. I THINK THE STATE VS. POWERS
24 DID -- IN FACT, THAT WAS A CASE THAT JUDGE ANDERSON
25 TRIED IN THIS COURTROOM, AND IN THAT CASE THEY HAD

1 INDICATED THAT THE COURT COULD REQUIRE -- AT TRIAL,
2 COULD REQUIRE THE PARTIES TO PROVIDE A WITNESS LIST,
3 BUT BASED ON THAT AND THE STATUTES THAT WE HAVE, I
4 WOULD DENY THAT MOTION.

5 THERE IS ALSO A NOTICE OF MOTION TO PRECLUDE USING
6 THE JUROR TYPE FORM AND THAT IS THE FORM WHERE WE GIVE
7 EACH JUROR A SHEET THAT DESCRIBES THE THREE TYPES OF
8 JURORS. IT'S A STANDARD FORM USED BY JUST ABOUT ALL
9 THE JUDGES NOW, I THINK OVER A PERIOD OF YEARS. THAT'S
10 ONE THAT THE SUPREME COURT HAS NOT DETERMINED --
11 DETERMINED WAS NOT APPROPRIATE, SO IT WOULD BE
12 APPROPRIATE THEN TO DENY THAT MOTION.

13 DID YOU WANT TO ADD ANYTHING OR PUT ANYTHING ON
14 THE RECORD ABOUT THAT, COUNSEL?

15 MR. YOUNG: YES, SIR, YOUR HONOR. WE WOULD TAKE
16 THE POSITION THAT THAT -- THE USE OF THAT FORM, IN
17 ESSENCE, GIVES AN OUT TO THOSE JURORS WHO DO NOT WISH
18 TO SERVE ON ANY KIND OF JURY. A LOT OF TIMES JURORS
19 FIND OUT IN THE MORNING DURING THE ROLL CALL OR THE
20 GENERAL QUALIFICATION THAT THEY HAVE BEEN SUMMONED TO
21 SERVE ON A DEATH PENALTY TRIAL. A LOT OF TIMES THEY
22 TRY TO FIND EXCUSES OR REASONS FOR WHICH TO BE EXCUSED
23 OR TO BE TRANSFERRED TO ANOTHER TERM OF COURT.

24 IT IS OUR POSITION THAT WHEN THEY ARE PRESENTED
25 THAT FORM PRIOR TO BEING VOIR DIRE, THEN THOSE

1 JURORS -- IT IS PLANTED IN THEIR MINDS AS TO WHICH ONE
2 THEY CAN USE IN ORDER TO ONE, GET OUT OF JURY DUTY OR
3 IN THE REVERSE, THOSE PERSONS WHO OTHERWISE WOULD NOT
4 BE QUALIFIED TO SERVE ON A JURY PURSUANT TO WHEN OR
5 THOSE WHO ARE AUTOMATIC DEATH ON EVERY SITUATION, THOSE
6 PERSONS WOULD BE ABLE TO FIND A WAY TO WORK THEIR WAY
7 ONTO A JURY AND THEREFORE DENY BOTH THE STATE AND
8 MR. BENNETT A FAIR TRIAL AND BASED ON THAT, WE BELIEVE
9 THAT IT WOULD BE MORE EFFICIENT IF THE COURT WILL ALLOW
10 THE ATTORNEYS TO -- ON VOIR DIRE TO INQUIRE AS TO --
11 AND ALLOW THE JUROR TO STATE IN THEIR OWN WORDS AS TO
12 THEIR BELIEFS OR THEIR VIEWS ON THE DEATH PENALTY.

13 WE BELIEVE THAT BOTH SIDES COULD GET A MORE
14 ACCURATE PICTURE AS TO THE VIEWS, WHICH IS WHAT THE
15 VOIR DIRE IS FOR, TO DEVELOP WHETHER THE JURORS POSE
16 ANY TYPE OF VIEWS THAT WOULD PREVENT THEM FROM BEING
17 FAIR AND IMPARTIAL JURORS, AND BASED ON THAT, WE WOULD
18 ASK THE COURT TO -- NOT TO ALLOW THAT FORM AND ALLOW
19 EITHER THE COURT TO ASK THE JURORS TO STATE THEIR VIEWS
20 OR THEIR POSITION ON THE DEATH PENALTY OR TO ALLOW THE
21 ATTORNEYS TO EXPLORE IT IN VOIR DIRE.

22 THE COURT: AGAIN, I WOULD DENY THAT MOTION.
23 ANYTHING FROM THE STATE ON THAT?

24 MR. MYERS: THE FORM HAS BEEN USED FOR NEARLY 20
25 YEARS OR LONGER. THE STATE VS. SOUTH 331 S.E.2D 775,

1 THE SUPREME COURT SAID THIS: "QUESTIONING JURORS AS TO
2 WHETHER THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY OR
3 ALWAYS VOTE FOR LIFE IMPRISONMENT OR VOTE FOR EITHER
4 DEPENDING ON THE EVIDENCE DID NOT PROPERLY STEER THE
5 JURORS, BUT WERE PROPER QUESTIONS BY THE JUDGE TO
6 ENSURE THE JURORS PERFORMED THEIR DUTIES AS REQUIRED BY
7 LAW." THAT FORM WAS USED IN STATE VS. SOUTH AND
8 APPROVED BY THE SUPREME COURT.

9 THE COURT: OKAY. COUNSEL, LET ME NOTE THAT THERE
10 IS ALSO A MOTION TO EXCLUDE ALL PHOTOGRAPHS OF THE
11 VICTIM. THAT IS, OF COURSE, AN EVIDENTIARY MOTION.
12 THAT IS ONE THAT WOULD BE APPROPRIATELY MADE DURING THE
13 TRIAL ITSELF, SO I WOULD HAVE TO DEFER ANY RULING ON
14 THAT. I WOULD OBVIOUSLY NOT BE ABLE TO RULE ON THAT
15 AND WILL JUST WAIT ABOUT MAKING A RULING ON THAT UNTIL
16 I'VE SEEN AND HEARD THE EVIDENCE. IS THERE ANYTHING IN
17 PARTICULAR THAT YOU WISH TO ADD TO IT?

18 MR. YOUNG: NO, SIR, YOUR HONOR. WE WISH TO HOLD
19 THAT UNTIL IT ARISES AT TRIAL.

20 THE COURT: ALL RIGHT. ANYTHING ELSE FROM THE
21 STATE ON THAT?

22 MR. MYERS: NO, SIR.

23 THE COURT: ALL RIGHT. I HAVE A MOTION TO --
24 EXCUSE ME, I HAVE A COUPLE OF MEMORANDA. I HAVE A
25 MEMORANDUM ON THE MOTION TO REQUIRE THE SOLICITOR TO

2337

1 GIVE THE JURY SELECTION DATA, WHICH I ASSUME IS THE
2 JURY RAP SHEETS?

3 MR. YOUNG: YES, SIR, YOUR HONOR.

4 THE COURT: ALL RIGHT. I'VE ALREADY GRANTED THAT.
5 THERE'S A MOTION FOR STRICT COMPLIANCE WITH 14-7890.
6 NOW, IS THAT REFERRING TO THE CHILDCARE?

7 MR. YOUNG: IT'S REGARDING THE JURY EXCUSES. THAT
8 IS ONE OF THOSE MOTIONS THAT I TOLD YOUR HONOR
9 DEPENDING ON HOW WE HANDLED THINGS TODAY --

10 THE COURT: AND I THINK WE HAVE DEALT WITH IT
11 RATHER STRICTLY.

12 MR. YOUNG: YES, SIR.

13 THE COURT: ALL RIGHT. I HAVE ALSO -- THE ONLY
14 ONES I HAVE LEFT IN MY HAND HERE ARE TWO OF THEM. ONE
15 IS A NOTICE OF MOTION AND A MOTION FOR A JURY VIEW AND
16 I THINK, AS I UNDERSTAND IT, THAT'S A MOTION TO ALLOW
17 THE JURY TO SEE THE DEATH -- IN ESSENCE, THE DEATH
18 CHAMBER AND ALSO TO SEE THE FACILITIES AROUND THE DEATH
19 CHAMBER, I GUESS.

20 DO YOU HAVE ANY ARGUMENT YOU WANT TO MAKE ON THAT?

21 MR. YOUNG: YOUR HONOR, I WOULD REQUEST THAT
22 THE -- DEPENDING ON HOW OUR CASE IS PRESENTED, WE WOULD
23 LIKE TO ASK THE COURT TO REQUIRE THE JURY TO HAVE AN
24 OPPORTUNITY TO VIEW BOTH A PRISON SITUATION AS FAR AS
25 GENERAL POPULATION, MEANING THE JAIL CELLS AND THINGS

2338

1 OF THAT NATURE, AND ALSO VISIT THE REVERSE OF THAT OR
2 THE OPPOSITE OF THAT, WHICH IS THE FACILITIES OF DEATH
3 ROW IN ORDER THAT THE JURORS WILL KNOW WHAT IS BEING
4 TALKED ABOUT DURING THE COURSE OF THE TRIAL.

5 WE BELIEVE THAT IT WILL ASSIST THE JURORS IN THEIR
6 CONSIDERATION OF THE EVIDENCE AND IT WILL BE VERY
7 HELPFUL.

8 IN THE ALTERNATIVE, YOUR HONOR, WE WOULD ASK THE
9 COURT FOR PERMISSION TO ALLOW US TO, EITHER THROUGH
10 STILL SHOT PHOTOGRAPHS OR THROUGH VIDEO CAMERAS, TO
11 MAKE THAT EVIDENCE AVAILABLE FOR THE JURY TO VIEW.

12 THE COURT: ALL RIGHT. WHAT IS THE STATE'S
13 POSITION ON THAT?

14 MR. MYERS: THAT'S BEEN DECIDED BY THE SUPREME
15 COURT IN CASES WHERE THE DEFENSE TRIED TO HAVE THE
16 ELECTRIC CHAIR SUBPOENAED AND BROUGHT INTO THE
17 COURTROOM.

18 THAT WAS DENIED AND THE STATE VS. PLATT AND ARNOLD
19 AT 284 S.E.2D 221, AND THEN SUBSEQUENTLY IN STATE VS.
20 ALBERT THOMPSON, 292 S.E.2D 581, SOUTH CAROLINA SUPREME
21 COURT HAS SAID THAT THE MANNER OF ELECTROCUTION AS A
22 METHOD OF DEATH IS A LEGISLATIVE DECISION, THAT IT IS
23 NOT AN APPROPRIATE MATTER FOR THE JURY. AS A MATTER OF
24 FACT, IT'S IRRELEVANT. THE FUNCTION OF THE JURY IS TO
25 CONSIDER WHETHER THE DEATH PENALTY SHOULD BE IMPOSED,

1 NOT THE METHOD OF DEATH. INTRODUCTION OF THIS EVIDENCE
2 WOULD HAVE BEEN IRRELEVANT AND AVERTING THE JURY FROM
3 ITS DUTY, ACCORDING TO THE SUPREME COURT.

4 ALSO, YOUR HONOR, OUR COURT HAS SAID IN STATE VS.
5 PLATT AND ARNOLD II, 313 S.E.2D 619, A JURY DOES NOT
6 NEED TO KNOW HOW OFTEN A PRISONER WILL TAKE A SHOWER OR
7 WHETHER HE WILL BE LONELY OR WITHDRAWN DURING HIS
8 DETENTION IN PRISON.

9 THOSE ARE MATTERS FOR OTHER AGENCIES. IT'S A
10 LEGISLATIVE MATTER. THE COURT HELD THAT THIS TESTIMONY
11 IS IRRELEVANT. IT'S NOT A MITIGATING FACTOR. ALSO,
12 THIS WOULD BE AN ARBITRARY AND CAPRICIOUS FACTOR. NOT
13 ONLY THAT, THE UNITED STATES SUPREME COURT HAS ALSO
14 ADDED ITS OPINION OF FURMAN, SOUTH CAROLINA SUPREME
15 COURT ON THAT.

16 THE UNITED STATES SUPREME COURT IN SKIPPER VS.
17 SOUTH CAROLINA, WHICH IS AT 106 S.C. 1669, 90 LAW ED2D
18 1. THE SUPREME COURT OF THE UNITED STATES SAID, FOR
19 EXAMPLE, WE HAVE NO QUARREL WITH THE STATEMENT OF THE
20 SUPREME COURT IN SOUTH CAROLINA IN THAT HOW OFTEN A
21 DEFENDANT WILL TAKE A SHOWER IS RELEVANT TO THE
22 SENTENCING DETERMINATION.

23 A JURY'S DUTY IS TO VOTE FOR LIFE IMPRISONMENT OR
24 THE DEATH PENALTY. OTHER MATTERS AS TO THE PUNISHMENT
25 ARE UP TO OTHER AGENCIES. IT'S A LEGISLATIVE FUNCTION

2340

1 AND HAS NOTHING TO DO WITH THE JURY IN THEIR ROLE IN
2 RETURNING AN APPROPRIATE SENTENCE, SO THAT WOULD BE
3 IRRELEVANT, AND TOTALLY INADMISSIBLE PURSUANT TO THE
4 SOUTH CAROLINA SUPREME COURT IN THREE CASES AND THE
5 UNITED STATES SUPREME COURT IN SKIPPER VS. SOUTH
6 CAROLINA.

7 THE COURT: IS THERE ANYTHING ELSE YOU WISH TO BE
8 HEARD ON?

9 MR. YOUNG: YOUR HONOR, THE DISTINCTION IS THAT WE
10 ARE NOT ASKING THE COURT TO ALLOW US TO ENTER ANY TYPE
11 OF EVIDENCE REGARDING THE EXECUTION PROCESS, WHICH IS
12 WHAT THOSE CASES DEALT WITH. THE DUTY OF THE JURY IS
13 TO MAKE A DETERMINATION OF THE APPROPRIATE SENTENCE IN
14 THIS CASE, WHETHER THAT BEING LIFE OR WHETHER THAT
15 BEING DEATH.

16 WHAT WE WANT A JURY TO VIEW IS NOT -- IN FACT, WE
17 HAVEN'T EVEN REQUESTED THAT THEY BE ALLOWED TO VIEW THE
18 DEATH CHAMBER OR ANYTHING DEALING WITH THE ELECTRIC
19 CHAIR OR ANY OTHER MEANS OF EXECUTION.

20 WHAT WE HAVE ASKED IS THAT THEY BE ALLOWED TO VIEW
21 THE FACILITIES THAT A PERSON WHO IS GIVEN A LIFE
22 SENTENCE AND A PERSON WHO IS GIVEN A DEATH SENTENCE,
23 THAT THEY WOULD BE IN.

24 THAT IS APPROPRIATE FOR THE JURY TO CONSIDER AS --
25 IN ORDER TO MAKE A DETERMINATION AS TO WHAT IS THE

1 APPROPRIATE SENTENCE IN THIS PARTICULAR CASE.

2 THOSE CASES THAT THE SOLICITOR HAS QUOTED AND
3 RELIED ON DEAL WITH THE INTRODUCTION OF THE EXECUTION,
4 THE MEANS OF EXECUTION, RATHER THAN -- THINGS OF THAT
5 NATURE.

6 WE'RE NOT ASKING THE COURT TO ALLOW US TO GET INTO
7 THAT INFORMATION. WE'RE QUITE FAMILIAR WITH THOSE
8 CASES, AND WE DO NOT INTEND TO EVEN DELVE INTO THOSE
9 AREAS.

10 COURTS HAVE ALLOWED, INCLUDING THIS COURT, HAS
11 ALLOWED TESTIMONY BY WARDENS OF VARIOUS CORRECTIONAL
12 FACILITIES TO TESTIFY REGARDING THEIR FACILITIES,
13 REGARDING THE WAY THAT THEIR FACILITIES ARE RAN AND
14 MANAGED AND THINGS OF THAT NATURE. WHAT WE'RE ASKING
15 IS TO ALLOW US TO PUT A PICTURE WITH THAT TESTIMONY SO
16 THAT IT WILL BE CLEAR TO THE JURY AS TO WHAT WE'RE
17 ACTUALLY DEALING WITH IN THIS SITUATION.

18 MR. MYERS: AND THAT'S WHAT OUR SUPREME COURT HAS
19 SAID IS IRRELEVANT. THAT WAS RAISED AND RULED ON BY
20 THE SUPREME COURT, THE ONE THAT SHOWED THE CONDITIONS.
21 IN STATE VS. PLATT, 313 S.E.2D 619, THE COURT SAID IT
22 IS OUR SETTLED VIEW THAT SUCH A DEFENSE AS THIS IS
23 HIGHLY IMPROPER, FOR IT INVITES THE JURY TO INTRUDE
24 UPON THE STRICTLY LEGISLATIVE FUNCTION OF DETERMINING
25 THE NATURE OF THE CRIME AND PUNISHMENT UNDER OUR

1 CONSTITUTION.

2 IN THE SENTENCING PHASE OF A CAPITAL CASE THE JURY
3 SHALL UNDERSTAND THE TERMS "LIFE IMPRISONMENT" AND
4 "DEATH PENALTY", IN THEIR ORDINARY AND PLAIN MEANING
5 WITHOUT ELABORATION.

6 THE COURT SAID THIS, "IT SHOULD NOT BE NECESSARY
7 IN THE FUTURE FOR THIS COURT TO REMIND THE BENCH AND
8 THE BAR OF THE STRICT FOCUS TO BE MAINTAINED IN THE
9 COURSE OF A CAPITAL SENTENCING TRIAL. IN THE PLATT
10 CASE BEFORE US THE DEFENDANTS ELECTED TO ENTER THE
11 FORBIDDEN FIELD OF SOCIAL POLICY AND PENALTY.

12 SUCH DETERMINATIONS AS THE TIME, PLACE, MANNER AND
13 CONDITIONS OF EXECUTION OR INCARCERATION ARE RESERVED
14 BY STATUTE IN OUR CASES TO AGENCIES OTHER THAN THE
15 JURY.

16 AS WE HAVE REPEATEDLY STATED, THE SOLE FUNCTION OF
17 THE JURY IN A CAPITAL SENTENCING TRIAL IS
18 INDIVIDUALIZED SELECTION OF ONE OR THE OTHER PENALTY,
19 LIFE IMPRISONMENT OR THE DEATH PENALTY, BASED UPON THE
20 CIRCUMSTANCES OF THE CRIME, THE CHARACTERISTICS OF THE
21 INDIVIDUAL DEFENDANT AND HIS BACKGROUND. THE COURT HAS
22 CLEARLY HELD THAT THIS IS IRRELEVANT TESTIMONY AND NOT
23 THE FUNCTION OF THE JURY."

24 THEY COULDN'T HAVE MADE IT ANY CLEARER WHEN THEY
25 SAID IT SHOULD NOT BE NECESSARY IN THE FUTURE FOR THE

1 COURT TO REMIND THE BENCH AND THE BAR OF THIS STRICT
2 FOCUS IN A CAPITAL SENTENCING PROCEEDING.

3 THE COURT: ANYTHING ELSE, MR. YOUNG?

4 MR. YOUNG: NO, SIR, YOUR HONOR.

5 THE COURT: ALL RIGHT. I'M GOING TO DENY THE
6 MOTION. AGAIN, I THINK THE SUPREME COURT HAS MADE IT
7 VERY PLAIN.

8 ALL RIGHT. ALSO, I HAVE A MOTION FOR A FULL
9 TRIAL, WHICH MAY HAVE BEEN SIMILAR TO THE EARLIER
10 MOTION MADE BY MR. FLOYD. DO YOU WANT TO ADDRESS THAT,
11 MR. YOUNG?

12 MR. YOUNG: YOUR HONOR, I WOULD INCORPORATE THE
13 ARGUMENT THAT MR. FLOYD MADE WITH REGARD TO THIS ISSUE,
14 ALSO. PRIMARILY I WISH TO POINT TO THE COURT'S --
15 BRING TO THE COURT'S ATTENTION IS THAT THE SUPREME
16 COURT IN STATE VS. BENNETT STATED THAT THE -- REVERSED
17 THIS CASE BECAUSE A JUROR WAS NOT QUALIFIED TO SERVE ON
18 THE JURY. IT IS OUR POSITION, YOUR HONOR, THAT THE
19 COURT WHEN IT RULED THAT THAT JUROR WAS NOT QUALIFIED,
20 THAT THAT JUROR WAS NOT QUALIFIED FOR THE ENTIRE TRIAL.

21 AS MR. FLOYD HAS STATED EARLIER, THE QUALIFICATION
22 OF THAT JUROR OR THE ERROR OF QUALIFYING THAT JUROR
23 OCCURRED PRIOR TO THE PROCEEDINGS BEGINNING OR
24 COMMENCING.

25 BASED ON THAT, YOUR HONOR, IT IS OUR POSITION THAT

1 THAT JUROR TAINTED THE ENTIRE PROCESS AND THE ENTIRE
2 TRIAL. THEREFORE, MR. BENNETT IS ENTITLED TO A FULL
3 TRIAL WHERE THE ISSUES OF GUILT OR INNOCENCE, AS WELL
4 AS PENALTY SHOULD BE REVIEWED BY A NEW JURY, A JURY
5 THAT IS QUALIFIED UNDER THE RULES AND THE STATUTES OF
6 SOUTH CAROLINA.

7 THE COURT: DID YOU WANT TO ADD ANYTHING TO THAT,
8 MR. MYERS?

9 MR. MYERS: I THINK WE ARE CONTROLLED BY THE
10 ORDERS OF THE SUPREME COURT WHICH SAID THAT THE CASE IS
11 REMANDED FOR RE-SENTENCING. IF THEY WANTED TO HAVE A
12 FULL TRIAL, THEY WOULD HAVE SAID SO.

13 THE COURT: AGAIN, I'LL DENY THAT MOTION.
14 ANYTHING ELSE ON IT, MR. YOUNG?

15 (PAUSE)

16 THE COURT: MR. YOUNG?

17 MR. YOUNG: NOTHING ELSE ON THAT MOTION, YOUR
18 HONOR.

19 THE COURT: ALL RIGHT. COUNSEL, THAT'S ALL THE
20 MOTIONS THAT I HAVE AT THIS POINT.

21 MR. YOUNG: YOUR HONOR, THERE SHOULD HAVE BEEN A
22 MOTION DELIVERED TO YOUR OFFICE YESTERDAY, ON --
23 REGARDING -- ACTUALLY, TWO MOTIONS, ONE BEING A NOTICE
24 OF MOTION AND MOTION TO HAVE MR. BENNETT TRANSPORTED TO
25 THE LEXINGTON COUNTY DETENTION CENTER.

2345

1 THE COURT: OKAY. ALL RIGHT. LET'S TAKE THAT UP.
2 FIRST, LET ME NOTE THAT THERE WAS A LETTER SENT TO ME
3 EARLIER BY MAIL FROM THE SHERIFF'S DEPARTMENT
4 INDICATING THAT THEY OBJECTED TO HAVING MR. BENNETT
5 HOUSED THERE.

6 MR. SOLICITOR, DO YOU KNOW ANYTHING ABOUT THIS AT
7 ALL?

8 MR. MYERS: I'M NOT INVOLVED THAT. I WOULD TAKE
9 NO POSITION, THAT'S BETWEEN YOU AND THE DEFENSE AND THE
10 SHERIFF'S DEPARTMENT.

11 THE COURT: OKAY.

12 MR. YOUNG: AND IF I CAN NOTE ALSO, YOUR HONOR --

13 THE COURT: YES.

14 MR. YOUNG: THAT ON -- THE MOTION WAS FILED -- IT
15 WAS SERVED TO OFFICER SMILEY AT THE LEXINGTON COUNTY
16 SHERIFF'S DEPARTMENT FOR OFFICER TATE. I SPOKE WITH
17 OFFICER TATE YESTERDAY REGARDING A MATTER -- WE HAD A
18 CONVERSATION REGARDING THIS MOTION BEING PENDING, AND
19 HE WAS AWARE THAT WE WERE HAVING MOTION HEARINGS TODAY
20 AT 2:30.

21 YOUR HONOR, WE ARE PREPARED AND WOULD LIKE THE
22 COURT TO CONSIDER THIS MOTION. MR. BENNETT IS
23 CURRENTLY INCARCERATED IN THE DEPARTMENT OF CORRECTIONS
24 AND HOUSED AT LIEBER CORRECTIONAL INSTITUTION, WHICH IS
25 IN RIDGEVILLE, SOUTH CAROLINA, WHICH IS ROUGHLY AN

1 HOUR-AND-A-HALF AWAY FROM THE LEXINGTON COUNTY AREA.

2 RIGHT NOW WE'RE REQUIRED TO GIVE AT LEAST 24 HOURS
3 NOTICE IN ORDER TO VISIT AND COMMUNICATE WITH
4 MR. BENNETT. WE ARE ASKING THE COURT TO ORDER THAT HE
5 BE TRANSPORTED THE FIRST OF NEXT WEEK TO LEXINGTON
6 COUNTY DETENTION CENTER TO BE HOUSED SO THAT WE CAN
7 HAVE MORE READY ACCESS TO HIM. WE ALSO HAVE EXPERTS IN
8 THE CASE, YOUR HONOR, WHO WOULD NEED ACCESS TO
9 MR. BENNETT, AS WELL.

10 THE DEPARTMENT OF CORRECTIONS, BECAUSE OF THEIR
11 STRICT CONFINES AND THE POLICIES AND PROCEDURES THAT
12 THEY MUST FOLLOW IN ORDER TO ASSURE SAFETY AND SECURITY
13 IN THEIR FACILITIES, THEY ARE NOT AS AMENABLE TO US AS
14 THE COUNTY JAIL WOULD BE AS FAR AS ALLOWING US TO COME
15 IN AND MEET WITH MR. BENNETT IN A SECURE FACILITY SO
16 THAT BASICALLY, HIS ATTORNEY/CLIENT PRIVILEGES WILL NOT
17 BE VIOLATED.

18 BASED ON THAT, YOUR HONOR, WE WOULD ASK THE COURT
19 TO ORDER THAT HE BE TRANSPORTED TO THE LEXINGTON COUNTY
20 DETENTION CENTER AND THAT BEGINNING NEXT WEEK HE WOULD
21 BE THERE ROUGHLY TWO, TWO-AND-A-HALF, THREE WEEKS
22 DURING THE COURSE OF THIS TRIAL. FOR THE PAST FIVE
23 YEARS -- I NOTICE OFFICER TATE STATED THAT BECAUSE OF
24 THINGS THAT HAPPENED IN THE PAST WHEN MR. BENNETT WAS
25 INCARCERATED THERE INITIALLY, THAT'S THE REASON THEY

1 DIDN'T WANT HIM TO COME BACK.

2 YOUR HONOR, IN THE PAST FIVE YEARS MR. BENNETT HAS
3 NOT HAD ANY INFRACTIONS IN THE DEPARTMENT OF
4 CORRECTIONS AND THERE ARE NO INDICATIONS THAT HE WOULD
5 HAVE ANY PROBLEMS AT THE LEXINGTON COUNTY SHERIFF'S
6 DEPARTMENT OR DETENTION CENTER WHILE HE WAS BEING
7 HOUSED THERE.

8 IN FACT, HE WAS MOVED FROM LEXINGTON COUNTY
9 INITIALLY, PLACED IN SAFEKEEPING, AND THEN HE WAS
10 BROUGHT BACK TO LEXINGTON COUNTY DURING HIS TRIAL, THE
11 LAST TRIAL. AT THAT POINT IN TIME, I BELIEVE, HE WAS
12 IN THE LEXINGTON COUNTY DETENTION CENTER. I WANT TO
13 SAY IT WAS FOR THREE WEEKS. IT MAY HAVE BEEN AN ENTIRE
14 MONTH, YOUR HONOR, AND DURING THAT TIMEFRAME THERE WERE
15 NO PROBLEMS WHATSOEVER.

16 WE DON'T BELIEVE THAT THERE ARE ANY INDICATIONS
17 THAT HE WOULD CAUSE A PROBLEM, THAT HE WOULD BE ANY
18 TYPE OF DANGER TO HIMSELF, THE INMATES AT THE LEXINGTON
19 COUNTY DETENTION CENTER, OR ANY OF THE CORRECTIONS
20 OFFICERS. BASED UPON THAT, WE'D ASK THE COURT TO ORDER
21 THAT HE BE TRANSPORTED ON MONDAY SO THAT HE WOULD BE
22 AVAILABLE TO ASSIST IN THE PREPARATION OF THIS CASE.

23 MR. MYERS: JUST --

24 THE COURT: COUNSEL, I WILL -- GO AHEAD.

25 MR. MYERS: JUST FOR THE RECORD, YOUR HONOR, THE

1 SOLICITOR HAS NO OBJECTION. IT'S BETWEEN THEM AND THE
2 SHERIFF'S DEPARTMENT, BUT I DON'T KNOW IF YOU'RE
3 PLANNING ON HEARINGS NEXT WEEK OR WHAT?

4 THE COURT: YES, SIR. IF THERE ARE NEEDS FOR ANY
5 HEARINGS, WE WOULD DO THEM NEXT WEEK SOME TIME.

6 MR. MYERS: AND IF YOU DO, THEN WE'LL PROBABLY
7 NEED THE SHERIFF'S DEPARTMENT ON ANOTHER MATTER THAT I
8 WAS GOING TO BRING UP AND I CAN DO THAT WHENEVER YOU
9 WANT ME TO.

10 THE COURT: OKAY. ALL RIGHT. WHAT I'LL DO IS GO
11 AHEAD AND GRANT THE MOTION AT THIS POINT. I DON'T KNOW
12 WHAT THE INCIDENTS WERE BEFORE. I HAVEN'T REVIEWED
13 THAT IN THE RECORD, BUT OBVIOUSLY WHAT I'LL DO IS LEAVE
14 IT OPEN FOR THE SHERIFF'S DEPARTMENT. IF THEY NEED TO
15 COME BACK AND ASK FOR THE ORDER TO BE VACATED, AND
16 CERTAINLY MR. BENNETT UNDERSTANDS THAT WHETHER HE STAYS
17 OVER THERE -- THAT THIS IS DONE FOR HIS CONVENIENCE AND
18 FOR THE WITNESSES' CONVENIENCE SO THEY CAN GET TO HIM
19 AND DO WHATEVER INTERVIEWS THAT ARE NECESSARY AND HIS
20 STAYING THERE, OF COURSE, WILL BE CONTINGENT ON HIS
21 CONDUCT WHILE HE'S IN THE SHERIFF'S DEPARTMENT OVER
22 THERE.

23 AGAIN, I DON'T KNOW IF THERE WERE PROBLEMS BEFORE
24 OR WHAT IT WAS, BUT IT WILL ALL COME DOWN TO HOW HE
25 CONDUCTS HIMSELF OVER THERE. IF THERE ARE NO PROBLEMS,

2349

1 I ASSUME THERE'S NO PROBLEM WITH HIM STAYING THERE
2 UNTIL TRIAL.

3 MR. YOUNG: YOUR HONOR, I WANT TO ASK THE COURT TO
4 ORDER ONE OTHER THING IN CONJUNCTION WITH THAT.
5 MR. BENNETT HAS ALL OF HIS PERSONAL HYGIENE EFFECTS AT
6 THE DEPARTMENT OF CORRECTIONS NOW.

7 THE COURT: YES, SIR.

8 MR. YOUNG: IF HE GOES TO THE LEXINGTON COUNTY
9 DETENTION CENTER, IT'S MY UNDERSTANDING THAT HE'LL HAVE
10 TO PURCHASE ALL OF THAT STUFF OVER AGAIN. CAN WE ASK
11 THE COURT TO ORDER THAT HE BE ALLOWED TO BRING HIS
12 PERSONAL HYGIENE EFFECTS WITH HIM?

13 THE COURT: NO, I'M NOT GOING TO GET INTO THAT
14 NOW. THAT'S SOMETHING THAT THE FACILITIES HANDLE.
15 THEY HAVE THEIR RULES FOR THOSE SORTS OF THINGS. I'M
16 NOT GOING TO INTERFERE WITH THEIR RULES. ALL I'M DOING
17 IS MAKING HIM AVAILABLE FOR YOUR EXPERTS OR OTHER
18 THINGS THAT YOU NEED TO PREPARE.

19 MR. YOUNG: YES, SIR, YOUR HONOR.

20 THE COURT: ANY OTHER MOTIONS THAT YOU HAVE,
21 MR. YOUNG, MR. FLOYD?

22 MR. YOUNG: THAT'S ALL THE MOTIONS WE HAVE AT THIS
23 TIME, YOUR HONOR.

24 THE COURT: OKAY, THANK YOU.

25 MR. SOLICITOR, YOU INDICATED YOU WANTED TO TAKE

1 SOMETHING UP AT THIS POINT OR YOU -- DID YOU WANT TO DO
2 IT NOW?

3 MR. MYERS: YES, SIR. WE PROVIDED THE DEFENSE
4 WITH A STATEMENT GIVEN TO THE DEPARTMENT OF CORRECTIONS
5 AND TO AN INTERNAL INVESTIGATION THAT THE DEPARTMENT OF
6 CORRECTIONS HAD CONCERNING THE DEFENDANT HAVING SEXUAL
7 RELATIONS ON DEATH ROW. THAT ALSO SPILLED OVER INTO
8 THE LEXINGTON COUNTY JAIL WHEN HE WAS HOUSED THERE.

9 NOW, I HAVE TALKED WITH THESE PEOPLE AT THE
10 DEPARTMENT OF CORRECTIONS, AND THEY DID AN
11 INVESTIGATION.

12 THEY TOOK THE STATEMENT FROM MR. BENNETT, AND WE
13 PROVIDED THE STATEMENT TO THE DEFENSE.

14 IN REGARD TO THAT, THERE WERE ALSO SOME TELEPHONE
15 CALLS MADE BY MR. BENNETT FROM DEATH ROW TO THE WOMAN
16 THAT HE WAS HAVING SEXUAL RELATIONS WITH. THE
17 DEPARTMENT OF CORRECTIONS HAS INFORMED ME THAT THEY
18 INFORMED INDIVIDUALS AT THE LEXINGTON COUNTY SHERIFF'S
19 DEPARTMENT OF THE DEPARTMENT OF CORRECTIONS
20 INVESTIGATION.

21 I'VE BEEN INFORMED THAT THE SHERIFF'S DEPARTMENT
22 CONDUCTED THEIR OWN INTERNAL INVESTIGATION. JUROR
23 DAVID GRICE WAS ONE OF THE TWO OFFICERS THAT CONDUCTED
24 THAT INVESTIGATION, SO WHEN HIS NAME CAME UP ON THE
25 JURY LIST, I THINK IT'S 143 OR SOMETHING ALONG IN

1 THERE, HE WAS ONE OF THE INVESTIGATING OFFICERS
2 RELATING TO CERTAIN INFRACTIONS AT THE LEXINGTON
3 SHERIFF'S DEPARTMENT BY MR. BENNETT.

4 ALSO, I WAS INFORMED THIS MORNING BY TWO OFFICERS
5 FROM THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS THAT
6 THEY HAD RECORDING DEVICES AT THE DEPARTMENT OF
7 CORRECTIONS TO RECORD TELEPHONE CONVERSATIONS MADE BY
8 INMATES OUTSIDE.

9 I WAS INFORMED THIS MORNING THAT THESE OFFICERS
10 WERE ADVISED DURING THEIR INVESTIGATIONS, I THINK
11 AROUND '97, THAT THERE WERE RECORDED CONVERSATIONS
12 BETWEEN THE DEFENDANT AND THIS WOMAN THAT HE WAS
13 CALLING. THERE WERE ALSO TELEPHONE RECORDS RELATING TO
14 THE CALLS BY MR. BENNETT TO THIS WOMAN, BUT THEY CAN'T
15 PRODUCE THOSE RECORDS OR THAT TAPE TO ME. THEY TOLD ME
16 THAT AN INSPECTOR NAMED ESLICK, E-S-L-I-C-K, FORWARDED
17 SOME OF THAT INFORMATION TO MR. GRICE AT THE SHERIFF'S
18 DEPARTMENT.

19 NOW I AM INFORMED THAT THE DEFENSE, IF THEY CAN
20 HELP ME OUT, HAS SUBPOENAED THE SHERIFF'S DEPARTMENT
21 FILE ON THAT INVESTIGATION. I AM ALSO INFORMED AGAIN
22 THAT THE SHERIFF'S DEPARTMENT HAD FILED SOMETHING ABOUT
23 THEM WANTING TO HAVE A HEARING ON THE RELEASE OF THAT
24 FILE.

25 I TAKE NO POSITION ON THAT. I DON'T OBJECT TO THE

2352

1 RELEASE OF THAT FILE, BUT I THINK YOU NEED TO GET
2 MR. ESLICK AND THE PEOPLE FROM THE DEPARTMENT OF
3 CORRECTIONS HERE. WE NEED TO GET THE LEXINGTON COUNTY
4 SHERIFF'S DEPARTMENT HERE TO SEE WHERE THAT TAPE IS OF
5 THESE TELEPHONE CALLS FROM THE DEFENDANT TO THIS WOMAN
6 AND THE PHONE RECORDS.

7 I DON'T HAVE THEM, AND I WAS INFORMED OF THAT THIS
8 MORNING BY SOME OF THE OFFICERS CONDUCTING THE
9 INVESTIGATION WITH THE DEPARTMENT OF CORRECTIONS, BUT
10 THEY DON'T HAVE IT, AND I TOLD THEM TODAY THAT I WANTED
11 THEM FOUND.

12 I GUESS THEY'RE LOOKING FOR THEM, BUT I THINK WE
13 NEED TO GET EVERYBODY IN THE COURTROOM TO GET TO THE
14 BOTTOM OF IT.

15 THE COURT: YES, SIR.

16 MR. MYERS: SO THAT GOES TO MR. GRICE BEING AN
17 INVESTIGATING OFFICER OF THE SHERIFF'S DEPARTMENT
18 INVESTIGATING MATTERS RELATING TO THIS TRIAL AND IT
19 ALSO GOES TO THE PHONE RECORDS FROM THE DEATH ROW
20 DEPARTMENT OF CORRECTIONS BY MR. BENNETT TO THIS LADY,
21 PHONE RECORDS AND THE RECORDED TELEPHONE CONVERSATIONS.
22 I'D LIKE TO LISTEN TO THEM AS I'M SURE THE DEFENSE --
23 THE DEFENSE IS ENTITLED TO THEM.

24 IT WAS BROUGHT TO MY ATTENTION THIS MORNING, SO
25 I'M ADVISING THE COURT AND ADVISING THE DEFENSE. IF

1 THEY'D MOVE FOR IT, I'D JOIN IN THEIR MOTION. I WOULD
2 LIKE TO GET A HEARING TO FIND OUT JUST WHERE ALL OF
3 THIS IS.

4 THE COURT: OKAY. COUNSEL, DO YOU WANT TO ADDRESS
5 THAT?

6 MR. FLOYD: YOUR HONOR, OF COURSE, THIS IS THE
7 FIRST WE'VE HEARD OF THIS SITUATION, SO WE PROBABLY
8 NEED TO FIRST ANALYZE IT A LITTLE BIT BEFORE --

9 THE COURT: YOU DIDN'T KNOW ABOUT THE TAPES?

10 MR. FLOYD: NOT THE TAPES, NO.

11 THE COURT: WELL, APPARENTLY MR. MYERS JUST FOUND
12 OUT VERY RECENTLY.

13 MR. MYERS: I'VE BEEN TRYING SINCE THIS MORNING TO
14 TRY TO FIND THEM AND NO ONE CAN TELL ME WHO HAS THEM.

15 MR. FLOYD: WE'RE KIND OF AT A LOSS AS TO WHY OR
16 HOW TAPES BETWEEN HIM AND A VISITOR -- HIM AND A
17 GIRLFRIEND WOULD BE RELEVANT TO WHETHER OR NOT HE GETS
18 THE DEATH PENALTY OR LIFE IMPRISONMENT.

19 THE COURT: OKAY.

20 MR. FLOYD: SO WE HAVE SOME KIND OF AN ISSUE
21 THERE, I THINK.

22 THE COURT: I DON'T KNOW. OBVIOUSLY, I DON'T
23 THINK YOU KNOW UNLESS YOU HEAR THE TAPES.

24 MR. MYERS: I'M NOT TALKING ABOUT ADMISSIBILITY.
25 I'M TALKING ABOUT LET'S GET THE INFORMATION. I WANT IT

1 AND I DON'T HAVE IT. I WAS JUST INFORMED ABOUT IT
2 TODAY. I KNOW THE DEFENSE IS ENTITLED TO IT, AND I'M
3 SURE THEY WANT IT.

4 THE COURT: SURE.

5 MR. MYERS: SO ALL I'M SAYING IS THAT WE GET THE
6 PEOPLE HERE AND SAY, NOW, WHERE IS IT, WHO'S GOT IT AND
7 LET'S MAKE A COPY FOR THE DEFENSE AND A COPY FOR THE
8 SOLICITOR'S OFFICE.

9 THE COURT: OKAY. LET'S SET A HEARING ON THAT
10 THEN. I ASSUME IT WOULD BE SOME TIME -- YOU PROBABLY
11 NEED IT EARLIER IN THE WEEK, DON'T YOU, MONDAY OR
12 WEDNESDAY?

13 MR. MYERS: MONDAY SUITS US FINE.

14 THE COURT: HOW ABOUT THAT, MR. FLOYD?

15 MR. FLOYD: WE'RE WORKING STRICTLY ON THIS CASE,
16 SO PRETTY MUCH WHENEVER YOU WANT IS OKAY WITH US.

17 THE COURT: WHAT ABOUT MONDAY AFTERNOON? HOW DOES
18 THAT SOUND?

19 MR. FLOYD: THAT'S AGREEABLE.

20 THE COURT: THAT WILL GIVE YOU TIME TO GET IN
21 TOUCH WITH COURT ADMINISTRATION. THIS COURT REPORTER
22 MAY NOT BE ON THIS PARTICULAR CASE. COURT
23 ADMINISTRATION MAY HAVE TO GET US ANOTHER COURT
24 REPORTER TO HEAR THIS.

25 MR. FLOYD: YOUR HONOR, AS LONG AS WE'RE GOING TO

1 DO THAT, MAYBE -- I DON'T KNOW WHETHER LIEBER IS GOING
2 TO NEED A WRITTEN ORDER OR WHAT, BUT IF WE'RE GOING TO
3 BRING HIM DOWN FOR COURT MONDAY MAYBE THEY COULD JUST
4 BRING HIM DOWN THEN, FOR GOOD, FOR THE DURATION OF THE
5 TRIAL.

6 MR. MYERS: IF THERE'S SOMETHING -- DO YOU KNOW
7 WHAT LIEBER WOULD NEED?

8 THE COURT: I DON'T HAVE ANY PROBLEM WITH LETTING
9 THEM BRING HIM ON MONDAY. WHAT ABOUT 3:00 O'CLOCK
10 MONDAY AFTERNOON? HOW DOES THAT SOUND?

11 MR. MYERS: YES.

12 THE COURT: WILL THAT GIVE YOU ENOUGH TIME?

13 MR. MYERS: YES.

14 MR. FLOYD: YES.

15 THE COURT: ALL RIGHT. WE'LL SET A HEARING FOR
16 3:00 THEN.

17 MR. MYERS, DO YOU WANT TO GO AHEAD AND SUBPOENA
18 WHOEVER YOU'RE GOING TO NEED ON THIS?

19 MR. MYERS: YES, SIR, I'LL BE GLAD TO.

20 THE COURT: MR. FLOYD, THE DEFENSE ALSO CAN
21 SUBPOENA ANYBODY YOU FEEL LIKE YOU NEED TO.

22 AND LET ME DO THIS, DO EITHER OF YOU HAVE ANY
23 PROBLEM WITH TELLING THE OTHER SIDE WHO YOU'RE GOING TO
24 SUBPOENA AND WHO NEEDS TO BE HERE?

25 MR. MYERS: WELL, I CAN TELL YOU THIS, THE THREE

1 PEOPLE THAT I KNOW OF ARE FROM THE DEPARTMENT OF
2 CORRECTIONS AND ARE AN OFFICER NAMED MR. GREEN, AN
3 OFFICER NAMED MR. TILL, AND THEN HE WAS INFORMED THIS
4 MORNING OF A FELLOW NAMED ESLICK, SO I'M GOING TO TRY
5 TO GET THOSE THREE HERE. OTHER THAN THOSE THREE, I
6 DON'T KNOW OF ANYBODY ELSE. FROM THE SHERIFF'S
7 DEPARTMENT, I'M GOING TO ASK THEM TO GET MR. TATE, TELL
8 MR. TATE TO BRING WHOEVER IS INVOLVED.

9 THE COURT: OKAY. I'M NOT FAMILIAR WITH ALL THIS,
10 BUT IS THIS A STANDARD PROCEDURE AT THE DEPARTMENT?

11 MR. MYERS: THEY TOLD ME -- HERE'S HOW THEY
12 EXPLAINED IT TO ME THIS MORNING. I SAID, HOW DOES THIS
13 GO ABOUT? AND THEY SAID THAT EACH INMATE HAD SOME KIND
14 OF PIN NUMBER AND THEY HAD TO PUT THAT PIN NUMBER IN TO
15 MAKE A CALL AND IF THEY WANTED TO FIND OUT IF AN INMATE
16 MADE A CALL, THEY COULD USE THAT PIN NUMBER TO GET THE
17 CALLS HE MADE.

18 NOW, THAT'S HOW IT WAS EXPLAINED TO ME. VERY
19 FRANKLY, I DIDN'T HAVE TIME TO GO INTO MUCH DETAIL
20 OTHER THAN TO TELL THEM TO FIND THIS STUFF FOR ME AND
21 NOBODY COULD FIND IT, BUT WE CAN HAVE THAT EXPLAINED TO
22 US MONDAY, I'M SURE.

23 THE COURT: ALL RIGHT. WE'LL DO THAT 3:00 O'CLOCK
24 MONDAY TO FIND OUT WHAT'S GOING ON.

25 ANYTHING ELSE, COUNSEL?

2357

1 MR. MYERS: YES, SIR.

2 THE COURT: THEY SAID THEY HAD EXPERT WITNESSES.
3 OF COURSE, WE'VE HAD TO GIVE THEM ALL OF OUR EXPERT
4 REPORTS AND EVERYTHING. WE'VE MOVE THAT THE DEFENSE BE
5 REQUIRED TO HAVE THEIR EXPERT WITNESSES TO MAKE REPORTS
6 AND DELIVERED TO THE SOLICITOR'S OFFICE AND ALSO ANY
7 INFORMATION THEY USE UNDER THE RULES TO BASE THEIR
8 OPINIONS ON.

9 THE COURT: ALL RIGHT. WHAT ABOUT THAT,
10 MR. FLOYD?

11 MR. FLOYD: YOUR HONOR, I DON'T SEE HOW THEY COULD
12 MAKE OUR EXPERTS GIVE REPORTS IF WE DON'T ORDER THE
13 REPORTS. AS FAR AS THAT GOES, THEY'VE HEARD THE
14 TESTIMONY ONCE. WE'VE ALREADY HAD THE TRIAL. WE MAY
15 HAVE SOME DIFFERENT ONES THIS TIME, BUT THERE'S BEEN NO
16 REPORTS.

17 THE COURT: YES, SIR.

18 MR. MYERS: AND THAT'S THE STANDARD THING. THIS
19 CASE, THE LAST TIME WHEN I WAS LOOKING THROUGH AN
20 EXPERT WITNESS'S FILE THERE WAS A LETTER FROM THE
21 DEFENSE COUNSEL DIRECTING HIM NOT TO WRITE A REPORT, SO
22 I'M JUST SAYING THEY TELL HIM NOT TO WRITE A REPORT SO
23 THEY DON'T HAVE TO GIVE IT TO US. SO WHAT THEY DID IS
24 SUBVERTING JUSTICE AND THE RULES BY DOING THAT. IN
25 THIS VERY CASE THAT WAS DONE, SO I'M SAYING THAT UNDER

2358

1 STATE VS. HALL, WHICH THE SUPREME COURT MENTIONED, BUT
2 DIDN'T DIRECT A RULE ON THAT A JUDGE MADE THEM DO IT.
3 THE SUPREME COURT SAID THE JUDGE DIDN'T HAVE THE
4 AUTHORITY TO MAKE THEM DO IT, SO I'M REQUESTING IT
5 BECAUSE I'M PRETTY SURE THE DEFENSE EXPERTS WERE TOLD
6 NOT TO WRITE A REPORT BECAUSE THAT'S WHAT THEY DID IN
7 THE FIRST TRIAL SO WHAT I'M REQUESTING IS THAT WE HAVE
8 A REPORT FROM THE EXPERTS AND THE UNDERLYING DATA, AND
9 THAT THEY BE REQUIRED TO BRING ALL THAT DATA TO COURT
10 WHEN THEY COME.

11 THE COURT: OKAY. A NUMBER OF JUDGES ARE FACED
12 WITH DOING THAT JUST TO GO AHEAD AND AVOID ANY SORT OF
13 PROBLEMS AND I'VE DONE THAT, I THINK, ON A COUPLE OF
14 OCCASIONS I'VE HAD RECENTLY, TOO, IS JUST TO REQUIRE
15 BOTH SIDES TO GO AHEAD AND GIVE A WRITTEN REPORT TO THE
16 OTHER SIDE, ON ANY EXPERT THAT THEY'RE GOING TO USE.

17 LET'S JUST MAKE THAT A BI-LATERAL MOTION, BOTH
18 SIDES CAN DO THAT. DEFENSE, GET A COPY TO THE STATE OF
19 ANY REPORTS FROM ANY EXPERTS THAT YOU PLAN TO USE.

20 MR. FLOYD: WE DON'T HAVE ANY REPORTS, YOUR HONOR.

21 THE COURT: WELL, THEY'LL HAVE TO COME UP WITH
22 SOME KIND OF A WRITTEN REPORT.

23 MR. FLOYD: I WOULDN'T KNOW, BECAUSE I NEVER
24 ORDERED THE REPORT.

25 THE COURT: OKAY. WOULD FRIDAY BE TOO LATE FOR

2359

1 YOU TO DECIDE TO DO THAT? MR. MYERS, WOULD FRIDAY BE
2 TOO LATE FOR YOU?

3 MR. MYERS: NO, THAT WOULD BE FINE.

4 THE COURT: HAVE YOU GOTTEN YOUR WRITTEN REPORT,
5 MR. FLOYD, FROM THE STATE?

6 MR. FLOYD: WE'VE GOTTEN NOTHING NEW FROM THEM,
7 YOUR HONOR.

8 THE COURT: OKAY.

9 MR. MYERS: THERE'S BEEN NOTHING NEW.

10 THE COURT: OKAY. IF YOU WOULD -- BOTH SIDES HAVE
11 IT TO THE OTHER SIDE BY NEXT FRIDAY, OKAY?

12 THE CLERK: JUDGE, IF I MIGHT ASK, ON JUROR 143
13 MR. GRICE, SINCE THE INFORMATION HAS BEEN GIVEN, ARE WE
14 GOING TO EXCUSE HIM?

15 THE COURT: MR. FLOYD, WHAT ABOUT THAT?

16 MR. FLOYD: YOUR HONOR, I WOULD AGREE PROBABLY HE
17 WOULD BE -- BUT, YOUR HONOR, LET ME ASK YOU A QUESTION
18 ABOUT WHAT YOU JUST SAID ABOUT THESE REPORTS. IF THE
19 TESTIMONY IS GOING TO BE GIVEN THAT'S CONSISTENT WITH
20 THE TESTIMONY THAT WAS GIVEN AT THE FIRST TRIAL, WOULD
21 WE BE REQUIRED TO GET AN EXPERT TO GENERATE A REPORT
22 THAT'S GOING TO BE THE SAME THAT HAS TESTIFIED TO?

23 THE COURT: WHAT ABOUT THAT, MR. MYERS?

24 MR. MYERS: IF THEY'RE USING AN EXPERT WHO
25 TESTIFIED AT THE PREVIOUS TRIAL, NO, SIR, I'M NOT GOING

1 TO ASK THAT THEY GIVE US REPORTS, BECAUSE WE HAVE THE
2 TRANSCRIPT OF THAT EXPERT'S TESTIMONY, BUT I STILL
3 WOULD LIKE FOR THEM TO BRING THEIR ENTIRE FILE WITH
4 THEM AND EVERYTHING THEY RELIED ON WHEN THEY COME IN
5 HERE.

6 THE COURT: ALL RIGHT. WELL, MR. FLOYD, IF IT'S
7 SOMEBODY WHO HAS TESTIFIED BEFORE, THERE WOULD BE NO
8 NEED TO PROVIDE A WRITTEN REPORT ON THAT, ONLY IF YOU
9 USE A WITNESS WHO DIDN'T TESTIFY BEFORE.

10 MR. FLOYD: OKAY.

11 THE COURT: AND ALSO, LET'S DO THIS, BOTH SIDES
12 BE SURE TO TELL YOUR EXPERTS TO BRING THEIR FULL FILES
13 WITH THEM. I'VE RUN INTO THIS IN TWO OR THREE CASES
14 WHERE PEOPLE COME IN AND THEY JUST DON'T HAVE THIS AND
15 THEY DON'T HAVE THAT. THEY NEED TO HAVE THE FULL FILE
16 WITH THEM.

17 ALL RIGHT. ANY OTHER MOTIONS THEN FROM THE STATE?

18 MR. MYERS: NO, SIR, THE ONLY OTHER THING I HAVE
19 ON THAT IS I'M PRETTY SURE BECAUSE THESE BOXES GET KIND
20 OF BIG ON STUFF. AT THE LAST TRIAL WE GOT INTO THE
21 TESTIMONY OF THE D.N.A. REPORT BY DR. DUGUGLIAMO AND I
22 TRIED TO GET THAT IN THROUGH ANOTHER WITNESS OTHER THAN
23 DR. DUGUGLIAMO -- AND I CAN'T SPELL THAT -- AND JUDGE
24 ANDERSON WOULDN'T LET ME DO THAT, BUT THAT THE ONLY
25 REPORT I KNOW OF BY SOMEBODY WHO DIDN'T TESTIFY IS HIS

2361

1 D.N.A. REPORT, AND I'M POSITIVE HE GAVE THAT TO THEM IN
2 THE LAST TRIAL.

3 THE COURT: OKAY.

4 THE COURT: ANYTHING ELSE THEN, MR. FLOYD?

5 MR. FLOYD: NO, YOUR HONOR.

6 THE COURT: MR. YOUNG?

7 MR. YOUNG: NO, SIR, YOUR HONOR.

8 THE COURT: OKAY. COUNSEL, WE'LL PLAN ON HAVING
9 THIS OTHER HEARING THEN AT 3:00 O'CLOCK ON MONDAY. ALL
10 RIGHT.

11

12 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

I, KAREN TRACY, OFFICIAL COURT REPORTER FOR THE
5TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS
HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE
CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
GENERAL SESSIONS FOR LEXINGTON COUNTY, SOUTH CAROLINA,
ON THE 30TH DAY OF JUNE, 2000.

AUGUST 3, 2005

Karen Tracy

KAREN TRACY, COURT REPORTER

MY COMMISSION EXPIRES: 04/01/14

2363

ORIGINAL**FILED**

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

THE STATE,

V.

JOHNNY OLANDIS BENNETT,

DEFENDANT.

IN THE COURT OF
GENERAL SESSIONS

2000 JUL 26 A 11:13

THOMAS H. COMERFORD
CLERK OF COURT
LEXINGTON SCNOTICE OF MOTION AND
MOTION FOR A NEW TRIAL

CASE NO: 93-GS-32-2354

TO: DONALD V. MYERS, SOLICITOR:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys will move before the Honorable Marc H. Westbrook, ten (10) days from today's date, or as soon thereafter as counsel may be heard, for an order granting defendant Johnny Bennett a new trial. This motion is made upon the grounds that the solicitor's closing argument referring to the defendant as "King Kong" and comparing him to a "caveman" were deplorable appeals to racial prejudice. (See Attached transcript of the solicitor's closing argument at pp. 12 and 29). Our Supreme Court has held that appeals to prejudice by the use of offensive racial stereotypes are unacceptable. See Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994). The appeals to racial prejudice in the present case were made to an all white jury after the solicitor struck one of only two black potential jurors on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1996).

Defense counsel did not object to the solicitor referring to the defendant as "King Kong" or his comparing the defendant to a caveman because they did not hear these racist references due to the configuration of the second floor courtroom in the Lexington County Courthouse. In that courtroom, the solicitor's table is located next to the jury panel, and the court reporter is

2364

nearby. Conversely, the defense table is located across the large courtroom. Further, this solicitor has a habit of dropping his voice in a theatrical manner that makes it very difficult, if not impossible, to hear his entire closing argument to the jury from across the courtroom. (See Attached affidavits of Defense counsel H. Wayne Floyd, and Herverly B.O. Young).

The South Carolina Supreme Court has held that a motion for a new trial based upon an inflammatory closing argument, which constitutes an abuse of a party, is the proper avenue for relief when a contemporaneous objection is not lodged at trial. See, Dial v. Niggel Associates, Inc., 333 S.C. 253, 509 S.E.2d 269 (1999); Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994); South Carolina State Highway Department v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). In Toyota, the South Carolina Supreme Court found negative racial stereotypes about Japanese people "outrageous" and counsel's conduct "abhorrent" in seeking to inject racial prejudice into the case. Toyota of Florence, Inc. v. Lynch, 314 S.C. at 263, 442 S.E.2d at 615.

"King Kong" is a fictional giant gorilla. In State v. Blanks, 479 N.W.2d 601 (Ct. App. Iowa. 1992), the court held that a prosecutor's references to the movie "Gorillas in the Mist" was improper where the defendant on trial was black. The court noted that despite the prosecutor's alleged good faith intentions and what he claimed to be innocent remarks, there was a possibility the jury would have interpreted the prosecutor's remarks as comparing the behavior of the defendant with that of apes and gorillas. "The prosecutor's good faith concerning this comparison is not determinative. It is the effect his comments may have had on the jury that concerns us." State v. Blanks, 479 N.W.2d at 605.

The United States Supreme Court has condemned the use of race for an advantage during a criminal trial. See, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1996). The use of racial

arguments by the state to obtain a conviction is an unconstitutional denial of due process. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978). In reversing the defendant's conviction in State v. Blanks, the court reaffirmed that the injection into a trial of race, sex or creed bias must be deplored and condemned. 479 N.W.2d at 605.

Similarly, in State v. Magee, 517 So.2d 433 (Ct. App. La. 1st Cir. 1987), the court held that the trial court acted appropriately by instructing prosecution witnesses not to refer to the defendant as "Caveman," even though that was unquestionably his nickname. The defendant ordinarily referred to himself as Caveman. Nonetheless, the obvious import of references to a defendant as being a caveman, a prehistoric creature, were deemed unacceptable.

Here, the solicitor referred to the defendant as a caveman who dragged his victim. A caveman is commonly understood to be a primitive sub-human creature. See, Leahy v. Leahy, 308 Or. 659, 303 Pa.2d 952, 961 (S. Ct. Or. *en banc* 1956). Treating a defendant as less than a human being is particularly abhorrent in a death penalty case since a constitutional sentencing phase must comport with "the basic concept of human dignity at the core of the [Eighth] Amendment. See Gregg v. Georgia, 428 U.S. 153, 182, 96 S.Ct. 2909, 2929 (1976).

Race permeated every aspect of this sentencing hearing from *voir dire* through the trial testimony to the deplorable appeal to racial prejudice in the solicitor's closing argument. The defendant also moves for a new trial on the grounds that follow.

During jury selection, the solicitor struck Shirley Sand, one of only two black potential jurors in the venire, because she was an educator at Dutch Fork. The alleged objectionable connection was that the defendant's mother worked in the cafeteria at Swansea High School. Swansea High School is in another school district miles away from Dutch Fork. Significantly, despite the solicitor's apparent objection that educators would identify with educators, the

2366

solicitor called five witnesses during the sentencing hearing that were also educators or principals. They testified about the defendant's school records, starting in as early as the fifth grade, and included items such as writing a girl a "dirty letter." The solicitor's stated reason was a pretext. Further, the solicitor's assertion that Sand was hardheaded and anti-authoritarian was made up out of whole cloth. The trial judge should have granted relief pursuant to Batson.

The judge later excused the only remaining black, Mr. Brown, in the venire. Brown was qualified after acknowledging that he knew the victim's family. He vowed to be fair to both sides. However, before the jury was sworn, Brown waffled on his ability to be fair after he viewed the victim's family in the courtroom. The judge excused Brown without a sufficient inquiry into his emotional reaction to seeing the victim's family in person. Consequently, an all-white jury sentenced this black defendant.

The state introduced evidence the defendant was involved in an altercation at a Pizza Hut with a white man, Shannon Gilbert. Over objection, Gilbert testified he subsequently had dreams about "black Indians" chasing him. This testimony was properly objected to because Mr. Gilbert's ensuing dreams were not proper evidence about the defendant's character, and they were not victim impact evidence for the crime for which the defendant was on trial. The blatant racial reference was obviously prejudicial. Payne v. Tennessee, 501 U.S. 808, 830 111 S.Ct. 2597, 2611 (1991), authorized the sentencer to hear "a quick glimpse of the life" the defendant "chose to extinguish." (O'Connor, White, and Kennedy, JJ., concurring). Payne never authorized victim impact evidence about the emotional harm done to victims of the defendant's lesser crimes for which he was not on trial. Furthermore, both of the Pizza Hut's victim's mother's testified in depth to the serious injuries they received in the incident in violation of Payne. This testimony was objected to but this objection was overruled.

The state then offered evidence that the defendant was involved in an alleged black-on-white fight at the Aiken County Youth Center where he was serving a Youthful Offender Act sentence for the Pizza Hut incident. This was another in a series of race based incidents that set the stage for the solicitor's closing argument referring to the defendant as "King Kong," and comparing him to a caveman.

The defendant's sexual relationship with a former Lexington County detention center guard, Judy Hardee, at the detention center, and on death row was a cause *celebre* for the prosecution. That sexual relationship was discovered after another death row inmate contacted the authorities. Investigators Tillman and Green then obtained a confession from the defendant when he was interrogated on death row.

Byron Collins testified during the defense's case in mitigation that appellant saved his life by pulling him down when he tried to hang himself in the detention center. On cross-examination the solicitor insinuated to Collins the prison guards did not like the defendant. Collins countered that the correctional officers actually loved the defendant. The solicitor then asked Collins if Judy Hardee also loved the defendant. Collins responded, "You mean the big girl?" The solicitor then said, "You know, the 'blonde lady.'"

Defense counsel objected and moved for a mistrial on the basis that the solicitor purposely was injecting race, defendant's having interracial sex, into the case. The solicitor's retort that describing Hardee as a "blonde lady" did not inform the jurors she was white defies credulity. This was prejudicial prosecutorial misconduct.

There were other errors of law during the trial that also entitle the defendant to a new trial. Defendant should have received a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing on the defendant's inculpatory statement to Investigators Tillman and Green in which he

admitted he had sex with Hardee. There was not any testimony during appellant's first trial about this sexual relationship because it only came to light after the trial.

Investigators Tillman and Green did not give the defendant Miranda warnings¹ before interrogating him on death row. Appellant's written statement was clearly used against him, the interracial sex aside, to show he was not following prison rules. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). This evidence overshadowed the defendant's otherwise exemplary record as an inmate since his conviction. The other obvious insinuation from the use of this statement was that the defendant would "enjoy" prison life, and should therefore be sentenced to death as punishment.

The defense should have received a Jackson v. Denno hearing on the voluntariness of the statements introduced against the defendant during his first trial. The ruling from the prior trial should not have been deemed the law of the case since the defense wanted to introduce new evidence on the subject during this sentencing hearing.

The court is required to hold a suppression hearing when a defendant contends an inculpatory statement to the police was not voluntarily tendered. State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989). It is a violation of the due process clause of the Fourteenth Amendment to deprive a defendant of an initial determination of the voluntariness of his statement before the jury considers that statement. See, Jackson v. Denno, *supra*. Even when a statement is found to have been voluntarily tendered, an affirmative finding that Miranda has been complied with is also required. See, State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 1292-93 (1985). The denial of a Jackson v. Denno hearing on

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

appellant's confession, and on his other inculpatory statements, entitles defendant Bennett to a new hearing.

Further, the state should have been estopped from using the sexual relationship with a correctional officer against the defendant since state actors knowingly and willfully participated in the misconduct. The other correctional officers not only "looked the other way" in deference to Hardee, and provided the facilities for the couple, they also used the defendant as an "enforcer" to keep problem inmates in line. The officers also sold merchandise to the defendant so that he could make a profit as consideration for his help in controlling other inmates. The state did not come into the sentencing hearing with clean hands on prison misconduct issues, and the proper sanction was to bar the state from gaining from its own misconduct. See State v. Quattlebaum, Op. No. 25051, Shearouse's Advance Sh. #4, 2000 W.L. 61022 (January 24, 2000).

In addition, alleged drug use was impermissibly placed before the sentencing jury. Pamela Gonzales testified that when appellant drove to her house in Orangeburg, she saw a glass with aluminum foil inside the trunk of his automobile. As a result, Gonzales then opined she thought appellant had been smoking crack cocaine.

The court struck this impermissible and highly prejudicial testimony, but should have instructed the jury to disabuse themselves of that testimony. There was not any evidence, let alone clear and convincing evidence in this case, that drug use was involved here. See State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Dickerson, Op. No. 25164, Shearouse's Adv. Sh. #28 (July 3, 2000), at p. 5-12. The jury should have been instructed to Gonzales' opinion, and to totally disabuse themselves of her testimony about alleged crack cocaine use.

The trial judge also allowed Detective Mark Jones to testify about hearsay matters contained in a police incident report. The incident report stated that the decedent's father told the police the decedent had been missing since Tuesday, and that he was last seen with the defendant. The father had not testified, and defense objected to this hearsay testimony.

Conversely, the court refused to allow the defense to play a 911 tape for the jury. On the 911 tape Rebecca Dixon told the 911 dispatcher, Michelle McLaurin, where the decedent's body could be located. She also said that Isadore Mack "did it," meaning Isadore Mack killed the decedent. Dixon's testimony was proffered, and she claimed she actually told the 911 dispatcher that it "wasn't Mack."

The defense therefore sought to play the 911 tape so that the jury could draw its own conclusions. The court should have allowed the jury to hear the tape to evaluate McLaurin's testimony. The 911 tape was admissible as a present sense impression, and the judge erred by refusing to allow the jury to hear it. United States v. Campbell, 782 F.Supp. 1258 (N.D.Ill. 1991); Collins, South Carolina Evidence, 19.3 (C) at p. 574 (2000 ed). The defense should have been allowed to place before the jury the contents of McLaurin's incident report about Dixon's 911 call as the Court allowed with Mark Jones. The state and the defendant were not "fed out of the same spoon" when it came to the introduction of evidence.

Moreover, Dixon claimed the 911 tape had been altered. The defense therefore moved for a continuance to allow this critical matter to be investigated. This should have been allowed.

Prior to the conclusion of the State's case the solicitor demanded to know whether the defense was going to call mental health witnesses or introduce mental health evidence. Defense counsel earlier were required to turn over any new expert reports to the solicitor. The defense complied, but objected to having to further reveal its mitigation strategy in advance.

The court swore the defendant as a witness. The court questioned the defendant without warning him of his Fifth Amendment right against self-incrimination, and that he could speak through his attorneys about legal matters. During questioning, the defendant revealed that the defense did not plan to call any mental health witnesses. This gave the solicitor the strong advantage of knowing the defense strategy in advance of the defendant's case, and allowed him to plan his case accordingly. The judge denied the defendant's motion for a mistrial based upon this improper procedure.

The jury also learned during testimony that the defendant was already on death row. This lessened the jury's sense of responsibility because they were aware that another Lexington County jury had previously sentenced appellant to death. The defense objected to the trial judge giving an instruction that only emphasized the objectionable evidence. Argument or jury instructions that tend to lessen the jury's sense of responsibility by suggesting that others have already made the same decision or will review their decision are improper. See, Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985).

The evidence during this trial regarding what the decedent had in his possession when he disappeared conflicted with the evidence offered by the state during the first trial. That was critical since robbery was the alleged motive for the crime. During the first trial the decedent's parents, with whom the decedent lived, testified he had an unemployment check with him when he disappeared. However, the state chose not to offer the decedent's parents as witnesses on several points during the present trial. Instead the solicitor called the decedent's brother-in-law and neighbor, Melvin Harris to testify about the same matters.

However, Harris now claimed that the decedent was carrying a shaving kit full of cash the day before he disappeared. There was no such testimony during the defendant's first trial,

and this "new and improved evidence" for the state was clearly offered to support the armed robbery allegation. Harris's testimony about the handling of the unemployment check and that he accompanied the victims father to Orangeburg looking for the victim also conflicted with that offered during the first trial. The defense moved for a mistrial since either the evidence offered during this trial, or the first trial was false.

In summary, the solicitor gave a closing argument referring to the defendant as "King Kong" and comparing him to a "Caveman." These deplorable references to race occurred in front of an all-white jury after the solicitor struck only one of two available blacks in the venire. Our Supreme Court has condemned the injection of race into a trial. Since race permeated all aspects of the defendant's trial, and for all of the other grounds argued above, and based upon the additional exceptions below, defendant Johnny Bennett should be granted a new trial.

The defendant also moves for a new trial on the following grounds:

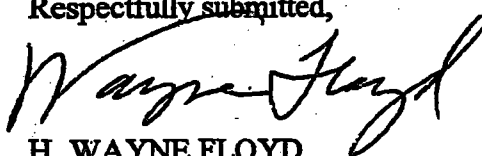
- (1) The court erred by refusing to excuse Juror Gaskins for cause after she responded three times that anyone convicted of committing murder with malice should receive the death penalty. Gaskins was constitutionally unable to consider evidence in mitigation because all murders are committed with malice aforethought, and the mitigation evidence was consequently irrelevant to Juror Gaskins;
- (2) The court erroneously excused a potential juror because she had to cover hospital visits and emergencies for three pastors on vacation. She said she could call the Lutheran Senate to first seek a replacement for her duties. The juror should have been allowed to make that call before the judge made a determination whether her employment duties constituted a sufficient basis to excuse her;

- (3) The court erred by refusing to excuse Juror Padgett, the wife of the former Assistant Jailer, since Mr. Padgett remained connected with the jail as a consultant after he retired. Mr. Padgett was the assistant to Captain Bost who in the first trial had described the defendant as the "most violent inmate" ever in the jail, Padgett and his wife were visited in their home by Bost twice a year and he witnessed an incident in the jail involving the defendant following his retirement;
- (4) The court erred by refusing to excuse Juror Porter since the Lexington County Solicitor's Office prosecuted the person that murdered her sister, and Porter was also a witness to that murder. Juror Porter could not realistically be expected to be impartial under these circumstances;
- (5) The court erred by excusing potential juror Outlaw on the grounds that he was schizophrenic. Schizophrenia can be treated with medication and a mental illness should not be a *per se* grounds for disqualification. The refusal to qualify Outlaw also forced the defense to spend a peremptory challenge to remove Padgett, who the judge refused to excuse;
- (6) The court erred by excusing previously qualified juror Brown after he indicated he was not sure he could be fair. The qualified juror saw the victim's family, and his last second emotional hesitation was not sufficient to justify his removal as a juror without a further inquiry;
- (7) The court erred by refusing to grant a continuance so that another jury panel could be chosen after an all-white jury panel was drawn to try this black defendant;

- (8) The court erred by admitting photographs of Shannon Gilbert and Aaron McGough, since these photographs of prior crime victims were irrelevant, unduly inflammatory, and appealed to the passions and sympathy of the jury;
- (9) The court erred by failing to direct a verdict on each of the aggravating circumstances, since there was not any evidence to support their submission;
- (10) The court erred by allowing the state to intentionally inject race into the case;
- (11) The court erred by ruling the state was not estopped from seeking the death penalty because it (a) waited four years to convene a sentencing jury, an unreasonable period of time that prejudiced the defendant; (b) the defendant was originally sentenced to death by eleven rather than twelve qualified jurors since one juror was not qualified by virtue of his admission he would vote with the majority; (C) the sentencing jury was not the same jury that heard the trial evidence in violation of S.C. Code §16-3-20 (B) and there was no error in the original sentencing proceeding justifying a new sentencing trial. The error was in the jury selection process. Accordingly, Defendant was entitled to a sentence of Life Imprisonment rather than a new sentencing trial.

For all of the above stated grounds, defendant Johnny Bennett should be granted a new trial.

Respectfully submitted,



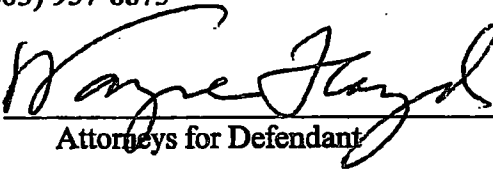
H. WAYNE FLOYD
Post Office Box 3972
West Columbia, SC 29171
(803) 739-1824

2375

HERVERY B. O. YOUNG
Assistant Public Defender

Lexington County Public Defender Office
206 E. Main Street
Lexington, SC 29072
(803) 957-8873

By


Attorneys for Defendant

This 26 day of July, 2000.

1 anybody working today because you all seem to be up here in
2 Columbia testifying. And they were.

3 You give him life, the real Johnny will come back.
4 You give him life and he'll come back out. Meeting him again
5 will be like meeting King Kong on a bad day. Vile Johnny.
6 Mean Johnny. Manipulating Johnny. Murderous Johnny. You
7 give him life those guards better button up their vests
8 because he's coming back out before us.

9 Because he's got what he wants. He's got the
10 people to testify, trying to pull the wools over his eyes,
11 trying to pull the wools over your eyes. Being smart, being
12 intelligent, being manipulative and being a con man, that's a
13 dangerous combination. And that's an explosive package
14 wrapped up in him, all six-foot-seven, 300 pound of him. And
15 that's for you to decide.

16 You know, what did Benton Smith, what did he do to
17 deserve what he went through? Five-foot-seven and a half,
18 135 pounds. What did frail old Benton do? He had some
19 money. He trusted Johnny Bennett.

20 The last picture. The last picture that these
21 folks over here get to hold. That's his handiwork. How
22 could a human being do something like that to another living,
23 breathing, fragile, little person like that? That's Johnny
24 Bennett for you, folks. He turns happiness, Happy Town,
25 grief, destruction, pain and murder, and then he leaves the

2377

1 black lady that testified? Johnny Bennett does what Johnny
2 Bennett wants to do. And it's Shannon Gilbert's fault. He's
3 in a coma for 13 days. It's Aaron Mcgough's fault as he's in
4 a coma for four days when Johnny Bennett beats him to the
5 ground and stomps him nearly to death. It ain't old Johnny's
6 fault.

7 And, you know, I don't know whether it was the
8 young black lady that was inside eating with her boyfriend or
9 the tall white boy that was outside that drove through, said
10 that they looked out -- or one of them, I don't know which
11 one said it, Johnny was even pulling one of them by his hair.
12 Kind of like an old caveman, dragging him by his hair. And
13 the guy was motionless.

14 Same thing happened in jail over there to
15 Mr. Duggins when he went in that cell and moved that female
16 guard out of the way and he dragged Mr. Duggins out by his
17 hair. Mr. Riddle wouldn't have that problem, he don't have
18 any hair, couldn't pull on him.

19 But it's not Johnny's fault. It's everybody else's
20 fault. Not old, big old Johnny, not him. And, you know,
21 just before he's getting ready to come to court to be
22 sentenced to prison, does he clear up his ways? No, because
23 on the 14th of September the judge sentenced him to prison.

24 September the 2nd he's back down in school, school
25 just started. Suspended, five days. But you know when he is

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
THE STATE	)	Indictment No.: 93-GS-32-2354
	)	
vs.	)	AFFIDAVIT OF HERVERY B. O. YOUNG
	)	
JOHNNY O. BENNETT, JR.	)	

I, HERVERY B. O. YOUNG, being first duly sworn, do hereby depose and say that:

1. I am co-counsel for Johnny O. Bennett in the above-captioned matter.

2. I was present during all stages of the re-sentencing hearing in this matter.

3. I did not hear the solicitor make references in his closing arguments comparing Mr. Bennett to a "caveman" and/or "King Kong".

4. I was made aware of these slurs after the conclusion of the case.

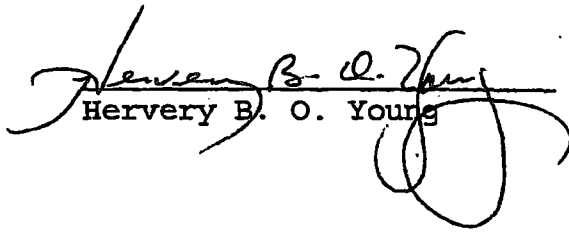
5. That the courtroom in Lexington County is configured in such a way that the defense table is across the room from the juror box and witness stand.

6. That the microphone system was not picking up properly and counsel occasionally had difficulty hearing and requested persons to speak up.

7. That the Solicitor has a reputation of giving a dramatic

2379

argument that includes the lowering and raising of his voice.


Hervey B. O. Young

SWORN TO BEFORE ME
this 25th Day of July, 2000


Notary Public for South Carolina

My Commission Expires: 4-12-2010

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF GENERAL SESSIONS
93-GS-32-2354

ORIGINAL

THE STATE OF SOUTH CAROLINA 2000 JUL 26 A 11:13

2380

Plaintiff, THOMAS H. COMERFORD
CLERK OF COURT
LEXINGTON SC

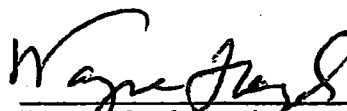
vs.

AFFIDAVIT OF WAYNE FLOYD

JOHNNY O. BENNETT,

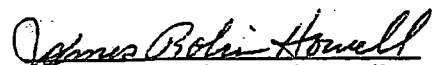
Defendant.

1. Affiant was present and attentive during Solicitor's closing arguments but could not hear everything that was said because of his position in the Courtroom, and the acoustics of the Courtroom and the fact that the Solicitor often dropped his voice to give dramatic context to his comments.
2. Affiant did not hear the Solicitor's comments comparing Defendant to "King Kong" and "caveman" did not discover the comments had been made until after the trial was over.


Wayne Floyd, Esquire

SWORN TO BEFORE ME

this 26 Day of July, 2000


Notary Public for South Carolina

My Commission Expires: Feb 2007

2381

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

THE STATE

vs.

JOHNNY O'LANDIS BENNETT,

Defendant.

STATE'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR A
NEW TRIAL.

Indictment No. 93-GS-32-2354

I. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS SOLICITOR'S COMMENTS IN CLOSING ARGUMENT WERE BASED ON TESTIMONY IN THE RECORD AND REASONABLE INFERENCES, WERE NOT IMPROPER, AND DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL

A Solicitor's final argument in the penalty phase of a capital trial is limited to the record and its reasonable inferences and focuses on the characteristics of the defendant and the nature of the crime. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (S.C. 1987) (citations omitted). The argument of the Solicitor must be viewed in the context of the entire record, and not isolated portions taken out of context. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (SC. 1997). "The relevant question is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 766 (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). See also Arnold v. Evatt, 113 F.3d 1352, 1358 (4th Cir. 1997).

The Fourth Circuit Court of Appeals held that even if a prosecutor's comments in closing argument are seen as "undesirable or even universally condemned" that is not sufficient to reverse a conviction. Arnold v. Evatt, 113 F.3d 1352, 1358 (4th Cir. 1997) (quoting Darden v.

2382

Wainwright, 477 U.S. 168, 181 (1935) and discussing re-sentencing phase comments made by the Solicitor). The court in Arnold went on to hold that in determining if "a prosecutor's comments denied the defendant fundamental fairness, the reviewing court should consider: (1) the nature of the comments, (2) the nature and quantum of the evidence before the jury, (3) the arguments of opposing counsel, (4) the judge's charge, and (5) whether the errors were isolated or repeated." Arnold at 1358 (citing Lawson v. Dixon, 3 F.3d 743, 755 (4th Cir. 1993) (citations omitted).

Race was irrelevant, immaterial and a non-issue in this case. Moreover, the record is crystal clear and pristine that race was never injected by the Solicitor. The Defendant was black, the victim was black, the chief investigating officers were black, and over 55% of the State's witnesses were racial minorities. The sole injection of race were the feeble attempts of defense counsel who not only attempted to play the race card, but deal from the bottom of the deck.

"KING-KONG" COMMENT

The defense argues that the Solicitor's closing "King Kong" statement appealed to racial prejudice. This argument is deplorable.

From the State's opening statement, through the testimony, to the Solicitor's closing argument, the size and strength of the Defendant (6'8", 300 pounds), versus the size of the victim (5'7½", 135 pounds) were repeated and emphasized. The State continuously referred to the unlawful, violent and reprehensible conduct of the defendant in and out of jail and prison.

Also, the State attacked the defense's theory that the Defendant had changed his multifarious, unlawful, disobedient, destructive and disruptive behavior, before and after incarceration, and was now a gentle, model prisoner. The State countered this contention by

2383

proving the Defendant had sexual intercourse with a female guard while incarcerated at the Lexington County jail and while on death row at the Department of Corrections. Moreover, the State introduced a prison document in which the Defendant stated that "anything in my jacket could very well have an impact on me when I go back to court." (Exhibit 66). Therefore, the Defendant was now perpetrating a fraud by being obedient, manipulating officers, and gaining their confidence so they could testify at the re-trial in his favor, as approximately 15 prison officials testified for the Defendant.

As to the nature of the comment, the Solicitor argued: "It says right down here, I want to talk to you. And this is to the warden, Warden Weldon, down at Lieber. (Referring to Exhibit 66).

He says I would very much like to speak with you about these things as soon as you find the time. He wants to talk with him. Because anything in my jacket would very well have an impact on me when I go back to court; May 27th, 1997. What did all those guards yesterday testify? I've been with Johnny since 1997. He's been good since '97. Every one of them.

I don't think any of them went past '97, because I wrote it down. I didn't ask them hardly any questions. But every one of them; I've been with Johnny since '97. Oh, he's the secretary of defense now. He's good. He goes to Bible class. He sings down there. He helps the preacher. The preacher is his best friend in the world.

Has he manipulated anybody? Because I know if anything bad is in my jacket, in my file, it could very well impact me when I go to court and see 12 men and women on a jury panel. So I think I'll be nice to some guards and get them to testify for me. That's why I asked one of them, is anybody working today because you all seem to be up here in Columbia testifying. And

2384

they were.

You give him life, the real Johnny will come back. You give him life and he'll come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. Murderous Johnny. You give him life those guards better button up their vests because he's coming back out before us.

Because he's got what he wants. He's got the people to testify, trying to pull the wools over his eyes, trying to pull the wools over your eyes. Being smart, being intelligent, being manipulative and being a con man, that's a dangerous combination. And that's an explosive package wrapped up in him, all six-foot-seven, 300 pounds of him. And that's for you to decide.

You know, what did Benton Smith, what did he do to deserve what he went through? Five-foot-seven and a half, 135 pounds. What did frail old Benton do? He had some money. He trusted Johnny Bennett." (Transcript, pp 28-29). All of this was without defense objection.

The use of the term "King Kong" was not, as defense counsel asserts, an "appeal [sic] to racial prejudice". The term depicted the brutality of the murder, the character of the defendant, emphasized the tremendous size of the defendant and his violent character, referred to the evidence in the record and reasonable inferences therefrom, the charge by the judge, and was used to overcome defense counsel's arguments and defenses.

Second, considering the nature and quantum of the evidence, the record is replete with overwhelming evidence which establishes the statutory aggravating circumstances of Kidnapping, Physical Torture, Larceny with the Use of a Deadly Weapon, and Robbery while Armed with a Deadly Weapon.

2385

Third, considering the arguments of opposing counsel, the Defendant's theory as shown through his witnesses, his attorney's closing statement, and his own soliloquy to the jury was that he was a changed man and that he no longer posed a threat to society. In fact, the record contains testimony elicited by the defense from the Defendant's own witnesses that the Defendant was nicknamed a "gentle giant" and described as a "big old teddy bear", the "Secretary of Defense", and the "Mediator" who taught other inmates how to comply with new rules and regulations in prison. The Solicitor's arguments were nothing more than a description of the circumstances surrounding the murder, a comment on the Defendant's brutality and character, a description of his size and frightening actions if he didn't get his way, and made in response to the Defendant's arguments and theory of the case.

Fourth, even though the State contends the term was proper, defense counsels' assertion that they did not object because they did not hear the comment is ludicrous. Everyone in the courtroom, even the court reporter, heard it. Counsel did not object because the totality of the context in which the term was used was supported by the record and proper.

The Solicitor also used cardboard figures of the Defendant and victim to further demonstrate the vast difference in their sizes. Defense counsel did not even object to the figures that were clearly visible to counsel. Moreover, the judge instructed the jurors to consider the sizes of the Defendant and victim as to physical torture, and charged the jurors not to be governed by sympathy, prejudice or passion.

Finally, and of major import, the term "King Kong" was only mentioned one time by the Solicitor not in a muffled tone, but loud and clear.

Therefore, "King Kong" was a legally permissible comment depicting the brutality of the

2386

murder; the character of the Defendant; his enormous physique; the aggravating circumstance of physical torture; his unlawful, lethal, destructive, disruptive and dangerous acts; and made in response to defense arguments and their theory of the case as an analogy of how the Defendant would return to his multifarious, deadly behavior in gargantuan and terrifying proportion, if given a life sentence.

"CAVEMAN" COMMENT

As with the "King Kong" comment, defense counsel desperately gasps for air in alleging that the use of the word "caveman" appealed to racial prejudice.

Defendant had been previously convicted of ABHAN for beating two men, Shannon Gilbert and Aaron McGough, unconscious at the Lexington Pizza Hut. One victim was in a coma for two weeks and the other for approximately five days. The State's eyewitness, Rhonda Smith, testified that she saw the Defendant drag the motionless body of one victim by the hair across the parking lot.

Defendant was also cited with infractions at the Lexington County Jail for an assault against inmate Duggins who was "a skinny little thing". Correctional officer Sharon McChesney testified that in trying to stop the Defendant, she was assaulted by the Defendant, and that the Defendant dragged Duggins by the hair from his cell across the floor.

In direct reference to this testimony and the character of the Defendant, Solicitor Myers talked about the Defendant's lengthy suspensions and disciplinary infractions in school, and argued the following:

"Expelled finally from school. They gave him chance, after chance, after chance, after

2387

chance but he wouldn't take it. They tried to counsel him. They'd kick him out of school, and finally they'd make him stay in school and have in-school suspension. Didn't work. Tried to talk with him, wouldn't listen. Until finally, so the other student could get an education, expelled.

Then he corrected his ways then, didn't he? No, sir. No, ma'am. The Pizza Hut. Pizza Hut. Shannon Gilbert in a coma for 13 days. Aaron McGough in a coma for four or five days, hanging on to life, boot print in one of them's head. You remember Ms. McGough said she went there and she didn't recognize her son because his face was so beaten up and had that round U-shape up there.

And what did those people say when they pulled in the Pizza Hut parking Lot? What was that fellow doing? Stomping on them when they're down. But, of course, now all of this are other people's faults. It's not Johnny Bennett's. Because the other students picked on him, intimidated him. They started to fight with Johnny Bennett.

It's the teachers' fault. They didn't help Johnny Bennett. They should have been more accommodating. It's the school in Swansea's fault because they didn't have the programs to teach Johnny Bennett right. Johnny does what Johnny wants to do.

Do you remember this Mary Felder Rice, that nice black lady that testified? Johnny Bennett does what Johnny Bennett wants to do. And it's Shannon Gilbert's fault. He's in a coma for 13 days. It's Aaron McGough's fault as he's in a coma for four days when Johnny Bennett beats him to the ground and stamps him nearly to death. It ain't old Johnny's fault.

And, you know, I don't know whether it was the young black lady that was inside eating with her boyfriend or the tall white boy that was outside that drove through, said that they looked

2383

out — or one of them, I don't know which one said it, Johnny was even pulling one of them by his hair. Kind of like an old caveman, dragging him by his hair. And the guy was motionless.

Same thing happened in jail over there to Mr. Duggins when he went in that cell and moved that female guard out of the way and he dragged Mr. Duggins out by his hair. Mr. Riddle wouldn't have that problem, he don't have any hair, couldn't pull on him.

But it's not Johnny's fault. It's everybody else's fault. Not old, big old Johnny, not him. And, you know, just before he's getting ready to come to court to be sentenced to prison, does he clear up his ways. No, because on the 14th of September the judge sentenced him to prison.

September the 2nd he's back down in school, school just started. Suspended, five days." (Transcript, pp 10-12). All of this was without defense objection.

To flimsily allege this argument injected racial prejudice is solely a figment of defense counsels' imagination. The comment was a direct reference to testimony by witnesses and abundantly supported by the record. It was clearly and properly aimed at the characteristics and character of the defendant, which the judge charged the jury to consider.

It also substantiated the State's Notice of Evidence in Aggravation of the Punishment which notified the Defendant that the State would present evidence and testimony of Defendant's "character", "acts of violence", "violations of laws, rules, regulations and/or ordinances", "prior records and the nature of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm", and "disregard for peace and good order".

It was also used to negate the charged statutory mitigating circumstance that "the defendant had no significant history of prior criminal convictions involving the use of violence against another person." (Transcript, pp 7-8).

2383

Nevertheless, the word "caveman" simply does not carry any racial connotations. The most popular publications of cavemen are the comic strip "B.C.", and the "Flintstones" movies, TV shows, etc. None of these illustrations or others has ever portrayed a black caveman. However, there are frequent depictions of a white caveman with a club dragging another white caveman by the hair.

Finally, the Solicitor mentioned the word "caveman" one and only one time. Moreover, the word was used in direct reference to the testimony of acts committed by the Defendant. It is submitted that this defense counsels' assertion is also totally devoid of a crumb of merit.

II. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS SOLICITOR'S COMMENTS IN CLOSING ARGUMENT WERE NOT OBJECTED TO AND WERE NOT FLAGRANT, VICIOUS, INFLAMMATORY REMARKS WHICH RESULTED IN CLEAR PREJUDICE

The general rule is that a contemporaneous objection and ruling at trial is required to preserve an issue. State v. Hudgins, 460 S.E.2d 388, *cert. denied*, 116 S.Ct. 821 (1996). It is undisputed that defense counsel failed to object during the Solicitor's closing argument to the "King Kong" and "Caveman" references. Carving out a narrow exception to the general rule, the South Carolina Supreme Court has held "that even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611, 615 (S.C. 1994) (citing South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 170 S.E.2d 211 (S.C. 1971)).

The Defendant relies on Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978) for the

2390

proposition that the use of racial arguments is an unconstitutional denial of due process. In Miller, a rape case where the defense argued consent, the prosecutor deliberately injected the issue of race when he stated that a white woman would never consent to having sexual relations with a black. The Solicitor's comments in the present case in no way brought the race of the Defendant into issue. Additionally, the case at hand is distinguished as a black man was on trial for murdering a black man.

Also, the Defendant relies on a non-controlling Iowa case, State v. Blanks, 479 N.W.2d 601 (Ct. App. Iowa, 1992), for the proposition that the use of the term "King Kong" was a clearly prejudicial racial comment. In Blanks, the Court determined that "given the facts of the case" a reference to the movie "Gorillas in the Mist" was racially prejudicial. Id. at 603. In Blanks, the defendant was a black man on trial for beating a white woman, and in the movie, it was likewise, a white woman who was violently murdered by black African hunters. Blanks is easily distinguishable, in the present case, we have a black man who brutally murdered another black man.

The Defendant relies on a non-controlling Louisiana case, State v. Magee, 517 So.2d 433 (Ct. App. La. 1st Cir. 1987) and a non-controlling Oregon case, Leahy v. Leahy, 308 Or. 659, 303 Pa.2d 952, 961 (S.Ct. Or. *en banc* 1956) for the proposition that the use of "caveman" is clearly prejudicial.

In Magee, there was no finding that the repeated use of the defendant's nickname, "caveman," was clearly prejudicial. When the defendant objected to the use of the nickname, the trial judge stated that future references would not be appropriate. On appeal, the Louisiana court assigned no error to the trial judge's failure to grant a mistrial where the defendant had

2391

not even asked for one. In Leahy, a divorce action, the court merely stated that caveman tactics by the parties were not to be tolerated. Neither case is on point as to the comments in the State's closing argument being clearly prejudicial.

Accordingly, the Defendant's motion for a new trial should be denied as there is no showing by the Defendant that the comments in the State's closing argument was a "flagrant case" which contained a "vicious, inflammatory argument" that resulted in "clear prejudice."

III. DEFENDANT'S MOTION FOR A NEW TRIAL ON THE REMAINING GROUNDS SHOULD ALSO BE DENIED.

- A. There was no Batson violation in the State's use of a strike on Shirley Sands a black educator, during jury selection.

The State struck Juror Sands, a black female, and the Defendant requested a Batson hearing. The State offered the following race-neutral explanations for striking Sands: 1) she was an employee of the Lexington County School System; 2) by reputation and observed demeanor she was argumentative, confrontational, difficult to get along with, and resentful of authority; 3) she did not acknowledge or look at the judge when questioned; and 4) she "bowed up" at the Solicitor when asked about the death penalty.

Juror Sands was employed with the public school system in Lexington County. The Defendant's mother was also employed in the Lexington County School System along with several witnesses that were called by the State. Juror Sands was the only juror in the entire qualification pool that was employed by the Lexington County School System. The State wanted to avoid any chance of some connection to or confrontation within the school system or among its authorities. (Transcript of Batson Hearing at Page 3 Line 23 to Page 4 Line 4).

2392

Potential jurors may be struck based on their demeanor and disposition. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (S.C. 1998) (citing State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991)). The State explained that Ms. Sands' reputation in the school system was that she resented authority, was extremely confrontational, and was difficult to get along with. (Transcript of Batson Hearing at Page 3 Lines 7-10). The evidence supports the State striking Juror Sands, as the defense argued the defendant's disciplinary infractions in school were the fault of school authorities, not the defendant. Sands would have agreed with the defense. In addition, the State explained that Juror Sands displayed a confrontational attitude in the courtroom by "bowing up" at the Solicitor when he questioned her position on the death penalty. (Transcript of Batson Hearing at Page 3 Line 14).

The Defendant failed to show that the legitimate race-neutral explanation offered by the State was a mere pretext. There were no white jurors seated who worked for the Lexington County School System. Additionally, there were no white jurors seated who displayed the same demeanor and disposition as Ms. Sands. Accordingly, the judge correctly ruled that there was no Batson violation.

B. Mr. Brown was properly excused by the judge from serving on the jury.

Juror Brown did not have a last second emotional hesitation as suggested by the Defendant. After Brown saw the victim's family, he properly brought to the Court's attention the fact that he knew the family, and that this relationship would interfere with his ability to serve as a juror. When questioned, Brown stated that he could no longer carry out his duty as a juror to be fair and impartial. He was correctly excused as dictated by Wainwright v. Witt, 469 U.S. 412 (1985).

2393

- C. The testimony of Shannon Gilbert was properly admitted.
- D. The testimony of the mothers' of the Pizza Hut victims was properly admitted.

The testimony was not meant to be nor was it introduced as victim impact testimony. Their testimony described the nature and extent of the injuries sustained by the victims. This type of evidence is direct evidence of the Defendant's character, which is clearly admissible, and so charged to the jury by the judge. Also, this testimony was admitted in the first trial.

- E. The testimony of the YOA correctional officer did not improperly inject the Defendant's race as an issue.

Sandra Key, a black correctional officer, testified regarding an incident involving the Defendant at the Aiken Correctional Institute. Without the State eliciting the information, Ms. Key of her own accord described the incident as involving white inmates and black inmates. This was a fact. The differences in the races of the individuals involved in this incident were never mentioned again.

- F. The Solicitor's statements describing the hair color of Judy Hardee did not inject the Defendant's race as an issue.

On cross-examination of Byron Collins, a defense witness, the Solicitor asked the witness if he knew Judy Hardee. In describing Hardee to the witness, the Solicitor stated, "You know, the blond lady." This statement did not inject race into the re-sentencing trial. Being a "blond lady" does not equate with being a white female. In fact, at least one of the State's witnesses was a black female with orange hair. Additionally, the stricken black juror, Ms. Sands, had short blondish hair. Regardless, the fact that Judy Hardee is a white female does not in itself improperly inject the issue of race.

- G. Defendant's was not entitled to a Jackson v. Denno hearing regarding Defendant's statement to SCDC Investigators in which

2394

he admitted to sexual relations with Judy Hardee while on death row.

Evidence of Defendant's sexual relations with Judy Hardee was not evidence of a crime, but rather it was evidence of the Defendant's character. The SCDC detectives were not investigating any crime committed by the Defendant. Instead, the investigators were investigating allegations of rule infractions by SCDC officers. As such, the Defendant was not subjected to custodial interrogation.

- H. Defendant was not entitled to a Jackson v. Denno hearing as to statements introduced against him at the first trial.

The Defendant may not re-litigate the admissibility of statements that were properly introduced in the guilt phase. State v. Young, 319 S.C.33, 459 S.E.2d 84 (S.C. 1995) *cert. denied* by Young v. South Carolina, 516 U.S. 1051, 116 S.Ct.718, 133 L.Ed.2d 671 (1996) (citing State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1990); State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); and S.C. Code Ann. Section 16-3-25(E)(2) (1985)).

- I. Testimony regarding Defendant's sexual relationship with Judy Hardee was properly admitted.

The testimony regarding the Defendant's sexual relationship while incarcerated on death row was proper as it went to the Defendant's character, and prison infractions or rules violations.

- J. Defendant's alleged drug use was properly struck from the record.

The Defendant requested and was granted the appropriate remedy.

- K. The Court properly allowed Mark Jones to testify about hearsay matters contained in a police report.

2395

Deputy Mark Jones testified that when he took the initial missing person report the victim's father stated that the victim had been missing since Tuesday and was last seen with the Defendant. This testimony was properly admitted as it was not offered for the truth of the matter asserted. S.C.R.E. Rule 801(c). The testimony was offered to explain why the officer took the action that he took after receiving the information. State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (S.C. App. 1996) (holding that officer's testimony concerning the content of a police dispatch was not hearsay as it was not offered to prove the truth of the matter asserted, but instead was used to explain why the officers began surveillance); United States v. Love, 767 F.2d 1052 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.E.2d 890 (1986) (holding that an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken).

Finally, the victim's father testified later during the sentencing trial. Any claimed error is therefor harmless as the witness was subject to cross-examination by defense counsel.

L. Defendant's attempt to introduce the 911 tape was properly denied.

Defense counsel's attempt to play the 911 tape was a thinly veiled offer to introduce improper evidence relating to third-party guilt. The proposed evidence was inadmissible as it was not inconsistent with the Defendant's guilt and would not raise a reasonable inference as to the Defendant's innocence. State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (S.C. 1988); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (S.C. 1994) *overruled on other grounds by State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (S.C. 1995). The only effect of allowing the jury to hear the 911 tape would be to cast a bare suspicion upon another individual. State v. Cooper, 334 S.C. 540, 514 S.E.2d 583, (S.C. 1999) (citing State v. Gregory, 198 S.C. 98,

2396

16 S.E.2d 532 (S.C. 1941)). This the defense can not do.

The Honorable Ralph King Anderson ruled and stated the following in the first trial, "I will protect your record in this regard. I'm not going to let in the 911 call or calls. That absolutely vitiates Parker and its progeny. ... Specifically, I want the State Supreme Court to know I do not believe that this evidence is admissible under any circumstances as juxtaposed Parker, Southerland, and South." (Record on Appeal, Vol. 5, p 1990, Line 13 - 20). The 911 tapes were ruled inadmissible during the guilt phase of the first trial, and this ruling became the law of the case.

In addition, Rebecca Dixon, the 911 caller, had no first hand knowledge of any information and could only testify as to what would be inadmissible hearsay.

M. Court's questioning of Defendant as to calling mental health witness does not entitle Defendant to a new trial.

The Court had previously ruled that all parties were required to turn over written reports of any new expert who was going to testify at trial. There were no mental health witnesses in the first trial. The State brought to the Court's attention the fact that the defense had not provided the State with any new reports, and that under the Court's ruling the defense would thereby be barred from calling any new experts, particularly mental health witnesses, to testify. The Court properly questioned the defense as to its intent to call any new experts. The Court then questioned the defendant to obtain a waiver on the record of his understanding of the ruling, and the fact that no new expert was to be called by the defense. This was absolutely proper.

N. Defendant's attorney's comments about death row, and testimony elicited by defense witness by Defendant's attorney do not require granting of a new trial.

2397

- O. New testimony by Melvin Harris concerning cash in victim's possession prior to murder does not require the granting of a new trial.

The State is not limited to the witnesses called, or the testimony elicited during the first trial. Moreover, the witness was fully cross-examined by the defense. Accordingly, the Defendant's right of confrontation was fully satisfied. The motion for a new trial should be denied.

- P. The Court did not err by refusing to excuse Juror Gaskins based on the totality of the voir dire.

Juror Gaskins initially seemed to have difficulty understanding what malice was and how it related to murder. However, once the Court explained the applicable law, Juror Gaskins clearly stated that she would need to see and hear all of the evidence from both sides before she could make a determination as to the appropriate sentence. See State v. Holmes, 320 S.C. 295, 464 S.E.2d 334 (1995) (stating that a juror who initially believed that a defendant had to prove his innocence was properly qualified once she was told the law and stated that she could follow it).

- Q. Juror was properly excused who had to cover hospital visits and emergencies for three pastors on vacation.

The Court had previously excused other prospective jurors based on employment conflicts and excusing this juror was merely consistent with previous rulings. See State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied*, 498 U.S. 881 (1990) (stating that the decision to qualify or disqualify prospective jurors is a matter of discretion with the court and is not reversible unless wholly unsupported by the evidence).

2398

- R. The Court did not err in refusing to excuse Juror Padgett who knew a State's witness, Adrian Bost, and whose husband witnessed an incident in jail involving Defendant.

Juror Padgett was properly qualified. She stated that she could follow the law, listen to all of the evidence, and make her own determination as to what was an appropriate sentence. The Defendant, during voir dire, had an opportunity to explore what they alleged as a potential bias. Juror Padgett maintained that she would not be biased towards the State or against the Defendant and would properly perform her duty as a fair and impartial juror. See State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (S.C. 1981) (holding that a motion for a mistrial was properly denied where a juror's wife was employed by the county Sheriff and had previously worked for the Solicitor's Office as there is no common law rule or statute which disqualifies a juror because of a relationship to a witness); State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (S.C. 1986) (holding that prior employment with the county police department did not disqualify a juror without a showing of bias or prejudice); and State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (holding that a juror who was the wife of an Horry County police officer was properly qualified).

- S. The Court did not err in refusing to excuse Juror Porter who witnessed her sister's murder and which case was prosecuted by the Solicitor's office.

Juror Porter was also properly qualified. She stated that she could follow the law, listen to all of the evidence, and make her own determination as to what was an appropriate sentence. Juror Porter stated that she would not be biased towards the State or against the Defendant and would be a fair and impartial juror. The Judge used proper discretion in qualifying the juror. State v. Council, 515 S.E.2d 508 (1999).

2393

T. The Court did not err in excusing Juror Outlaw on the grounds that he was schizophrenic.

In chambers, Juror Outlaw stated that he was a diagnosed schizophrenic and that his doctor told him that he should not serve on the jury. It is within the trial judge's discretion to excuse a juror for health reasons. State v. South, 285 S.C. 529, 331 S.E.2d 775 (S.C. 1985). See State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (S.C. 1985) (stating that the trial judge was correct in excusing a juror whose nervousness and serious medical condition prevented her from being a competent juror); Section 14-7-810 (S.C. Code of Laws 1976 as amended) (stating that the trial judge's decision as to whether or not a juror is qualified to serve as a juror and render efficient jury service because of a mental infirmity must not be disturbed on appeal); State v. Gaskins, 284 S.C. 105, 362 S.E.2d 132 (S.C. 1985). Accordingly, Juror Outlaw was properly excused.

Any claim that any of the above jurors were not impartial must focus on the jurors who were ultimately seated. Ross v. Oklahoma, 487 U.S. 81 (1988); State v. Tucker, 478 S.E.2d 260 (1996). The defendant was satisfied with the impartiality of the seated jurors since he did not use all of his ten (10) strikes. He also cannot raise this issue because he did not exhaust all of his preemptory challenges. State v. Tucker, 478 S.E.2d 260 (1996); State v. Hudgins, 460 S.E.2d 388 (1995).

U. The Court did not err in denying Defendant's motion to qualify another jury pool after an all-white jury was drawn.

Defendant was not entitled to a jury containing African-Americans. Defendant was entitled to a jury selected from an appropriately qualified juror pool. This is exactly what the Defendant got.

2400

- V. The Court did not err in admitting photographs of Shannon Gilbert and Aaron McGough.

Photographs showing injuries to victims of previous crimes are admissible and appropriate in the sentencing phase to show the character of the defendant. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (S.C. 1985). Also, the photographs were admitted in the first trial.

- W. The Court did not err in failing to direct a verdict on each of the aggravating circumstances.

The record contains over whelming evidence establishing the statutory aggravating circumstances of kidnapping, torture, larceny with the use of deadly weapon, and robbery while armed with a deadly weapon. These circumstances were admitted and found in the first trial.

- X. The Court did not err in ruling that the State was not estopped from seeking the death penalty.

The same ruling was made at the first trial. The South Carolina Supreme Court had already reviewed this case. After review, the Supreme Court affirmed the jury's finding of guilt, reversed the sentence and remanded the case for a re-sentencing hearing.


DONALD V. MYERS, SOLICITOR
Eleventh Judicial Circuit

Lexington, South Carolina

August 30, 2000

2401
ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
2000 SEP 14 P 3:47

IN THE COURT OF GENERAL SESSIONS

THE STATE)
THOMAS H. GOMERFORD)
CLERK OF COURT)
LEXINGTON SC)
vs.)

STATE'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR A
NEW TRIAL BASED ON JURY
LEARNING THAT DEFENDANT WAS
ON DEATH ROW.

JOHNNY O'LANDIS BENNETT,)
Defendant.)

Indictment No. 93-GS-32-2354

**A. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS
JURY'S KNOWLEDGE THAT DEFENDANT WAS ON DEATH ROW DID
NOT DIMINISH THE JURY'S SENSE OF RESPONSIBILITY**

The Defendant's attorney, Wayne Floyd, on direct examination of a defense witness, made a statement about the Defendant and death row. In addition, on direct examination another defense witness stated that the Defendant was on death row which was responsive to the direct examination by the Defendant's attorney. However, during continued questioning by defense co-counsel, Hervery Young, the witness testified that inmates sentenced to death and inmates convicted but not yet sentenced were both housed on death row. The State did not make any comment nor elicit any testimony whatsoever regarding the Defendant's presence on death row. Indeed, throughout the course of the trial, the jury was instructed that the Defendant had previously been found guilty of murder and that it was this jury's duty to determine the manner of punishment. This is consistent with the testimony heard by the jury regarding the Defendant being on death row. Accordingly, the Defendant's motion for a new trial should be denied as there is no evidence that the jury's sense of responsibility was lessened by the passing references to death row.

B. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS DEFENDANT CAN NOT COMPLAIN OF AN ERROR CAUSED BY HIS ATTORNEY

In State v. Washington, 432 S.E.2d 448, 315 S.C. 108 (S.C. 1992), the South Carolina Supreme Court affirmed the trial judge's denial of a defendant's motion for a mistrial stating that defendant "may not complain of the admission of evidence elicited by his own counsel." Id. at 449 (finding that a witness' answers were responsive to defense counsel's questioning). See also State v. Cutro, 332 S.C. 100, 504 S.E.2d 324, 327 (S.C. 1998); State v. McFadden, 318 S.C. 404, 458 S.E.2d 61, 64-65 (S.C. App. 1995). Similarly, a defendant may not complain of an error committed by his own attorney. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (S.C. 1984) (quoting State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835 (S.C. 1962) and holding that a defendant "cannot complain of an error which his own conduct has induced"). Furthermore, a claim of an improper remark by a defendant's attorney, testimony elicited by a defendant's attorney on direct examination, or the ineffectiveness of defense counsel must be reserved for post-conviction relief. State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989). Therefore, Defendant's motion for a new trial based on the statements by defense counsel or witnesses of Defendant's presence on death row should be denied. This matter is more properly raised on post-conviction relief which will provide the Defendant with a greater latitude in alleging errors.

C. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS JURY'S KNOWLEDGE THAT DEFENDANT WAS ON DEATH ROW DID NOT AMOUNT TO A CALDWELL VIOLATION AND DID NOT DIMINISH THE JURY'S SENSE OF RESPONSIBILITY

The defense mistakenly relies on Caldwell v. Mississippi as standing for the proposition that the jury's knowledge of the Defendant's presence on death row lessens their sense of

responsibility in sentencing the Defendant. 472 U.S. 320, 105 S.Ct.2633 (1985) (discussing a prosecutor's argument to a jury in which he stated that the jury's sentence was not the final decision and that their decision was "automatically reviewable by the supreme court"). This is incorrect. In Caldwell, the United States Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". Id. at 329. In the present case, the references that the Defendant was on death row in no way led the jury to believe that the responsibility in sentencing the Defendant rested anywhere other than with themselves. Caldwell is inapplicable.

It is not error for jurors to know the defendant is, or has been, on death row. In a resentencing trial, even if a juror states he was familiar with the previous trial and agreed with the original death sentence, the juror is nevertheless properly qualified to serve where he further states that he would make a decision based strictly upon the evidence at the retrial. State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989). In the present case, all jurors stated they would base their verdict solely on the evidence and law in this trial.

Moreover, in State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), nine jurors were qualified even though they knew the defendant was on death row where the jurors stated they could render a verdict as to the sentence based only on the evidence presented in the courtroom. The Supreme Court unanimously affirmed the qualifications of these jurors. Chief Justice Toal, writing for the court, stated,

In so holding, we also reject Bell's argument that the juror's knowledge of the previous death sentence diminished their sense of

responsibility in deciding what sentence to impose. Bell relies, by analogy, on the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.E.2d 231 (1985). In Caldwell, the prosecutor urged the jury not to view itself as the final determiners of whether the petitioner would die, since a death sentence would be reviewed for correctness by the Mississippi Supreme Court. The Court concluded that this invitation to rely on the Mississippi Court's review would generate a bias towards returning a death sentence. Caldwell, 472 U.S. at 333, 105 S.Ct. at 2642.

We find that the reasoning of Caldwell does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell at 368.

Therefore, the South Carolina Supreme Court has squarely ruled that "the reasoning of Caldwell does not control" where jurors have knowledge that the defendant is on death row, and Caldwell does not support the Defendant's motion for a new trial in the present case.

However, Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), is directly on point and controlling for the denial of the Defendant's motion for a new trial. In Jones, during a resentencing hearing, a defense witness on direct examination stated that the defendant "was supposed to be on death row, and inmates on lock-up and death row don't suppose to mingle together" and that "death row inmates is up on the third-like a two story house." 332 S.C. 329, 504 S.E.2d 822, 828, (S.C. 1998) *cert. denied by Jones v. South Carolina*, 526 U.S. 1021, 119 S.Ct. 1259 (1999) *and rehearing denied by Jones v. South Carolina*, 526 U.S. 1128, 119 S.Ct. 1788 (1999). Just like the Defendant, Jones argued "that as a result of these references to death row, the reliability of the jury's verdict and sentence was diminished by the knowledge that another jury had sentenced Jones to die for the same offenses that were under consideration at the resentencing hearing." Id.

On a writ of certiorari for denial of post-conviction relief, the South Carolina Supreme Court stated that the defense argument lacked merit for several reasons. First, "there was no formal introduction of evidence of his previous death sentence. There was only passing reference to death row from which the jury may have inferred that Jones had been sentenced to death before." Id. Second, "the statement did not state that he was on death row for committing the crime against [the victim's of this case]. It may have been construed by the jury as a death sentence for a previous crime." Id. See State v. Gaskins, 326 S.E.2d 132, 284 S.C. 105 (S.C. 1995) (affirming death sentence where a former Solicitor testified regarding the reversal of a defendant's prior death sentence for a different murder and stating that "[n]othing in his testimony can be construed as an attempt to minimize the jury's responsibility in imposing a sentence") *cert. denied by* Gaskins v. South Carolina, 471 U.S. 1120, 105 S.Ct. 2368 (1995); *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Gaskins v. McKellar, 916 F.2d 941, 953 (4th Cir. 1990) (stating that no Caldwell violation occurred and "[t]he most a reasonable jury could have made of this evidence was that the statute under which the jury was to sentence [the defendant] might conceivably be invalidated as unconstitutional at some future date).

Finally, the South Carolina Supreme Court stated that Jones failed to satisfy the underlying rationale of Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.E.2d 1 (1994) where the United State's Supreme Court stated, "[w]e do not believe that the admission of evidence regarding petitioner's prior death sentence [for another murder] affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." Jones at 828 (quoting Romano at 10). The South Carolina Supreme Court stated that Jones

failed to establish "how this passing reference to death row has mislead the jury regarding its role in the sentencing process or diminished its sense of responsibility." Id.

The present case parallels Jones with the additional possibility that the jury could have reasonably inferred that the Defendant's presence on death row was as a result of having been convicted of murder and simply awaiting sentencing. As in Jones, the death row comments were passing remarks and were not formally introduced. The comments did not state that the Defendant was on death row for murdering Benton Smith, the victim in the present case. Even if the jury believed that the Defendant had been previously sentenced to death, the jury may have construed his presence on death row as a result of a death sentence from a previous crime. Moreover, all of the jurors testified on voir dire that they would base their sentencing verdict in this case solely on the evidence and law presented in court. The Defendant makes only an unsubstantiated assertion and fails to make any showing that the passing references to death row misled the jury as to its role and diminished its sense of responsibility in deciding on the appropriate punishment. For all these reasons, the Defendant's motion for a new trial should be denied.


DONALD V. MYERS, SOLICITOR
Eleventh Judicial Circuit

Lexington, South Carolina
September 14, 2000

ORIGINAL

2407

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
THE STATE)
vs.)
JOHNNY O'LANDIS BENNETT,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
ELEVENTH JUDICIAL CIRCUIT

93-GS-32-2354

ORDER

2003 SEP -4 P 12:34

FILED

THOMAS H. CONERFORD
CLERK OF COURT

FACTS

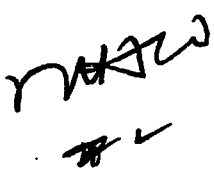
The victim, Benton Smith, a 24 year-old black male, was last seen on November 27, 1990 leaving his residence near Gaston in his 1980 Toyota accompanied by the Defendant, Johnny O'Landis Bennett. Smith cashed a \$147.00 unemployment check at 11:56 am. Later that day, Bennett, by himself, was seen driving Smith's car. Witnesses testified Smith never let anyone else drive his car. Other testimony showed that Bennett gave friends several items from Smith's car. The car was later found behind Swansea High School where Bennett's mother worked. Bennett confessed to the murder and led law enforcement to Smith's body behind his sister's home. An autopsy found that Smith had been stabbed 70-75 times in the head, neck, and upper back with a Phillips head screwdriver. Smith died as a result of internal bleeding or asphyxiation secondary to the stab wounds.

PROCEDURAL HISTORY

Johnny O'Landis Bennett was convicted of murder, kidnapping, armed robbery, and grand larceny. He was sentenced to death for the murder, and sentenced consecutively to 25 years for the armed robbery and 5 years for the grand larceny. On appeal, the South Carolina

Supreme Court upheld the convictions and the sentences for the armed robbery and grand larceny, but reversed and remanded the sentence of death for a new sentencing hearing. The Supreme Court found that Juror Number 137, while qualified to serve during the guilt phase, was unqualified to serve during the sentencing phase. 493 S.E.2d 845 (1997).

A new sentencing hearing was held, and on July 16, 2000, Johnny O'Landis Bennett was again sentenced to death for the murder of Benton Smith. A motion for a new trial was timely filed by Wayne Floyd, Esquire, and Hervery Young, Esquire, on behalf of the Defendant. Both parties briefed the issues and oral arguments were heard. For the following reasons, I find that the Defendant's motion for a new trial should be denied.



ISSUES

1. The Defendant claims that race permeated every aspect of the trial such that the Defendant was prejudiced and entitled to a new trial. Specifically,
 - a. Did the State's strike of Ms. Sands violate Batson?
 - b. Did the trial court err in excusing Mr. Brown, a black man, from serving on the jury?
 - c. Did the testimony regarding the Defendant's beating of Shanon Gilbert, a white man, improperly inject race into the trial?
 - d. Did the testimony of Sandra Key, a correctional officer, regarding the Defendant's involvement in a black on white altercation improperly inject race into the trial?

- e. Did the Solicitor's reference to Judy Hardee as "the blond lady" and testimony regarding the Defendant's relationship with Ms. Hardee improperly inject race into the trial?
- f. Did the Solicitor's use of "King Kong" and "Caveman" analogies during closing arguments improperly inject race into the trial?
2. Did the trial court err in failing to conduct a Jackson v. Denno hearing before allowing testimony of Defendant's statements where he admitted having sexual relationships with Judy Hardee while on Death Row?
3. Did the trial court err in ruling that the State was not estopped from introducing evidence of Defendant's sexual relationship with Judy Hardee because, as Defendant claims, other correctional officers knowingly and willfully facilitated the misconduct?
4. Did the trial court improperly fail to instruct the jury to disregard testimony of Defendant's drug use?
5. Did the trial court err in allowing Detective Mark Jones to testify about hearsay matters contained in a police report?
6. Did the trial court err in refusing to allow the defense to play a 911 tape where Rebecca Dixon was alleged to have said that Isadore Mack killed Benton Smith?
7. Did the trial court err in denying Defendant's motion for a continuance to investigate Rebecca Dixon's claim that the 911 tape was altered?

8. Did the trial court err in questioning the Defendant as to calling mental health witnesses?
9. Did defense attorney's comments and testimony regarding Defendant's presence on Death Row require a new trial?
10. Did testimony of Melvin Harris require a new trial?
11. Did the trial judge err in refusing to excuse Juror Gaskins based on her voir dire responses?
12. Did the trial court err in excusing a potential juror because she had to cover hospital visits and emergencies for three pastors on vacation?
13. Did the trial court err in refusing to excuse Juror Padgett, the wife of the former Assistant Jailer?
14. Did the trial court err in refusing to excuse Juror Porter who witnessed her sister's murder and which case was prosecuted by the Solicitor's office?
15. Did the trial court err in excusing Juror Outlaw on the grounds that he was schizophrenic?
16. Did the trial court err in refusing to grant a continuance so that another jury panel could be chosen after an all white jury panel was drawn to try a black defendant?
17. Did the trial court err in admitting photographs of Shanon Gilbert and Aaron McGough, victims of prior crimes committed by the Defendant?

18. Did the trial court err in failing to grant a directed verdict on each aggravating circumstance?

19. Did the trial court err in ruling that the state was not estopped from seeking the Death Penalty?

LAW/ANALYSIS

1.a. Juror Sands

Shirley Sands, a black female, was struck by the State during jury selection. The Defendant claims that Juror Sands was struck because of her race in violation of Batson v. Kentucky, 476 U.S. 79. 106 S.Ct. 1712 (1996). A Batson hearing was conducted, and the State offered several race-neutral explanations for striking Mrs. Sands.

First, the State offered that Ms. Sands was struck because she was an employee of the Lexington County School System. Specifically, Ms. Sands was an employee of the Dutch Fork school district and thereby part of the Lexington County School System. Additionally, the Defendant's mother was employed by Swansea High School also part of the Lexington County School System. Finally, several witnesses that were to be called by the State were employed in the Lexington County School System, and the State alleged that Ms. Sands had difficulty getting along with other school employees. The State offered that they were trying to avoid any chance of connection to or confrontation within the school system or among its employees or authorities. Additionally, Ms. Sands was the only juror in the entire qualified pool who was employed by the Lexington County School System.

Second, the State offered that that Ms. Sands was struck because of her reputation for being argumentative, confrontational, difficult to work with, and resentful of authority; and she exhibited a similar demeanor during jury selection. The Solicitor, referring to his voir dire notes, said that Ms. Sands' disrespectful demeanor was alarming in that she "didn't even acknowledge the judge" when the judge was speaking to her. The Solicitor also pointed out that during his voir dire Ms. Sands "bowed up" and "challenged me."

PKW
6
The court had the opportunity to observe the juror throughout voir dire. It is noted that during the Court's interaction, Juror Sands refused to look at the Court, speak into the microphone, and generally displayed a confrontational or disruptive demeanor. The same demeanor was displayed during the Solicitor's voir dire. She was the only juror to act in this manner. The Court is also impressed with the State's explanation of the juror's reputation. It is well settled that potential jurors may be properly struck based on their demeanor, disposition, or credibility. State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991); State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998) (citing State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991)). The Court finds that, in the totality of the circumstances, the State's explanation regarding Juror Sands demeanor was reasonable, valid, and supported by the facts.

The Court further finds that the school system explanation was valid. Based upon Juror Sands' demeanor during voir dire, it was evident that she was confrontational, argumentative, and somewhat resentful of authority. The difficulty between her and school employees and authorities was not refuted by the defense. The State's argument that it wanted to avoid a possible outside school system conflict being injected into the trial was

reasonable. School employees testified for both the State and the Defendant, and defense witnesses attributed some of Defendant's problems to the school system. Moreover, the Defendant's mother was an employee of the Lexington County School System. The Defendant also conceded that Ms. Sands' status was unique in that she was the only potential juror employed by the Lexington County School System. Viewing the entire matter, the explanation of preventing a juror - witness school system conflict was racially neutral, reasonable, and not pre-textual. State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989).

Algo
1
The Court concludes that gender or race was not a factor in striking Ms. Sands. The State accepted Thomas Brown, a black male, when the State still had three (3) strikes remaining. Moreover, the victim was black, the two chief investigating officers who participated in the State's jury selection were black, and the majority of the State's witnesses were black. This further supports the State's position that striking Ms. Sands was racially neutral. Further, eight (8) females served on the jury, and the State did not use all of its strikes. Therefore, gender was not a basis for excluding Ms. Sands.

Based on the potential conflict with Ms. Sands and the Lexington County School System or other employees, she being the only school employee in the jury pool, the reputation of Ms. Sands, the hostile attitude exhibited by her during voir dire, her demeanor, and all of the above, I find that the Defendant has failed to prove a Batson or J.E.B. v. Alabama violation, and that the State presented legitimate race-neutral and gender-neutral explanations for the strike of Juror Sands.

1.b. Juror Brown

Defendant alleges error in the Court excusing Jury Brown from the jury panel. Juror Brown, a black male, was accepted by both the State and Defendant and was seated as a member of the jury. However, after Mr. Brown saw the victim's family, he informed the Court that he knew the family. When questioned, he stated this relationship would affect his ability to be fair and impartial. Brown was excused because he could not carry out the requirements of a juror to be fair and impartial to both parties. It is the duty of the Judge to assume that each and every juror is unbiased, fair and impartial. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973). A juror who is ultimately qualified may thereafter be excused or disqualified if he states he cannot be fair and impartial. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). The Juror's relationship with the victim's family would prevent or substantially impair the performance of his duties as a juror according to the law. Wainwright v. Witt, 469 U.S. 412 (1985). Thus, juror Brown was not qualified to continue serving as a juror. Furthermore, the Court finds that not excusing Juror Brown, as the defense requested, would result in automatic reversal for failing to seat twelve impartial jurors.

1.c. Testimony of Shanon Gilbert and mothers of Pizza Hut victims

In 1988, Johnny Bennett was convicted of Assault and Battery of a High and Aggravated Nature and sentenced to a Y.O. A. not to exceed six years for an incident that occurred at the Pizza Hut in the Town of Lexington. One victim was in a coma for two weeks, the other for about five days. At the resentencing hearing, the State introduced the testimony of Shanon

Gilbert, one victim of this ABHAN. Over Defendant's objection, Mr. Gilbert, who still suffers from head injuries, testified that after the beating he had received by the Defendant, he had dreams about "black Indians" chasing him. The Defendant claims that Gilbert's dreams were not proper evidence about the Defendant's character, and that the "black Indians" comment was a blatant racial reference that was highly prejudicial mandating a new trial.

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the particular characteristics of the defendant. State v. Owens, 346, S.C. 637, 552 S.E.2d 745 (2001). Information and details of prior criminal convictions are admissible as additional evidence during the sentencing or resentencing phase of a capital trial. State v. Plath, 281 S.C. 1, 313 S.E.2d 619(S.C. 1984); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985); State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (1985).

intjw
9
The Defendant also takes exception to the testimony of both of the Pizza Hut's victims' mothers. Over objection, both mothers testified to the serious injuries that their sons received at the hands of the Defendant. Based on the above-cited cases, I find that the testimony of Shanon Gilbert and both mothers was appropriate character evidence regarding the effects of Defendant's actions on these victims, on the community, and that this information was relevant to the jury's deliberation as to the Defendant's character. The same type of testimony was admitted at the first trial.

The comment of "black Indians" was not elicited by the State, was mentioned only once, was evidence of the Defendant's violent character and the impact of that violence on the victims, was not referred to thereafter by the State, was not a blatant racial reference, and did

not prejudice the Defendant. I, therefore, find this isolated comment does not warrant a new trial.

1.d. Testimony of Sandra Key

The State offered as character evidence the testimony of Sandra Key, a correctional officer, regarding the Defendant's involvement in a fight at the Aiken County Youth Center where he was serving a Youthful Offender Act sentence for the ABHAN at Pizza Hut. Sandra Key, a black female, testified that the incident involved black inmates fighting white inmates.

mkw
10

The Defendant argues that this was another in a series of race-based incidents that set the stage for the Solicitor's closing argument. The State argues that they did not ask Sandra Key the race of the individuals involved, that she testified to that information of her own accord, and that the race of the individuals involved was never mentioned again. I find that Sandra Keys' testimony regarding the race of the participants was offered on her own accord and not as a result of questioning by the State, that the State did not mention the race of the participants again, and the testimony in no way prejudiced the Defendant.

1.e. Testimony of Byron Collins

This issue arises out of the testimony of Byron Collins that was offered by the Defendant during his case in mitigation. Collins testified that that the Defendant saved his life by pulling him down when he tried to hang himself. The Solicitor on cross-examination insinuated that the prison guards did not like the Defendant. Collins replied that the correctional officers actually loved the Defendant. The Solicitor then asked Collins if he knew Judy Hardee. Judy Hardee

was a former Lexington County Detention Center guard who had a sexual relationship with the Defendant while he was on death row. Collins responded, "You mean the big girl?" The Solicitor then said, "You know, the blond lady."

The Defendant objected and moved for a mistrial stating that Solicitor was again injecting race into the case. The State argued that the statement did not inject race into the trial. The State pointed out that the phrase "blond lady" does not in and of itself equate with a white female, and that in fact, stricken black juror Sands had blondish hair. The State argues that the descriptive phrase did not inject race into the trial and was used only to identify Hardee. I hold that the Solicitor's reference to Judy Hardee as "the blond lady" and the testimony regarding the Defendant's relationship with Ms. Hardee did not improperly inject race into the trial.

msw
11
1.f. "King Kong" and "Caveman"

Defendant argues that he is entitled to a new trial based on the Solicitor comparing the size and violent acts of the Defendant to "King Kong" and a "Caveman" in closing argument.

A Solicitor's closing argument in a capital trial is limited to the record and its reasonable inferences and should focus on the defendant's character, his background, and the nature of the crime. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) (citations omitted). The Solicitor's argument must be viewed in the context of the entire record and must not be taken out of context. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). "The relevant question is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 766 (citations omitted).

In closing argument, the Solicitor stated, "You give him life, the real Johnny will come back. You give him life and he'll come back out. Meeting him again will be like meeting King Kong on a bad day. Vile Johnny. Mean Johnny. Manipulating Johnny. You give him life those guards better button up their vests because he's coming back out before us." Partial Transcript at 29.

From the State's opening statement throughout the trial to the closing argument, the State repeatedly emphasized the enormity of the Defendant (6'8", 300 pounds) versus the frailty of the victim (5'7 1/2", 135 pounds) and the Defendant's violent nature. In closing, the Solicitor used cardboard figures, without defense objections, of the Defendant and victim to demonstrate the vast difference in sizes. Differences of size and strength are elements of the aggravating circumstance of physical torture that was charged to the jury. The Solicitor's one time comment of "King Kong" referred to the hugeness of the Defendant, his violent character, his taking advantage of his size and strength, his actions, his disrespect for prison rules while incarcerated, his manipulating prison officials to testify for him at retrial, the danger to guards if the defendant received a life sentence, and to attack the defenses' theory that the Defendant had changed from a disruptive, violent person to a model inmate. The Solicitor's comment did not compare the Defendant himself to King Kong, but rather compared Defendant's size and actions to the destructiveness of King Kong. It is also noted that the Defendant did not object to the "King Kong" statement.

Further, this statement was an invited response to the Defendant's evidence and argument. Defense witnesses described the Defendant as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator" who taught other inmates how to

comply with prison rules and regulations. These terms were relied upon by the defense in jury arguments to indicate Defendant was a changed man and no longer posed a threat. The Solicitor's argument and "King Kong" reference was in response to Defendant's evidence, theory of the case, and arguments. State v. Patterson, 394 S.E.2d 699 (1989); State v. Singleton, 326 S.E.2d 153 (1985).

74 JV
#13
I find that, viewing the Solicitor's argument in the context of the entire record and its reasonable inferences, the analogy to "King Kong," mentioned only one time, was not an appeal to racial prejudice. Rather, it properly described the circumstances surrounding the murder, the character and violent background of the Defendant, his disregard for prison rules and regulations, the actions of the Defendant if given a life sentence, to counteract defense evidence and argument, was an invited response, emphasized the tremendous size and strength of the Defendant, the Defendant did not object to the term, and was used in connection with the very large cardboard figure of the Defendant which was also used without objection. The comment did not infect the trial with unfairness, did not prejudice the Defendant, and was not a denial of due process or fundamental fairness.

Defendant also moves for a new trial based on the Solicitor comparing the Defendant's actions to a "caveman" in closing argument. Defendant argues this injected racial prejudice.

In the Pizza Hut ABHAN case, State's witness Rhonda Smith, a black female, testified she saw Defendant drag the motionless body of one victim by the hair across the parking lot. Also, in an infraction when Defendant was incarcerated at the Lexington County

Jail, Officer Sharon McChesney testified she tried to stop Defendant from assaulting inmate Duggins who was "a skinny little thing." Defendant then assaulted Officer McChesney, and Defendant dragged Duggins by the hair from his cell across the floor.

The Solicitor referred to this testimony and other characteristics of the Defendant in closing. He stated the Defendant was even pulling one Pizza Hut victim by his hair. "Kind of like an old caveman, dragging him by his hair. And the guy was motionless. Same thing happened in the jail over there to Mr. Duggins when he went to the cell and moved the female guard out of the way and he dragged Mr. Duggins out by his hair." Partial Transcript at 12.

PAW
14

The Solicitor was directly referring to testimony in the record and the reasonable inferences and descriptions drawn therefrom. The comment was properly directed to the characteristics of the Defendant relating to circumstances surrounding a prior ABHAN conviction and jail infraction which the Court charged the jury to consider as to the Defendant's character. I find that comparing Defendant's hair pulling to similar actions attributable to "an old caveman" does not in any manner inject racial overtones. Defendant presented no proof that the term "caveman" connotes racial prejudice, and I find absolutely that "caveman" does not so suggest. The conclusion that the term is not racially suggestive is further supported by the fact that the Defendant did not even object to the Solicitor's one-time comment of comparing Defendant's actions to "an old caveman."

The argument also supported the State's Notice of Evidence in Aggravation of the Punishment which notified the Defendant the State would present evidence of Defendant's

character, acts of violence, violations of laws, rules, regulations an/or ordinances, prior records and the nature of said crimes, propensity to commit acts of violence or bodily harm, and disregard for peace and good order. It also negated the charged statutory mitigating circumstance that Defendant had no significant history of prior criminal convictions involving the use of violence against another person.

Finally, the comment was an invited response to the Defendant's testimony and argument that Defendant had changed from a violent person to a gentle, model prisoner. The Solicitor was again emphasizing the size and strength of the Defendant, his prior criminal history, and the brutality of his character. State v. Singelton, 284 S.C. 388, 326 S.E.2d 153 (1985); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Viewing the Solicitor's argument in the context of the entire record, testimony, and the reasonable inferences drawn therefrom, the single "caveman" comment did not appeal to racial prejudice and did not deny the Defendant a fair trial.

1. Jackson v. Denno

This issue arises out of the State's introduction of statements made by the Defendant to Department of Corrections Investigators Tillman and Green during their investigation of complaints regarding correctional officers allowing inmates to have sexual relations while on death row. As part of the investigation, Tillman and Green interviewed the Defendant. During that interview, the Defendant admitting having a sexual relationship with a woman named Judy Hardee. The investigators did not give the Defendant Miranda warnings before interviewing him. The Defendant argues that he was entitled to a hearing pursuant to

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) as the statement was used against him as proof that the Defendant failed to follow prison rules.

The State argues that evidence of Defendant's sexual relations with Hardee was not evidence of any crime that the Defendant committed, but was rather evidence of the Defendant's character.

It is well-settled that evidence of a defendant's behavior in prison is admissible in the penalty phase as it bears upon the defendant's character. State v. Hughes, 521 S.E.2d 500 (1999). Confessions to other crimes or prison infractions are not admitted to prove defendant's guilt, but as evidence relevant to defendant's character. Proof of the corpus delicti of the crimes or infractions with corroborating evidence aside from the confession is not required. State v. Howard, 369 S.E.2d 132 (1988); State v. Gaskins, 326 S.E.2d 132 (1985).

makw
16

Moreover, the evidence does not have to fit within a Lyle exception because Lyle evidence is substantive evidence to establish guilt, not character evidence relevant to capital sentencing. State v. Hughes, 521 S.E.2d 500 (1999); State v. Middleton, 368 S.E.2d 457 (1988). Also, the jury is not required to find proof beyond a reasonable doubt or clear and convincing proof where the other crimes or infractions are introduced to show character. State v. George, 476 S.E.2d 903 (1996); State v. Green, 392 S.E.2d 157 (1990); State v. Middleton, 368 S.E.2d 457 (1988).

The investigators were not investigating a crime by Defendant, but instead allegations of misconduct or rule infractions by SCDC officers in allowing Defendant and others to have sex while incarcerated. The evidence was not used to prove the Defendant's guilt or to prove an

aggravating circumstance, but was admitted to show Defendant's individual characteristics and acts relevant to his character while incarcerated in prison. A Stewart character jury charge was given for the jury to so consider this evidence. As such, Miranda was inapplicable, and Defendant was not entitled to a Jackson v. Denno hearing.

The Defendant also claims that ~~he~~ he should have received a Jackson v. Denno hearing on the voluntariness of the statements introduced against him during the trial. Although, these statements were introduced against him at the first trial, the Defendant claims that before they could be introduced against him during the retrial he was entitled to another hearing regarding their admissibility. The State argues and the Court agrees that the Defendant may not re-litigate the admissibility of statements that were properly introduced in the first trial. See State v. Young, 319 S.C. 33, 459 S.E.2d 84 (S.C. 1995) *cert. denied by* Young v. South Carolina, 516 U.S. 1051, 116 S.Ct. 718, 133 L.E.2d 671 (1996) (citing State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1990); State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); and S.C. Code Ann. Section 16-3-25(E)(2) (1985)).

3. Defendant's Sexual Relationship with Judy Hardee

The State introduced evidence of Defendant's sexual relationship with Judy Hardee, a correctional officer, while the Defendant was incarcerated. The Defendant argues that the State should be estopped from using evidence of this as state actors, other correctional officers, knowingly allowed and willfully participated in the misconduct. The Court disagrees, and holds that evidence of the Defendant's sexual relationship with a correctional officer was properly

admitted and went to the Defendant's character and was evidence of violations of prison rules.

State v. Hughes, 521 S.E.2d 500 (1999); State v. Stewart, 320 S.E.2d 447 (1984).

4. Defendant's Drug Use

This issue arises out of the testimony of Pamela Gonzales. Ms. Gonzales testified that when Defendant was at her house in Orangeburg she observed glass and aluminum foil inside the trunk of the car Defendant was driving. Ms. Gonzales stated that she believed that the Defendant had been smoking crack cocaine. The Defendant objected to this testimony and asked the court to strike the testimony from the record. The court agreed and ordered the testimony to be stricken per Defendant's request. The Defendant now argues in this motion for a new trial that the court should have instructed the jury to disabuse themselves of this testimony. The Court finds that the Defendant requested and was granted an appropriate remedy.

mfw
18

5. Hearsay Testimony of Mark Jones

Deputy Mark Jones testified that while taking the initial missing persons report, the victim's father said that the victim had been missing since Tuesday and was last seen with the Defendant. The Defendant objected to this testimony as hearsay. The State's argument is two fold: (1) that the testimony is not hearsay as it was not offered for the proof of the matter asserted, but was offered to explain why the deputy took the action he did after receiving the information; and (2) that any error in admitting the statement was harmless as the victim's father later testified and was subject to cross-examination by the Defendant. The Court finds that that

the testimony was not hearsay and that if it is hearsay, its introduction was harmless and does not necessitate a new trial.

6. 911 Tape

The Defendant sought to introduce a 911 tape on which Rebecca Dixon stated that Isadore Mack "did it" and that she knew where the victim's body could be located. Dixon's testimony was proffered, and she claimed that she had actually told the dispatcher that Isadore Mack did not commit the murder. The Defendant sought to introduce the tape to allow the jury to reach its own conclusions. The Court finds that the Defendant's request to introduce the 911 tape was properly denied as inadmissible evidence of third-party guilt and that it was not inconsistent with the Defendant's guilt and would not raise a reasonable inference as to the Defendant's innocence. State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (S.C. 1988); State v. Southerland, 316 S.C. 377, 446 S.E.2d 862 (S.C. 1994) *overruled on other grounds by State v. Chapman*, 317 S.C. 377, 454 S.E.2d 317 (S.C. 1995). The Court additionally finds that during the guilt phase of the first trial the 911 tapes were not allowed in and that this ruling became the law of the case.

7. Motion for Continuance

Rebecca Dixon claimed that the 911 tape had been altered, and the Defendant moved for a continuance to investigate the matter. The Court finds that Rebecca Dixon had no first hand knowledge of any information and that anything she testified to would be inadmissible hearsay. Also as the 911 tape was held to be inadmissible evidence of third-party guilt, the Court finds that the motion for continuance was properly denied.

8. Questioning of Defendant as to Mental Health Experts

This issue arises out of the Court's ruling that all parties were required to provide written reports for any new expert that was going to testify at trial. The State informed the Court that the Defendant had failed to provide any new written reports and that under the prior ruling the Defendant would thereby be prohibited from introducing the testimony of any new experts, specifically mental health experts. The Court then questioned the defense as to their intent to call any new experts. The Court then put the Defendant under oath and questioned the Defendant to obtain a waiver on the record of his understanding of the ruling and that no new expert was to be called by the defense.

*Revised
p. 20*

The defense objected to the questioning of the Defendant without advising him of his Fifth Amendment rights against self-incrimination and the fact that he could speak through his attorneys regarding legal matters. The Defendant claims that the questioning revealed that the defense did not plan on calling any mental health experts in mitigation and that his fact allowed the State to unfairly plan their case accordingly. The Court finds that the questioning was proper and that if any error was committed, it was harmless error. The Defendant's attorneys were not going to offer the testimony of any new experts, they did not provide the State with any new reports, and therefore would have been barred from introducing any new expert testimony.

9. Death Row Comments

This issue arises out of the introduction of evidence by the defense that the Defendant had been on Death Row. The Defendant's attorney, Wayne Floyd, on direct examination of a

defense witness, made a statement regarding the Defendant's presence on death row. Additionally, in response to co-counsel Hervery Young's direct examination of another defense witness, the jury again heard that the Defendant was on death row. Mr. Young then elicited additional testimony from the same witness that both inmates sentenced to death and inmates convicted but not yet sentenced were housed on death row.

The Defendant moved for a new trial arguing that the jury's knowledge that the Defendant had previously been on death row lessened the jury's sense of responsibility as they were now aware that the Defendant had previously been sentenced to death. Over Defendant's objection, the Court gave a curative instruction after the second witness mentioned death row.

WJW
Th
The defense mistakenly relies on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct.2633 (1985) as standing for the proposition that the jury's knowledge of the Defendant's presence on death row lessens their sense of responsibility in sentencing the Defendant. Caldwell held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". Id. at 329. In the present case, the references to the Defendant being on death row in no way lead the jury to believe that the responsibility in sentencing the Defendant rested anywhere other than with themselves.

The State argues that it is not error for jurors to know the defendant is, or has been, on death row. State v. Atkins, 399 S.E.2d 760 (1990); State v. Gaskins, 326 S.E.2d 132 (1985). Even if a juror states he was familiar with the previous trial and agreed with the original death sentence, the juror is nevertheless properly qualified to serve where he further states that he would

make a decision based strictly upon the evidence at trial. State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989). Moreover, in State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), nine jurors were qualified even though they knew the defendant was on death row where the jurors stated they could render a verdict based only on the evidence presented in the courtroom. The Supreme Court unanimously affirmed the qualifications of these jurors holding that the knowledge of the previous death sentence did not diminish "their sense of responsibility in deciding what sentence to impose." Id.

7/22
*22

I find that Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), is directly on point and controlling for the denial of the Defendant's motion for a new trial. In Jones, during a resentencing hearing, a defense witness on direct examination stated that the defendant "was supposed to be on death row, and inmates on lock-up and death row don't suppose to mingle together . . . " and that "death row inmates is up on the third-like a two story house." 332 S.C. 329, 504 S.E.2d 822, 828, (S.C. 1998) *cert. denied by Jones v. South Carolina*, 526 U.S. 1021, 119 S.Ct. 1259 (1999) *and rehearing denied by Jones v. South Carolina*, 526 U.S. 1128, 119 S.Ct. 1788 (1999). On a writ of certiorari for denial of post-conviction relief, the South Carolina Supreme Court wrote that "the statement did not state that he was on death row for committing the crime against [the victim's of this case]. It may have been construed by the jury as a death sentence for a previous crime." Id. Finally, the South Carolina Supreme Court stated that Jones failed to satisfy the underlying rationale of Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.E.2d 1 (1994) where the United State's Supreme Court stated, "[w]e do not believe that the admission of evidence regarding petitioner's prior death sentence [for another murder] affirmatively misled the jury regarding its role in the sentencing process so as

to diminish its sense of responsibility." Jones at 828 (quoting Romano at 10). The South Carolina Supreme Court stated that Jones failed to establish "how this passing reference to death row has mislead the jury regarding its role in the sentencing process or diminished its sense of responsibility." Id.

The present case parallels Jones with the additional possibility that the jury could have reasonably inferred that the Defendant's presence on death row was as a result of having been convicted of murder and simply awaiting sentencing. As in Jones, the death row comments were passing remarks and were not formally introduced. ~~The comments did not state that the Defendant was on death row for murdering Denton Smith, the victim in the present case. Even if the jury believed that the Defendant had been previously sentenced to death, the jury may have construed his presence on death row as a result of a death sentence from a previous crime.~~ *Noted*

*7/27/20
2 3* All of the jurors testified on *voir dire* that they would base their sentencing verdict in this case solely on the evidence and law presented in court. The Court also instructed the jury to base their verdict only on the evidence and law in this case.

Additionally, the State did not make any comment nor elicit any testimony whatsoever regarding the Defendant's presence on death row. In State v. Washington, 432 S.E.2d 448, 315 S.C. 108 (S.C. 1992), the South Carolina Supreme Court affirmed the trial judge's denial of a defendant's motion for a mistrial stating that defendant "may not complain of the admission of evidence elicited by his own counsel." Id. at 449. Any claim of an improper remark by a defendant's attorney, testimony elicited by a defendant's attorney on direct examination, or the ineffectiveness of defense counsel must be reserved for post-conviction relief. State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989).

For all of these reasons, I find that Defendant's motion for a new trial based on the statements by defense counsel or witnesses regarding Defendant's presence on death row is denied.

10. Testimony of Melvin Harris

During the first trial, the victim's parents testified that he had an unemployment check in his possession immediately prior to his disappearance. At the resentencing trial, the State did not call the victim's parents to testify, but instead offered the victim's brother-in-law and neighbor, Melvin Harris. Mr. Harris claimed that the victim had a shaving kit full of money in his possession the day before he disappeared. This testimony was not presented during the first trial. Additionally, Harris testified as to the handling of the unemployment check and the fact that he and the victim's father went to Orangeburg looking for the victim. The Defendant claims this testimony contradicted testimony in the first trial.

The State correctly asserts that it is not limited to witnesses that were offered during the first trial. As Harris was subject to cross-examination, I find that the Defendant's right of confrontation was satisfied and that the motion for a new trial should be denied.

11. Refusal to Excuse Juror Gaskins

This issue arises as the Court refused to excuse Juror Gaskins based on her *voire dire* responses. The Defendant claims that Juror Gaskins was unable to consider evidence in mitigation because she responded that anyone convicted of committing murder with malice should receive the death penalty. Initially, Juror Gaskins seemed to have some difficulty understanding

what malice was and how it related to murder. However, after the Court explained the applicable law, Juror Gaskins unequivocally stated that she would need to hear all of the evidence from both sides before she could make a determination as to the appropriate sentence. I find that Juror Gaskins was properly qualified. See State v. Holmes, 320 S.C. 295, 464 S.E.2d 334 (1995) (holding that a juror who initially believed that a defendant had to prove his innocence was properly qualified once the law was explained to her and she stated that she could follow the law). State v. Council, 515 S.E.2d 508 (1999); State v. George, 476 S.E.2d 903 (1996).

12. Excusal of Juror to Cover Pastors' Vacations

74/12
9 25
The Defendant claims that the Court erroneously excused a potential juror because she had to cover hospital visits and emergencies for three pastors on vacation. The juror offered to call the Lutheran Synod to find a replacement for her duties, and the Defendant argues that the juror should have been allowed to make the call prior to the Court determining that her employment duties constituted a sufficient basis to excuse her. I find that the excusal of the juror was justified, supported by the evidence and consistent with the employment conflicts for which other potential jurors had been excused. See State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied*, 498 U.S. 881 (1990) (stating that the decision to qualify or disqualify prospective jurors is a matter of discretion of the court and is not reversible unless wholly unsupported by the evidence).

13. Refusal to Excuse Juror Padgett

The Defendant claims that the Court erred in refusing to excuse Juror Padgett, the wife of the former Assistant Jailer who maintained his relationship with the jail as a consultant. Mr. Padgett was the assistant to Captain Bost who in the first trial testified that the Defendant was "the

most violent inmate" he had ever seen. Additionally, the Defendant claims the juror is unqualified as Mr. and Mrs. Padgett had been visited in their home by Bost twice a year and that Mr. Padgett had witnessed an incident in the jail involving the Defendant.

NAJW
26

Juror Padgett, when questioned, stated that she could follow the law, listen to all of the evidence, make her own determination as to what was an appropriate sentence, and would not be biased toward or against either the State or the Defendant. I also note that the Defendant had the opportunity to develop any potential bias of the juror during *voir dire*. I find that Juror Padgett was properly qualified. See State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (S.C. 1981) (holding that a motion for a mistrial was properly denied where a juror's wife was employed by the county Sheriff and has previously worked for the Solicitor's office noting that there is no common law rule or statute that disqualifies a juror based on a relationship to a witness); State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (S.C. 1986) (holding that prior employment with the county police department did not disqualify a juror without a showing of bias or prejudice); and State v. George, 323 S.C. 496, 476 S.E. 2d 903 (1996) (holding that a juror who was the wife of an Horry County police officer was properly qualified).

14. Refusal to Excuse Juror Porter

Juror Porter witnessed her sister's murder, and the Eleventh Circuit Solicitor's Office prosecuted that case. The defense requested that Juror Porter be excused claiming that it was unrealistic to expect her to be a fair and impartial juror.

A juror that personally knew the victim of the case on trial is not disqualified, if the friendship would not prevent the juror from giving the defendant a fair trial. State v. Jones, 378 S.E.2d 594 (1989).

Juror Porter stated that she could follow the law, would listen to all of the evidence, make her own determination as to what an appropriate sentence would be, not be biased for or against either the State or the Defendant, and could be a fair and impartial juror. I find that Juror Porter was properly qualified based on the voir dire.

15. Excusal of Juror Outlaw

[Handwritten: 27]
In chambers, Juror Outlaw informed the Court that he was a diagnosed schizophrenic and that his doctor had told him that he should not serve on a jury. Juror Outlaw was excused from the venire. The Defendant alleges error in the excusal of Juror Outlaw claiming that schizophrenia can be treated with medication and that a mental illness should not be per se grounds for disqualification.

It is clearly within the trial courts discretion to excuse a juror for health reasons. State v. South, 285 S.C. 529, 331 S.E. 2d 775 (S.C. 1985). See also State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (S.C. 1985) (finding that the trial judge was correct in excusing a juror whose nervousness and serious medical condition prevented her from being a competent juror); Section 14-7-810 (S.C. Code of Laws 1976 as amended) (stating that the trial judge's decision of whether or not a juror is qualified to render efficient jury service in light of a mental infirmity can not be disturbed on appeal); State v. Gaskins, 284 S.C. 105, 362 S.E.2d 132 (S.C. 1985). I find that Juror Outlaw was properly excused.

The Defendant also claims that the refusal of the Court to qualify Outlaw forced the defense to use a peremptory strike to remove Juror Padgett, who the Court refused to excuse. However, as the Defendant failed to use all of his strikes, this argument is without merit. State v. Tucker, 478 S.E.2d 260 (1996); State v. Hudgins, 460 S.E.2d 388 (1995).

16. Refusal to Grant New Jury Panel

The Defendant asserts that the Court erred in refusing to grant a continuance so that another jury panel could be chosen after an all-white jury panel was drawn to try the Defendant, a black male. The Defendant mistakenly believes that he is entitled to a jury containing African-Americans. This is not true. The Court finds that the continuance was properly denied.

hktw
2-4
17. Photographs of Gilbert and McGough

The Defendant claims that the Court erred in admitting photographs of Shannon Gilbert and Aaron McGough. The Defendant argues that the photographs of prior crime victims were irrelevant, unduly inflammatory, and appealed to the passions and sympathies of the jury.

First, the Court notes that the photographs were admitted at the first trial. Also, photographs showing injuries to victims of previous crimes are admissible and appropriate as character evidence in the sentencing phase of a capital case. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (S.C. 1985). Accordingly, the Court holds that the photographs were properly admitted and finds that the probative value of the photographs substantially outweighed any prejudicial effect.

18. Directed Verdict as to Aggravating Circumstances

The Defendant argues that the Court erred in failing to direct a verdict on each aggravating circumstance claiming that there was no evidence to support their submission to the jury. The Court finds that the record contains sufficient evidence from which a jury could find establishing the statutory aggravating circumstances of kidnapping, physical torture, larceny with the use of a deadly weapon, and robbery while armed with a deadly weapon.

19. Estoppel

The Defendant argues that the State should be estopped from seeking the death penalty for the following reasons: (1) that there was a delay of over four years in convening a sentencing jury; (2) that the Defendant was originally sentenced to death by only eleven qualified jurors; and (3) that the sentencing jury was not the same jury that originally convicted the Defendant.

*WJW
p. 29*

The South Carolina Supreme Court reviewed the original conviction and sentence of death. After review, the Supreme Court affirmed the jury's verdict of guilt and remanded the case for a resentencing hearing. This trial was in accordance with that ruling. I find that the State was not estopped from seeking the death penalty.

For the above reasons, I find that the Defendant's motion for a new trial is and should be denied.

Marc H. Westbrook

The Honorable Marc H. Westbrook

August 29, 2003

Lexington, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
THE STATE)
-v-)
JOHNNY O. BENNETT,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
2000 JUN 21 P 3:36

Indictment No. 93-GS-32-2

CLERK OF COURT

MOTION TO EXCLUDE ALL
PHOTOGRAPHS OF VICTIM

ORIGINAL

In anticipation of an attempt by the Solicitor for the Eleventh Judicial Circuit to introduce prejudicial photographs of the victim in this case, the Defendant now, through his undersigned attorney, moves to exclude from consideration by the jury any and all photographs taken of the victim in the above referenced matter. The Defendant further requests a hearing before the Court as to the admissibility of such photographs before the Solicitor attempts to introduce such photographs before the jury panel.

The general rules as to use of photographs and whether relevant issues list five elements of proof to which photographs are relevant. They include:

1. To prove the identity of the victim. There is no question as to the identity.
2. To prove the cause of death and/or injury. Testimony on this issue will be given by a competent State physician.
3. To refute self-defense.
4. To prove use of force.
5. To prove element of crime.

The purpose of such photographs is not within the general rules of relevancy or probative value and is outweighed by the

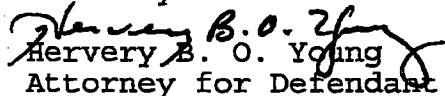
2437

gruesome and inflammatory character of the photographs. For this reason and relying on the South Carolina rules as to admissibility of photographs, the Defendant moves that such photographs be excluded from being introduced.

Respectfully submitted,



Wayne Floyd
Attorney for Defendant


Hervey B. O. Young
Attorney for Defendant

Lexington, South Carolina

Dated: June 21, 2000

ORIGINAL

STATE OF SOUTH CAROLINA

FILED

COUNTY OF

LEXINGTON

SEP 13 PM 1:26

IN THE COURT OF GENERAL SESSIONS

93-GS-32-2354

THE STATE

-vs-

JOHNNY O. BENNETT,

THOMAS H. COMERFORD

CLERK OF COURT

LEXINGTON SC

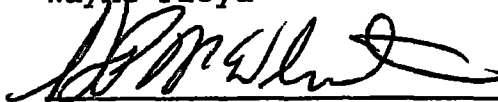
MOTION TO EXCLUDE ALL
PHOTOGRAPHS OF VICTIM

The defendant, through his undersigned counsel, will move at trial for an order excluding from evidence all photographs taken of the victim in the above-referenced case. The Defendant therefore requests a hearing before the Court as to the admissibility of such photographs before the State attempts to introduce such photographs before the jury panel.

Any relevance contained in the photographs is outweighed by the danger of inflaming the passion and prejudice of the jury; hence, the Defendant will move that such be excluded from evidence.

Respectfully submitted,

Wayne Floyd



H. Patterson McWhirter
Attorneys for Defendant

Dated: 9-13-95

STATE OF SOUTH CAROLINA)

FILED

COUNTY OF LEXINGTON)

95 SEP 28 PM 4:16 IN THE COURT OF GENERAL SESSIONS
93-GS-32-2354

THE STATE

THOMAS H. CONERFORD
CLERK OF COURT
LEXINGTON SC

-vs-

BRADY MOTION

JOHNNY O. BENNETT,

Defendant.

The Defense moves pursuant to Brady that they be supplied every report, document, and any other written material including all case files relating to an investigation concerning the matters set forth in Johnny Bennett's statement, the first page of which is attached hereto, and Joseph Penland's statement of June 24, 1992. This request would include all investigations involving correctional officers' activities regarding special favors for inmates, contraband, and rules violations relating to any of the conduct alleged in such statements and any conduct discovered as a result of all investigations started as a result of said statements.

The Defense further moves for copies of personnel files on the following correctional officers: Officer Donnell Perry, Officer Leon Robertson, Officer James Brown, Officer Allen Carter, Officer Pat Chisolm, Officer Casey/Case, Officer Raymond, Officer Hatcher, Officer Giddons, Officer Rob, and other officer referred to as working with Officer Casey in Joseph Penland's statement of June 24, 1992.

Wayne Floyd



H. Patterson McWhirter
Attorney for Defendant

Dated: 9-28-95

2440

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

STATE)
v.)
JOHNNY O'LANDIS BENNETT,)
Defendant.)

STATE'S RESPONSE TO DEFENDANT'S
DISCOVERY MOTIONS

THOMAS E. COMBERFORD
CLERK OF COURT
LEXINGTON SC

95 AUG 25 PM 5:07

FILED

TO: H. PATTERSON MCWHIRTER, ESQ. AND WAYNE FLOYD, ATTORNEYS FOR
THE DEFENDANT

A Motion's hearing was conducted in Florence, South Carolina, on August 17, 1995, before the Honorable Ralph King Anderson, Jr. in the above capital case, and the State's Responses hereinbelow are pursuant to that hearing.

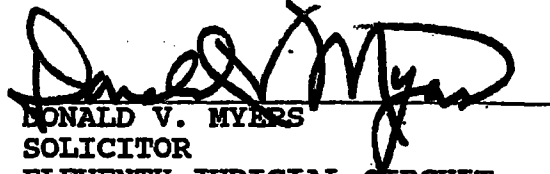
1. With reference to Notice of Motion and Motion for Production of Discovery Material, Motion No. 2, Part 3, the following are additional Lexington County Deputies who went to the ball field: Scott Bailey, Dwayne Peake, Jay Phillips, and Eddie Hite.

2. Motion No. 11. The family of the victim, Benton Smith, advises that the victim had been treated by Dr. Raymond E. Diamond, physicians at Doctor's Care located in West Columbia, and unknown doctors at the Lexington County Medical Center (hospital). The Lexington County Medical Center is the only hospital known to the family where the victim may have been treated. The family has no knowledge of the victim ever being treated at a mental health facility.

The defendant's attorneys are directed to the Lexington

County Medical Center for additional materials relating to this Motion, and based upon information and belief, the defendant's attorneys have previously obtained records from the Lexington County Medical Center.

3. Brady Motion for victim impact information, Motion No. 20, the parents of the victim, Benton Smith, have advised that there were never any substantial disagreements, arguments, bad relations, discord, or unhappy circumstances that ever existed between the victim and family members. The parents further advised that unlike the situation with other children, they never even had an occasion to ever spank the victim.


DONALD V. MYERS
SOLICITOR
ELEVENTH JUDICIAL CIRCUIT

Lexington, South Carolina

August 25, 1995

ORIGINAL

2412

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FILED

95 AUG 30 AM 9:15

IN THE COURT OF GENERAL SESSIONS
ELEVENTH JUDICIAL CIRCUIT

THE STATE

v.

JOHNNY O'LANDIS BENNETT, JR.,

Defendant.

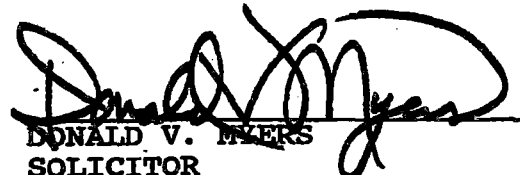
THOMAS H. COMERFORD
CLERK OF COURT
LEXINGTON SC

STATE'S RESPONSE TO DEFENDANT'S
DISCOVERY MOTIONS

TO: WAYNE FLOYD, ESQ. AND H. PATTERSON MCWHIRTER, ESQ., ATTORNEYS
FOR THE DEFENDANT

A Motions's hearing was conducted in Florence, South Carolina,
on August 17, 1995, before the Honorable Ralph King Anderson, Jr.
in the above capital case, and the State's Responses hereinbelow
are pursuant to that hearing.

1. With reference to Notice of Motion and Motion for
Production, No. 10, relating to files of the Lexington Police
Department, the Solicitor's Office has received materials from
the Lexington Police Department which are hereby served on the
defendant. These materials consist of sixteen (16) pages
relating to the investigative report, and nine (9) pages
relating to medical reports for Aaron McGough and Shannon
Gilbert.


DONALD V. MYERS
SOLICITOR
ELEVENTH JUDICIAL CIRCUIT

Lexington, South Carolina

August 30, 1995

STATE OF SOUTH CAROLINA) **FILED**
 COUNTY OF LEXINGTON) IN THE COURT OF GENERAL SESSIONS

95 JUN 20 AM 9:24

THE STATE

vs.

JOHNNY O'LANDIS BENNETT, JR.,)

Defendant.)

THOMAS J. McWHIRTER
 CLERK OF COURT
 LEXINGTON SC

3A

REQUEST FOR DISCOVERY

Indictment No. 93-GS-32-2354

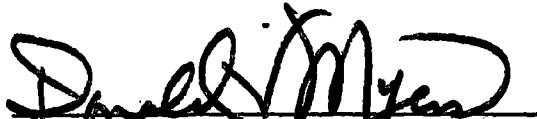
TO: JOHNNY O'LANDIS BENNETT, JR., AND HIS ATTORNEYS OF RECORD,
 WAYNE FLOYD, ESQ., AND H. PATTERSON MCWHIRTER, ESQ.

Request is hereby made that the Defendant disclose to the State the names and addresses of any potential expert the Defendant intends to call upon to testify during either the Guilt or Penalty phase in the trial of the above-captioned matter. Specifically the State requests the Defendant disclose the names and addresses of those potential experts upon whom the Defendant intends to rely to establish the defense of insanity, a plea of guilty but mentally ill and/or any other mental deficiency of the Defendant. Further, the State requests the Defendant disclose the conclusions of any potential expert witnesses reduced to writing and accompanied by any written material upon which such an opinion is based.

The State further requests that the Defendant disclose the names and addresses of any potential lay witnesses the Defendant intends to call upon to testify during either the Guilt or Penalty phase in the trial of the above-captioned matter, if their testimony potentially will be offered to establish the defense of insanity, a plea of guilty but mentally ill, and/or any other mental deficiency of the Defendant. Written compliance to

2444

this request shall be served upon the undersigned within ten (10) days of the date of this request.


DONALD V. MYERS, SOLICITOR
Eleventh Judicial Circuit

Lexington, South Carolina

June 20, 1995

292
DVM

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

FILED

ORIGINAL 4:15

MAR 15 4 03 PM '92
IN THE COURT OF GENERAL SESSIONS

THE STATE

vs.

JOHNNY O'LANDIS BENNETT, JR.

Defendant.

THOMAS L. SHERFORD
CLERK OF COURT
LEXINGTON SC

3.

REQUEST FOR DISCOVERY

Indictment No. 91-GS-32-649

TO: JOHNNY O'LANDIS BENNETT, JR. AND HIS ATTORNEYS OF RECORD,
ELIZABETH C. FULLWOOD, STEPHEN R. SOLTIS AND WAYNE FLOYD.

Request is hereby made that the Defendant disclose to the State copies of all records, books, papers, documents, photographs, tangible objects, results or reports of physical or mental examinations and tests relating thereto, of scientific tests, examinations or experiments, and any other facts, data or tests which any witness for the Defendant intends to rely upon in testifying or informing opinions or inferences therefrom, or any of the above perceived by or made known to such witness. The above shall be served upon the undersigned within ten (10) days of the date of this request.


DONALD V. MYERS, SOLICITOR
Eleventh Judicial Circuit

Lexington, South Carolina

March 15, 1992

2446

STATE OF SOUTH CAROLINA)

FILED ORIGINAL

IN THE COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON)

95 AUG 15 PM 3:55

93-GS-32-2354

THE STATE

THOMAS H. CONERFORD

CLERK OF COURT

-vs-

LEXINGTON SC MOTION FOR WITNESS NAME

JOHNNY O. BENNETT,

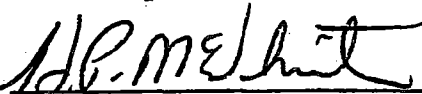
An investigative report by Freddie Hamer dated 12-10-90, a copy of which is attached hereto and incorporated herein, states, "Mr. Smith and Joe (Joseph Mack 568-2017) stated that they had spoken with someone that seen the above subject operating the vehicle with the victim on the passenger side, go down the dirt road by the Fast Fare near Silver Lake and whenever he came out, they did not see the victim."

The Defendant hereby moves pursuant to the "Brady" case for this information as it is favorable to the Defendant and would tend to establish innocence.

Respectfully submitted

Wayne Floyd

Attorney for Defendant



H. Patterson McWhirter
Attorney for Defendant

Dated: 8-15-95

ORIGINAL

2447

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

95 AUG 15 PM 3:57

93-GS-32-2354

THE STATE,

THOMAS H. COMERFORD

CLERK OF COURT

LEXINGTON SC

-vs-

MOTION FOR IN-CAMERA INSPECTION

JOHNNY O. BENNETT,

Defendant.

Now comes the Defendant, by and through his undersigned attorney, and moves for an Order requiring the State to make available to the Court all information and evidence obtained by the State or any law enforcement agency during the investigation of the above-captioned matter so as to enable the trial Judge to make an in-camera inspection of said information and evidence so as to insure that the State has complied with the requirements of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). State v. Goodson, 255 S.E. 2d 679 (1979).

Respectfully submitted,

Wayne Floyd

Attorney for Defendant

H. Patterson McWhirter

Attorney for Defendant

Lexington, South Carolina

Dated:

8-15-95

STATE OF SOUTH CAROLINA

COUNTY OF

95 JUNE 21 AM 8:45
LEXINGTON SCIN THE COURT OF GENERAL SESSIONS
93-GS-32-2354

THE STATE

THOMAS H. COMERFORD
CLERK OF COURT
-vs- LEXINGTON SCMOTION FOR BRADY INFORMATION
REGARDING VICTIM'S LIFE

JOHNNY O. BENNETT,

Defendant.

The Defense has been informed in prior hearings that the Prosecution may attempt to present victim impact information in the above-captioned case. In view of this, the Defendant, by and through his undersigned attorneys, hereby moves for the Prosecution to release to the Defense any and all information that may come to the attention of the prosecution that would reflect negatively on the victim, Benton Smith, including all information that would show bad character, drug related activities, bad personal habits, bad work record, bad relation with any and all persons including the reasons for those bad relations, prior criminal involvement by the victim, and any and all other facts or information that may come to the attention of the Prosecution that would show that the victim had any bad habits, characteristics, or traits.

It is specifically requested that the Prosecution have its agents, including the sheriff's department deputies who investigated this matter, make notes regarding their knowledge or knowledge to be gained by them regarding the above-referenced information. It is further requested that the names of all witnesses, together with the substance of the information known by said witnesses, in regard to the above-referenced matter, be released to the Defense.

Respectfully requested,

Wayne Floyd


 H. Patterson McWhirter
 Attorney for Defendant
Dated: 8-22-95

Dec. 07 2005 09:03AM P2
2449

FAX NO. : 8082181

FROM : LEX GENERAL SESSIONS

WITNESSES

F. R. Hamer, LCSD

Charles E. Jones, LCSD

ARREST WARRANT NO. C 946902

ACTION OF GRAND JURY

TRUE BILL

Susan B. Bowling
Foreman of Grand Jury 9-2-93

VERDICT

Foreman of Grand Jury

DOCKET NO. **93-GS-32-2354**

The State of South Carolina,

County of **LEXINGTON**

COURT OF GENERAL SESSIONS

September TERM 1993

THE STATE

vs.

JOHNNY O'LANDIS BENNETT, JR.

CDR #116, 095, 139, 098

Indictment for

COUNT ONE - MURDER
COUNT TWO - KIDNAPPING §16-3-910
COUNT THREE - ARMED ROBBERY §16-11-330
COUNT FOUR - LARCENY OF AUTO

Indictment

Verdict

Dec. 07 2005 09:03AM P3

FAX NO. : 8082181

FROM : LEX GENERAL SESSIONS

2450

WITNESSES

F. R. Hamer, LCSD

Charles E. Jones, LCSD

ARREST WARRANT NO. C946902

**ACTION OF GRAND JURY
TRUE BILL**

Lucas B. Dowling
Foreman of Grand Jury 9-2-93

VERDICT

Foreman of Grand Jury

Date:

DOCKET NO. *Casey*

The State of South Carolina,

County of **LEXINGTON**

COURT OF GENERAL SESSIONS

September TERM 1993

THE STATE

vs.

JOHNNY O'LANDIS BENNETT, JR.

Indictment for

FORM 32 (12/87)

2451

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
COUNT ONE - MURDER
COUNT TWO - KIDNAPPING §16-3-910
COUNT THREE - ARMED ROBBERY §16-11-330
COUNT FOUR - LARCENY OF AUTO

At a Court of General Sessions, convened on September 7, 1993,
the Grand Jurors of Lexington County present upon their oath:

COUNT ONE - MURDER

That JOHNNY O'LANDIS BENNETT, JR., in Lexington County on or about November 27, 1990, did wilfully, feloniously and with malice aforethought, kill one BENTON DARRELL SMITH by stabbing the victim multiple times (approximately 70 times) about the head, face, body; including, but not limited to the hand, wrist, shoulder, neck, chest, face, and back of the head with a Phillips Head Screw Driver and that the said BENTON DARRELL SMITH died as a proximate result thereof in Lexington County on or about November 27, 1990.

COUNT TWO - KIDNAPPING

That JOHNNY O'LANDIS BENNETT, JR., did in Lexington County on or about November 27, 1990, unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away one BENTON DARRELL SMITH without authority of law and without the consent of the said BENTON DARRELL SMITH, in violation of §16-3-910 Code of Laws of South Carolina, 1976, as amended.

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


SOLICITOR

FORM 32 (12/87)

2452

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR

At a Court of General Sessions, convened on September 7, 1993,
the Grand Jurors of Lexington County present upon their oath:

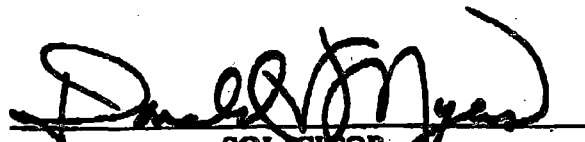
COUNT THREE - ARMED ROBBERY

That JOHNNY O'LANDIS BENNETT, JR., did in Lexington County on or about November 27, 1990, while armed with a deadly weapon, to wit: A Phillips Head Screw Driver, feloniously take from the person or presence of BENTON DARRELL SMITH by means of force or intimidation goods, monies, or personal property items of BENTON DARRELL SMITH such goods, monies, or personal property, including but not limited to the items described as follows: Wallet, U. S. Currency, Radar Detector, Floormats, Camera, Two (2) small glasses, Walking cane, Pillows (2), Keys, Driver's license, and other personal property items, in violation of §16-11-330 of the Code of Laws of South Carolina, 1976, as amended.

COUNT FOUR - LARCENY OF AUTO

That JOHNNY O'LANDIS BENNETT, JR., did in Lexington County on or about November 27, 1990, feloniously take and carry away the personal property of BENTON DARRELL SMITH, to wit: a 1980 Toyota Corolla, VIN TE720462607, of the value of more than Two Hundred Dollars, with intent to deprive the owner permanently of such property.

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


SOLICITOR

2453

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

88-65-32-837
COURT OF GENERAL SESSIONS

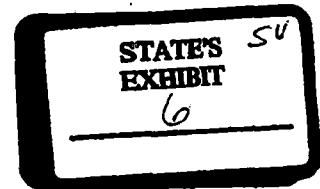
THE STATE)

VS.)

Johnny Bennett

SENTENCE

DEFENDANT



INDETERMINATE SENTENCE

SECTION 5 (C)

THE COURT FINDS THE DEFENDANT WAS 17 (17-20)
~~YEARS OF AGE AT THE DATE OF CONVICTION~~ ~~(21-24)~~
~~YEARS OF AGE AT THE DATE OF CONVICTION AND HAS CONSENTED IN~~
~~WRITING TO BE TREATED TO BE TREATED AS A YOUTHFUL OFFENDER),~~
AND IS SUITABLE FOR HANDLING UNDER THE YOUTHFUL OFFENDER ACT.

IT IS THE SENTENCE OF THE COURT THAT PURSUANT TO SECTION 5 (C)
OF THE YOUTHFUL OFFENDER ACT, THE DEFENDANT IS COMMITTED TO THE
CUSTODY OF THE DEPARTMENT OF CORRECTIONS, YOUTHFUL OFFENDER
DIVISION, FOR AN INDETERMINATE PERIOD OF TIME NOT TO EXCEED 6
(OR MAXIMUM ALLOWABLE FOR OFFENSE IF LESS THAN SIX) YEARS.

*Remain at home. Do not go to Lexington. House Arrest.
Sentence effective 9:00 AM on 9-19-88*

Julius H. Baggett
PRESIDING JUDGE

9-14-88

DATE

T.C. Bryant

9-14-88



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.

December 21st, 2005



Robert M. Dudek
Assistant Appellate Defender

South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY O. BENNETT, JR.

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

AILEEN P. CLARE
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEYS FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	3
ARGUMENTS	

1.

The court erred by allowing the mothers of the 1988 Pizza Hut assaults to give victim impact testimony about the injuries their son's suffered. The Pizza Hut incident was a totally unrelated case, and victim impact evidence about the prior crime was not admissible. The testimony from the youth's mothers was high prejudicial, and appellant should be granted a new sentencing hearing 4

2.

The court erred by admitting photographs of the victims of the 1988 Pizza Hut incident. These photographs of the victim's in their hospital beds was not relevant and it was intended to inflame the passions of the jury 14

3.

The court erred by allowing Shannon Gilbert, a victim of the 1998 Pizza Hut assault, to testify he had dreams as a result of the incident in which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant was highly prejudicial.....16

4.

The court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard, Judie Hardee, "the blond haired lady." The solicitor was impermissibly injecting race into the case to appellant's detriment before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with a white prison guard 20

5.

The court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King Kong and a Caveman. The court erroneously ruled these were not impermissible and objectionable racial stereotypes that this court had previously ruled in *Toyota of Florence, Inc. v. Lynch* were unacceptable in the courts of this state 28

6.

The court erred by refusing to allow defense counsel to ask the same "would you just vote with the majority" series of questions that resulted in the reversal of appellant's initial death sentence, since this was legitimate and valuable defense *voir dire* 34

CONCLUSION 41

TABLE OF AUTHORITIES

CASES

<u>Allison v. State</u> , 157 Tex.Crim. 200, 248 S.W.2d 147 (1952).....	26
<u>Bates v. Bell</u> , No. 02-6436 (6th Cir., filed March 23, 2005)	32
<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S.Ct. 1712 (1986)	30, 31
<u>Bonifay v. State</u> , 680 So.2d 413 (Fla. 1996).....	32
<u>Booth v. Maryland</u> , 482 U.S. 496, 107 S.Ct. 2429 (1987)	10, 11
<u>Bryant v. State</u> , 25 S.W.3d 924 (Tex. Ct. App. 2000)	26
<u>Cantu v. State</u> , 939 S.W.2d 627 (Tex. Crim. App. 1997).....	12
<u>Commonwealth v. Lara</u> , 39 Mass.App.Ct. 546, 658 N.E.2d 692 (1995).....	31
<u>Contee v. State</u> , 223 Md. 575, 165 A.2d 889 (1960)	31
<u>Dawson v. State</u> , 103 Nev. 76, 734 P.2d 221 (1987).....	27
<u>Dial v. Niggel Associates, Inc.</u> , 333 S.C. 253, 509 S.E.2d 269 (1999)	30
<u>Gregg v. Georgia</u> , 428 U.S.153, 96 S.Ct. 2909 (1976).....	32
<u>Jackson v. State</u> , 364 Md. 192, 772 A.2d 273 (2001).....	31
<u>Leahey v. Leahy</u> , 308 Or. 659, 303 Pa.2d 952 (Or. Sup. Ct. 1956).....	32
<u>Miller v. North Carolina</u> , 583 F.2d 701 (4th Cir. 1978)	25, 30, 31
<u>Miller v. Oklahoma</u> , 528 U.S. 897, 120 S.Ct. 228 (1999)	18
<u>Miller v. State</u> , 977 P.2d 1099 (Okla.App. 1998).....	18
<u>Mills v. Maryland</u> , 486 U.S. 367, 108 S.Ct. 1860 (1998)	11
<u>Moore v. Morton</u> , 255 F.3d 95 (3d Cir. 2001).....	26
<u>Morgan v. Illinois</u> , 504 U.S. 719, 112 S.Ct. 2222 (1992).....	34, 40

<u>Payne v. Tennessee</u> , 501 U.S. 808, 111 S.Ct. 2597 (1991)	passim
<u>Payton v. Kears</u> e, 329 S.C. 51, 495 S.E.2d 205 (1998)	31
<u>People v. Dunlap</u> , 975 P.2d 723 (Colo. 1999)	12, 19
<u>People v. Hope</u> , 702 N.E.2d 1282 (Ill. 1998).....	11, 18
<u>Sherman v. State</u> , 965 P.2d 903 (Nev. 1998).....	12, 19
<u>South Carolina State H'way Dept. v. Nasim</u> , 255 S.C. 406, 179 S.E.2d 211 (1971).....	30
<u>South Carolina v. Gathers</u> , 490 U.S. 805, 109 S.E.2d 2207 (1989).....	10, 11
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991)	15
<u>State v. Belgarde</u> , 110 Wash2d 504, 755 P.2d 174 (1988)	30
<u>State v. Bennett</u> , 328 S.C. 251, 493 S.E.2d 845 (1997)	3, 34, 39, 40
<u>State v. Blanks</u> , 479 NW.2d 601 (Iowa Ct. App. 1992)	32
<u>State v. George</u> , 323 S.C. 496, 476 S.E.2d 903 (1996).....	17
<u>State v. Hill</u> , 361 S.C. 297, 604 S.E.2d 696 (2004)	39, 40
<u>State v. Langley</u> , 334 S.C. 643, 515 S.E.2d 98 (1999).....	15
<u>State v. Livingston</u> , 327 S.C. 17, 488 S.E.2d 313 (1997).....	15
<u>State v. Magee</u> , 517 So.2d 433 (Ct.App.La. 1st Cir. 1987)	32
<u>State v. McClure</u> , 342 S.C. 403, 537 S.E.2d 273 (2000).....	13
<u>State v. Plath</u> , 281 S.C. 1, 313 S.E.2d 619 (1984)	11
<u>State v. Rogan</u> , 91 Hawaii 405, 984 P.2d 1231 (1999).....	25, 26, 31
<u>State v. Simpson</u> , 325 S.C. 37, 479 S.E.2d 57 (1996)	18
<u>State v. Southerland</u> , 316 S.C. 377, 447 S.E.2d 862 (1994).....	12
<u>State v. Stewart</u> , 283 S.C. 104, 320 S.E.2d 447 (1984).....	11
<u>State v. Tomlin</u> , 299 S.C. 294, 384 S.E.2d 707 (1989).....	30

<u>Terrazas v. State</u> , 696 So.2d 1309 (Fla 2d DCA 1997)	25, 31
<u>Toyota of Florence, Inc., v. Lynch</u> , 314 S.C. 257, 442 S.E.2d 611 (1994)	30
<u>United States ex rel. Haynes v. McKendrick</u> , 481 F.2d 152, (2d Cir. 1973).....	31
<u>United States v. Cannon</u> , 88 F.3d 1495 (8th Cir. 1996).....	31
<u>United States v. Doe</u> , 903 F.2d 16 (D.C. Cir. 1991).....	31
<u>United States v. Grey</u> , 433 F.2d 1043 (6th Cir. 1970)	26
<u>Universal Studios, Inc. v. Nintendo Co.</u> , 746 F.2d 112 (2d Cir. 1984)	32
<u>Volmor v. United States</u> , 13 F.2d 594 (6th Cir. 1926).....	33
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S.Ct. 2978 (1976)	11

STATUTES

S.C. Code § 16-3-20.....	38

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by allowing the mothers of the 1988 Pizza Huts assault victims, Ms. Brady and Ms. McGough, to testify about the extent of their sons' injuries and their effects since this constituted impermissible victim impact evidence that did not pertain to the crime for which appellant was on trial?

2.

Whether the court erred by admitting photographs of the 1988 Pizza Hut incident victims, Shannon Gilbert and Aaron McGough, since the photographs were irrelevant, and they went beyond the permissible testimony about the fact of the crime itself, and they were intended to inflame the passions of the jury?

3.

Whether the court erred by allowing Shannon Gilbert, a victim of the 1998 Pizza Hut assault, to testify that he had dreams as a result of the incident in which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant and highly prejudicial?

4.

Whether the court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard Judy Hardee, "the blond-haired lady," since the solicitor was impermissibly injecting race into the case before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with Hardee, a white prison guard?

5.

Whether the court erred by refusing to grant a new trial where the solicitor in his closing argument compared appellant to King-Kong and a Caveman since the court erroneously ruled these were not impermissible and objectionable racial stereotypes that this Court ruled in Toyota of Florence, Inc. v. Lynch were unacceptable in the courts of this state?

6.

Whether the court erred by refusing to allow defense counsel to ask the same “would you just vote with the majority” series of questions that resulted in the reversal of appellant’s initial death sentence, since this was legitimate and valuable defense *voir dire*?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for the offenses of murder, kidnapping, armed robbery and grand larceny. R. 2449 - 2452. The state sought the death penalty.

Appellant's case originally came on for trial on October 9, 1995 before the Honorable Ralph King Anderson and a jury. Appellant was convicted on all counts and was given death for murder at the penalty phase of the trial.

This Court affirmed the convictions, but reversed appellant's death sentence and ordered a new sentencing trial in State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997).

Appellant's new sentencing trial began on July 10, 2000. Wayne Floyd and Herverly B. O. Young represented appellant. Donnie Myers, Dayton Riddle, and Shawn Graham were the solicitors. R. 1.

At the conclusion of the sentencing trial the jury sentenced appellant to death. R. 2149, 11. 1 - 11. Judge Westbrook then sentenced appellant to death for murder, thirty-years for kidnapping, thirty years for armed robbery and five years for grand larceny. R. 2157, 1. 13 - 2158, 1. 20. This appeal follows.

ARGUMENT

1.

The court erred by allowing the mothers of the 1988 Pizza Hut assaults to give victim impact testimony about the injuries their son's suffered. The Pizza Hut incident was a totally unrelated case, and victim impact evidence about the prior crime was not admissible. The testimony from the youth's mothers was high prejudicial, and appellant should be granted a new sentencing hearing.

William Mark DuBose testified that on March 4, 1998 he witnessed an incident in the parking lot of the Pizza Hut in Lexington. When Dubose turned into the Pizza Hut parking lot he saw two white males lying on the pavement. DuBose recalled seeing "a large black male" standing over one of the victims. The man was stomping on the victim's head with his foot. R. 987, ll. 7 – 9.

Rhonda Smith testified regarding this same incident. Smith was with her boyfriend at the Pizza Hut that night. R. 996, ll. 7 – 18. While sitting in a booth Smith observed a black male drag a white male by his hair "more or less in front of the door to the Pizza Hut." R. 998 , ll. 3 – 22. The man knelt down and beat the victim in the face. He also kicked him. R. 998, l. 23 – 999, l. 1.

Sharon Brady was the mother of Shannon Gilbert, one of the two Pizza Hut victims. Prior to Ms. Brady's testimony, defense counsel Floyd objected that her testimony on the extent of her son's injuries and the reaction to those injuries was not relevant. Defense counsel noted this victim impact evidence had "nothing to do with the particular crime that Mr. Bennett is on trial for now." Defense counsel would make the same objection prior to the testimony of Helen McGough, the mother of the other victim, Aaron. R. 1038, l. 16 –

1040, l. 8. The judge ruled that it was his "understanding of the Supreme Court rulings . . . that that is appropriate to be introduced." R. 1039, l. 9 – 1040, l. 8.

Ms. Brady testified that her son was working at the Pizza Hut in Lexington on March 4, 1998. She received a telephone call from the Pizza Hut informing her that her son had been taken to the Lexington Hospital. A second phone call stated that her son had been taken to Richland Memorial Hospital instead "because of the trauma - - because of head trauma." R. 1013, ll. 4 – 10.

Ms. Brady testified that when she arrived at Richland Memorial Hospital her son was unconscious. She had difficulty recognizing her son "because of the beatings, the bruises, cuts on his face and head." R. 1013, ll. 22 – 24. The following occurred on direct-examination of Ms. Brady:

Q. Now, was he released from the hospital that night?

A. No.

Q. What was his condition for the next few days at the hospital over at Richland Memorial?

A. He was unconscious for 13 days. He was in intensive care, and he was under all the life support systems.

R. 1013, l. 25 – 1014, l. 8.

As will be seen infra, defense counsel also objected to a photograph of Shannon Gilbert in the intensive care unit being admitted into evidence. That photograph, state's exhibit 5, is on file with this Court. Counsel argued the photograph was irrelevant, and it was meant to inflame the jury. The judge allowed the photograph into evidence. R. 1015, ll. 10 – 23.

Ms. Brady also testified that after about thirteen days in intensive care her son "came to" . . . "enough that he was moved from intensive care to a private room." R. 1016, ll. 10 – 23. Ms. Brady said her son then stayed at home for about five days after he was discharged from Richland Memorial Hospital. "[T]hen he was taken to the Rebound Head Trauma Center in Lancaster, South Carolina." R. 1017, ll. 20 – 24.

Shannon Gilbert stayed in the trauma center in Lancaster for about two and a half months. R 1018, ll. 20 –25. Following her son's release from the Lancaster trauma center, "they set up a homebound rehabilitation therapy for him, and we also had to hire a tutor because he did not get home in time enough to - - for the state to set up tutor for him for school." R. 1019, ll. 7 – 12.

Mrs. Brady added that her son also needed a speech therapist and a physical therapist to help him exercise his left leg and arm. R. 1019, ll. 19 – 25. The following occurred between the solicitor and Mrs. Brady:

Q. Has he recovered from this, Mrs. Brady?

A. Pardon?

Q. Has he recovered from that beating?

A. Not completely. There's still traces from the beating.

Mr. Myers: If you would, answer any questions they have for you.

The Court: Cross?

Mr. Floyd: We have no questions, Your Honor.

R. 1020, ll. 9 – 17.

Shannon Gilbert testified he was working at the Pizza Hut on March 4, 1998. He recalled that a black man approached him near the Pizza Hut telephone. The next thing he remembered was waking up in the hospital. R. 1021, l. 20 – 1022, l. 14.

The solicitor then introduced appellant's convictions on September 14, 1998 for assault and battery of a high and aggravated nature for the March 4, 1998 Pizza Hut incident. Judge Baggett sentenced appellant to a youthful offender sentence for an indeterminate period not to exceed six years. R. 1029, ll. 16- 25.

The state then called Helen McGough. Ms. McGough's son Aaron McGough also was working at the Pizza Hut on March 4, 1998. Defense counsel made the identical objection to this victim impact evidence. R. 1031, ll. 15 – 25.

Ms. McGough recalled that March 4, 1998 was her son's first day working at the Pizza Hut. She stayed up that night waiting for him to get home so she could hear about his new job. Ms. McGough said Aaron was supposed to get off work at 11:00, but he did not come home. Ms. McGough related that she received a telephone call from the Pizza Hut telling her that Aaron had been hurt, and that he was being transported to Lexington Hospital. About five or ten minutes later she received a second phone call stating that because of severity of Aaron's injuries he was being taken to Richland Memorial Hospital. R. 1032, ll. 9 – 22.

When Ms. McGough arrived at Richland Memorial Hospital she was told the ambulance was on its way. When the ambulance pulled up and opened the door, Ms. McGough said she called out to her son, "and they told me he couldn't hear me." R. 1033, ll. 4 – 8. On direct-examination of Ms. McGough the solicitor established:

- Q. What did your son look like at that time: did you have a chance to see him?
- A. If I hadn't of know it was Aaron I wouldn't have been able to tell by his face. His face was just - - it was all cut up. His eyes were just little slits. His nose and his mouth was just - - it was just all one. His forehead was all cut up. And if I hadn't of known it was him I wouldn't have recognized him.
- Q. Did he have any unusual marks on his forehead?
- A. Yeah, he had a big U-shape right here on his forehead that you can even see today.
- Q. After they brought Aaron in where did he go?
- A. He went straight back to the emergency room.
- Q. And do you know what kind of doctor treated Aaron that night?
- A. They brought in a neurologist, they brought in a plastic surgeon. I don't really know who else saw him. I know there were several people who saw him.
- Q. And how long was Aaron in surgery before you got to see him again?
- A. A long time, because they brought him in, it was about 12 o'clock and we didn't get to see him - - it was - - oh, it was after four. It was probably almost five o'clock by the time we saw him.
- Q. And when was the next time that you got to see Aaron again?
- A. Well, it was - - they were taking him up to I.C.U. when we finally got to see him.
- Q. The intensive care unit?
- A. Uh-huh. And we rode up in the elevator with him and they kept - - I tried to talk to him and there was no response at all.

R. 1033, l. 17 – 1034, l. 23.

Ms. McGough said she stayed with her son in the hospital for four days while he was in the intensive care unit. R. 1035, ll. 3 – 10. Photographs of Aaron McGough, as will be seen infra, were introduced over defense counsel's objection. R. 1035, l. 11 – 1036, l. 14. They are also on file with this Court.

Ms. McGough said as a result of his injuries her son's "personality has changed. Aaron was a real easy-going kid. He was just real laid-back, nothing bothered him or anything. And now he's real - - he gets frustrated real quick and he's quick to anger. It's just really changed his personality. He has short-term memory loss. I mean, lots of things that he'll forget. He's a plumber, he forgets his tools, forgets his house key, things like that." R. 1036, ll. 18, 25.

Ms. McGough said she stayed at home with her son for six weeks after his release from the hospital. R. 1037, ll. 1 – 8. The following concluded the direct examination:

Q. And what condition was he in when he was released?

A. He was real weak. We had to watch him real close because of the brain swelling, that there wouldn't be any seizures and so it was - -

Q. Thank you, Ms. McGough. Please answer any questions that they have for you.

A. Yes, sir.

The Court: Cross?

Mr. Floyd: No questions, Your Honor.

R. 1037, ll. 9 – 17.

Discussion

In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), the United States Supreme Court for the first time held that victim impact evidence was not *per se* inadmissible. The Court noted that Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2429 (1987), and South Carolina v. Gathers, 490 U.S. 805, 109 S.E.2d 2207 (1989) were based upon the premise that evidence relating to the defendant's victim, and the harm he caused to the dead victim's family, did not reflect on the defendant's "blameworthiness." The Court reasoned that only evidence relating to blameworthiness was relevant during a capital sentencing trial.

On its rethinking of those holdings, the Court noted, "[T]he assessment of harm caused by the defendant as a result of the *crime charged* has understandably been an important concern of the criminal law, both in determining the elements of offense and in determining the appropriate punishment." Payne v. Tennessee, 501 U.S. at 819, 111 S.Ct. at 2597. (emphasis added).

The Court in Payne held that a state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the juror's decision as to whether or not the death penalty should be imposed. Payne v. Tennessee, 501 U.S. at 827, 111 S. Ct. at 2597. The Payne Court stated that the victim's death represented a unique loss to society and in particular to his family. Payne v. Tennessee, 501 U.S. at 825, 111 S.Ct. 2608.

In Justice O'Connor's concurring opinion, in which she was joined by Justice White and Justice Kennedy, she reasoned that before a convicted murderer is sentenced a state may decide that the jury should see "a quick glimpse of the life [the capital defendant] petitioner

chose to extinguish” citing Mills v. Maryland, 486 U.S. 367, 397, 108 S.Ct. 1860, 1867 (1998) (Rehnquist, C.J., dissenting).” The concurring justices noted that this quick glimpse was needed to remind the jury that the person killed was a unique human being. Payne v. Tennessee, 501 U.S. at 830, 111 S.Ct. 2611.

This Court in State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984), held that evidence of the defendant’s prior crimes was admissible during the penalty phase of a capital trial. This Court held that the jury must be instructed that these prior crimes may not be used as proof of a statutory aggravating circumstance, but were only to be considered as they reflected upon the defendant’s character. See also Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976); State v. Plath, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984).

It is clear the Court in Payne v. Tennessee only authorized victim impact evidence as it pertained to the life of the victim whose life “the defendant chose to extinguish.” The rulings of the trial court in this case allowing the victim impact evidence of Mrs. Brady and Mrs. McGough was an impermissible and unwarranted, and a highly radical departure from what the Supreme Court authorized in Payne after overruling Booth v. Maryland and South Carolina v. Gathers. There is not any language in Payne authorizing victim impact evidence on unrelated crime victims, and, as shown above, clear language that victim impact evidence only pertains to the murder victim for which the defendant is on trial.

Other states have properly found that victim impact evidence of other offenses is not admissible. See People v. Hope, 702 N.E.2d 1282, 1287-89 (Ill. 1998) (there is not “any language in Payne which would suggest that victim impact evidence stemming from a defendant’s other, unrelated crimes is admissible at his capital sentencing”); People v.

Dunlap, 975 P.2d 723, 744-45 (Colo. 1999) (“evidence regarding the impact of a capital defendant’s prior crimes on the victims of those crimes, is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998) (“we conclude that the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible” although evidence of the existence of the prior murder would be admissible to prove an aggravating circumstance); Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997)(“the admission of such evidence would open the door to admission of victim impact evidence arising from *any* extraneous offense committed by a defendant . . . such evidence is irrelevant under Tex. R. Crim. Evid. 401.”).

Further, the trial judge’s ruling was based on an erroneous assumption that this Court or the United States Supreme Court had approved such evidence. Tr. p. 1039, l. 9 – p. 1040, l. 8. If upheld by this Court, the trial court’s ruling allowing victim impact evidence about prior crimes committed by the defendant will make a capital trial virtually unworkable in South Carolina. The state would be allowed to put up victim impact evidence about the prior crimes, and the defense would then have the opportunity to rebut that victim impact evidence. See Payne v. Tennessee, 501 U.S. at 824 – 825, 111 S.Ct at 2607 – 2608; State v. Southerland, 316 S.C. 377, 447 S.E.2d 862, 867 (1994).

The extensive victim impact about the two teenage boys working at the Pizza Hut was extremely emotional, and it was totally unrelated to the murder victim or his family in this case. The victim impact evidence about the 1988 Pizza Hut incident was evidence of every parent’s worst nightmare about their late returning home child, and its effect was

surely palpable. Payne v. Tennessee did not authorize victim impact evidence about a past victim of a crime or bad act for which the defendant was not on trial.

The solicitor vividly reminded the jury of the Pizza Hut victim impact evidence in his closing, thereby exacerbating the prejudice: "Shannon Gilbert in a coma for thirteen days. Aaron McGough in a coma for four or five days, hanging on to life, boot print in one of them's head. You remember Ms. McGough said she went there and she didn't recognize her son because his face was so beaten up and had that round U-shape up there." Tr. 2061, l. 13 – 2062, l. 18. In State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), this Court noted that a harmless error analysis in a death penalty case is very difficult because the jury can recommend a life sentence for any reason or no reason at all. Any one juror can prevent a death sentence. The Pizza Hut victim impact evidence was dramatic, moving, and effective. It was not harmless error. Appellant should be granted a new sentencing hearing.

2.

The court erred by admitting photographs of the victims of the 1988 Pizza Hut incident. These photographs of the victim's in their hospital beds was not relevant and it was intended to inflame the passions of the jury.

As seen, the trial court admitted victim impact evidence over the objection of the defense regarding the 1988 Pizza Hut incident. This error was compounded when the court admitted irrelevant photographs that were meant to inflame the passions of the jury.

Sharon Brady, the mother of Shannon Gilbert, testified at length about her son's injuries, and his stay in the intensive care unit at Richland Memorial Hospital. The solicitor then sought to introduce a photograph of her son into evidence.

Defense counsel correctly noted that the defense had objected "to this type of testimony" - - victim impact evidence - - "and the picture just adds nothing except to inflame or prejudice the jury against the defendant." R. 1015, ll. 1 - 25. State's exhibit 5 is on file with this Court, and defense counsel correctly noted this evidence was only meant to inflame the jury. It shows the beaten victim laying in a hospital bed on a ventilator.

When Helen McGough, the mother of Aaron McGough testified, the solicitor introduced a set of photographs, state's exhibit 7, of the victim. R. 1035, l. 6 - 1036, l. 14. Defense counsel lodged the same objection. These photographs are also on file with this Court and they are equally objectionable hospital bed shots.

Discussion

As stated above, victim impact evidence is admissible under Payne v. Tennessee so that the jury can understand the murdered victim as something more than a faceless stranger. The rationale behind Payne v. Tennessee was that the defendant had the opportunity to

introduce any and all mitigating evidence about the defendant, and in fairness the prosecution should be allowed to humanize the murdered victim. Payne, 501 U.S. at 822-825, 111 S.Ct. 2606-2608. As stated, the Court in Payne v. Tennessee did not throw open the flood gates to allow highly emotional victim impact evidence regarding unrelated other bad acts or crimes evidence.

This Court has held that photographs designed to elicit an emotional reaction - - victim impact photographs - - are not relevant and are not admissible to prove guilt. See, State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation garb was irrelevant and inadmissible; State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of the victim of a felony DUI causing death and her husband taken shortly before her death was irrelevant). See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Appellant fully understands that Langley and Livingston were non-capital cases, and they involved evidence of the victims in better times. However, victim impact evidence on prior bad acts or crimes in a capital cases is not authorized, and the Langley and Livingston cases remain controlling. This Court in both Langley and Livingston rejected the state's argument that the irrelevant and emotionally charged evidence was harmless.

The photographs of the victims of this 1988 incident in their hospital beds were highly prejudicial. Having photographs of two teenage boys, working at night for spending money, lying in a hospital bed, badly beaten, is, respectfully, not the type of error that should be deemed harmless in a death penalty case. Appellant should be granted a new sentencing hearing where such irrelevant emotionally charged evidence is not permitted.

3.

The court erred by allowing Shannon Gilbert, a victim of the 1998 Pizza Hut assault, to testify he had dreams as a result of the incident in which Indians, that he thought were black, attempted to kill him, since this evidence was irrelevant and was highly prejudicial.

As seen, the state offered extensive victim impact evidence about the 1998 Pizza Hut incident. Shannon Gilbert identified the picture of himself in the hospital bed, state's exhibit 5, and he testified he was shown the photograph at a later date. R. 1027, ll. 9 – 16.

The following then occurred on direct-examination of Mr. Gilbert:

Q. Do you have any consciousness about being in a hospital; do you know of any dreams or anything? Is that all you remember about the hospital?

A. I had a dream. I did have a dream in the hospital. It's the only one I remember, of course. It was - - I remember waking up - -

Mr. Floyd: Your Honor, I'm going to object to any dream. I don't see how that's relevant.

Mr. Myers: He'll bring out the relevance.

The Court: Overruled.

By Mr. Myers:

Q. Go ahead.

A. I remember the dream. I woke up and I remember being really afraid. And, of course, there were several in the room. I'm not sure who it was, nurses, maybe my mother. I'm not sure who all was there, but to calm me down. And I remember telling them what it was about. It was - - Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on - - or after years have gone

by I've maybe even thought, well, there might have been a link. You know, that I was remembering something about trying to get away from someone.

Q. Shannon, did you come in this courtroom - -

Mr. Floyd: Your Honor, I renew my motion. I move that it be stricken. That's irrelevant.

The Court: I'll note the motion. Denied.

By Mr. Myers:

Q. Did you come in this courtroom when the person that beat you and Aaron up was sentenced?

A. Yes.

Q. And was that person Johnny Olandis Bennett, Jr?

A. Yes.

R. 1027, l. 17 - 1028, l. 23.

Discussion

Evidence about a dream Shannon Gilbert had about Indians that he thought were black chasing him, and trying to kill him, was not relevant in this case. Although evidence of a capital defendant's prior crimes is relevant and admissible since it relates to his character, the United States Supreme Court in Payne v. Tennessee only authorized the state to admit, if it chose, victim impact evidence about the murdered victim for whom the defendant was on trial. See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); Payne v. Tennessee, *supra*. This dream evidence of the prior crime was not admissible, and the trial judge's ruling was based on the erroneous assumption that this Court had expressly approved the admission of such evidence. R. 1039, l. 9 - 1040, l. 8.

In Miller v. State, 977 P.2d 1099 (Okl.App. 1998) the Court noted that by statute in Oklahoma victim impact evidence was limited to the impact of the murder on the family of the victim. It is arguable that is slightly different from the precedent of this Court that allowed, in dicta, victim impact evidence about the victim's standing in the community. See State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, 60 (1996).¹ However, any such victim impact evidence was always directly related to the victim for which the capital defendant was on trial.

In Miller v. State the Court held that evidence from the mother of the victim that her dead son appeared to her in two dreams asking "Are we going to trial?" was improper victim impact evidence. See Miller v. State, 977 P.2d at 1113.² However, the Court noted that no objection was made to the dream testimony at trial, and consequently the Oklahoma Court of Appeals reviewed the dream evidence for plain error only. The Court then found the error harmless given the fact that each aggravating circumstance was supported by strong evidence, and the dead victim's mother's testimony in which she described her loss was largely within statutory limits.

Further, as stated above, other states have prohibited victim impact evidence about a prior crime. The impact or later trauma to a live victim of a prior crime is not predictable, and there is not any language in Payne authorizing such victim impact evidence as being relevant. See People v. Hope, 702 N.E.2d 1282, 1287-89 (Ill. 1998); People v. Dunlap,

¹ In State v. Simpson, this Court held that evidence about the victim's standing in the community did not deprive Simpson of a fair sentencing hearing. However, this Court noted the issue was not preserved because defense counsel did not object, at any time, to the victim impact evidence complained of on appeal.

² *Certiorari* denied Miller v. Oklahoma, 528 U.S. 897, 120 S.Ct. 228 (1999).

975 P.2d 723, 744-45, n. 14 (Colo. 1999); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998).

Here, we have victim impact evidence from a live victim about a prior ABHAN.

Defense counsel correctly objected and renewed his objection to the "black Indians" dream testimony of Shannon Gilbert. Gilbert was obviously not the victim of the crime for which appellant was on trial, nor was he a family member of the dead victim in this case. Appellant should be granted a new sentencing hearing.

4.

The court erred by refusing to declare a mistrial where the solicitor asked inmate Byron Collins whether he remembered prison guard, Judie Hardee, "the blond haired lady." The solicitor was impermissibly injecting race into the case to appellant's detriment before an all white jury by assuring that the jury understood appellant was having a continuous interracial sexual relationship with a white prison guard.

Relevant facts

The state offered evidence that appellant had broken certain rules while incarcerated. Corporal Johnny Ray testified that on April 3, 1995 appellant refused to go outside for recreation in violation of applicable jail rules. Ray also testified appellant cursed at him. R. 1594, l. 6 – 1595, l. 17.

James Green was a criminal investigator with the South Carolina Department of Corrections Internal Affairs Branch. R. 1599, ll. 12 – 14. Green testified he was investigating allegations that appellant was having sex with a visitor inside of the Department of Corrections. R. 1601, ll. 1 – 17.

Over defense objection, Green read appellant's admissions to the jury on this subject. Appellant told Green that he knew correctional officer Judie Hardee before he was incarcerated. Appellant admitted having sex with Hardee at the Lexington County Detention Center, and inside the Department of Corrections. R. 1601, l. 1 – 1602, l. 9.

Appellant said that three different officers allowed him to have sex with Hardee, but "no money ever changed hands." Appellant also admitted Hardee had been visiting him "while I was a safe keeper and since I [have] been [in the] S.C.D.C." R. 1602, ll. 2 – 25.

Green also testified that appellant and Hardee would both have had to fill out a form putting her on his visitor's list inside the Department of Corrections. R. 1603, ll. 7 – 18. As a result of Green's investigation, Hardee's visitation privileges were suspended indefinitely. R. 1603, ll. 19 – 22.

Rudolph Tillman was a criminal investigator with the Department of Corrections. Tillman also testified he was investigating allegations of sexual relations between appellant and Judie Hardee. R. 1617, ll. 4 – 21.

Tillman said that appellant admitted to him on April 3, 1997 that certain prison guards had allowed him to have sex with Hardee. R. 1617, l. 5 – 1619, l. 23. Tillman also stated that Hardee's visitation privileges were revoked indefinitely in March of 1997. R. 1620, ll. 4 – 9.

Tillman further testified that an investigation of appellant's "pin number" for outside calls revealed appellant had made approximately four hundred telephone calls to Judie Hardee's home. R. 1620, l. 19 – 1621, l. 16.

Warden Willie Weldon of Lieber Correctional Institution testified that appellant wrote a letter to Warden Sheedy confirming their conversation about trying to get Judie Hardee's visitation privileges restored. Appellant advised the warden that Hardee was no longer employed in law enforcement. Hardee apparently lost her job as a result of having sex with appellant. R. 1633, ll. 10 – 21.

During the defense case there was evidence offered about how appellant saved another inmate from committing suicide while he was in the Lexington Detention Center. Kenneth Tager testified that while employed at the Lexington County Detention Center in 1991 he observed a suicide attempt. R. 1963, ll. 13 – 16. Tager remembered that about

nine or ten o'clock at night there was "a whole bunch of ruckus." When Tager went to investigate he was told someone was committing suicide. R. 1963, ll. 17 – 24.

Tager remembered the inmate was hanging himself and the inmate's roommate was attempting to hold him up. Tager recalled, "Johnny [appellant] had come to the door and was saying something to the effect of hey, let me out, I'll help you out, help you get him down. And they did, they went down there and let him out. And he went into the room, and Johnny being as big as he is, he, you know, pretty much was [of] big assistance in getting the guy down because of the weight and everything. When they got him down, the guy still had the bed sheet on his neck pretty tight still. They may have cut it down or snatched it down or something." R. 1964, ll. 14 – 23.

The inmate who attempted suicide was Byron Collins. He was called as a defense witness. R. 1974, l. 10 – 1975, l. 4.

Collins testified that he was in Lexington County Detention Center in 1991. Collins said he was very depressed because he was facing a life sentence without parole for drug conspiracy and he was also facing the death penalty in North Carolina. R. 1975, l. 5 – 1976, l. 10.

Collins remembered, "[w]hen I came to, John Bennett is the face I seen taking me down and I was - - well, he was all over me, you know. And he was talking, but I really couldn't say what he was saying at that time because, you know, I was kind of had been passed out. And that's what I can tell you about this situation there." R. 1976, ll. 5 – 10. Collins said appellant was very instrumental in his recovery from depression because appellant told him he had a "a lot to live for . . ." R. 1977, ll. 18 – 24.

On cross-examination by the solicitor Collins said he had not witnessed appellant beating up other people as an enforcer for jail personnel inside the jail, and he had not seen appellant refuse to obey orders. R. 1978, 1. 10 – 1979, 1. 3. On redirect examination Collins repeated he had not seen appellant being disruptive in the jail. R. 1979, 11. 5 – 18. The following occurred on recross-examination of Collins:

By Mr. Myers:

Q. There was one guard that loved Johnny Bennett and that was Judie Hardee, you remember her?

A. The real big lady?

Q. Judie Hardee, you remember her, *the blond-headed lady*?

Mr. Floyd: Your Honor - -

A. She was a real big lady.

The Court: Wait a minute. Don't answer the question. If you know who she was, you can answer the question.

A. It's been a long time.

The Court: Listen to me. If you don't know, you can say you don't know.

A. I don't remember.

Mr. Floyd: Your Honor, we move for a mistrial on prosecutorial misconduct.

The Court: Denied.

Any other questions?

Mr. Myers: No further questions.

Mr. Floyd: Your Honor, I'd like to put that on the record sometime.