

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

RECEIVED

Apr 05 2021
S.C. SUPREME COURT

ANDRES ANTONIO TORRES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000842

APPENDIX

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THE FOLLOWING DOCUMENTS ARE ON FILE WITH THIS COURT:

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John Shackelford - Direct examination
By Mr. Allen

1 A Tony was able to earn the highest level. And so, he
2 did earn those rewards frequently. I would say it
3 fluctuated. You know, it was an up and down kind of thing.
4 But he was able to do it more so than a lot of the kids that
5 were in there.

6 And so, you know, again, I think the infrequency of
7 being able to return home, and, you know, obviously he could
8 make a mistake at home. You know, he could have an incident
9 where he'd go into rage or make threats. And of course, mom
10 was a little hesitant for him to come back home. So, we
11 always had to work with mom on that and, and Tony.

12 And, and I think the idea of public school or anything
13 different, then he had a lot of stressors with school. I
14 think there's a lot of self-esteem issues that were triggers
15 with him also. So --.

16 Q Did he always -- I think when he earned the level or
17 when he earned enough points, I mean, if I understand your
18 testimony correctly, that he would earn points---

19 A Right.

20 Q ---and would get say the opportunity to go home for the
21 weekend, is that right?

22 A Right.

23 Q One question I forgot to ask you, but Pioneer Ridge is,
24 and I think you mentioned, it was a residential treatment---

25 A Right.

John Shackelford - Direct examination
By Mr. Allen

1 Q ---place, right?

2 A It was, yeah.

3 Q So, children stayed---

4 A Daily.

5 Q ---on site?

6 A They lived there 24 hours a day, yes, sir.

7 Q So, but when he earned, like I say, a weekend home, did
8 he always get that?

9 A No, he did not. Not on a consistent basis. And, you
10 know, staff would, they would typically be a response to
11 that. Tony would usually deteriorate. That was a big goal
12 for him. That's where he wanted to be. And so, he usually
13 would lose his level. He would, he would either act out or,
14 or have a physical altercation, whether it would be staff or
15 with a, a peer in the program. There would be incidents
16 like that.

17 Q And can you tell me some of the reasons why he did not
18 get to go home?

19 A To the best of my recall -- and again, I feel like mom
20 had a lot of fear. But from my recall of that time, it
21 would, it would be -- consistent participation was not
22 available. So, given that factor, it was usually a, you
23 know, a, it was. It was an ongoing stressor for him.

24 Q Okay. When you say consistent participation, you're
25 talking about---

John Shackelford - Direct examination
By Mr. Allen

1 A Meaning actively participating on an ongoing basis. I
2 don't think mom was able to do that at that time.

3 Q Okay. So, so, whose participation were we talking,
4 were you talking about?

5 A I'm talking about mom's participation in the program.

6 Q Okay.

7 A Yeah, Tony was, you know, he was physically in the
8 program, and I would, I would say, you know, he participated
9 well. He, he was able to, at times, to be a leader with
10 other peers. He was able to, to gain at the higher levels.
11 But I, I think you get a, get to a point of diminishing
12 returns when, when you're working for things and then the,
13 you know, especially at a level system, and then the things
14 that are suppose to be those rewards aren't there. And so,
15 that's very demotivating.

16 Q Okay. And could you tell if it had an effect on Tony's
17 esteem or self-esteem I should say?

18 A I think that had a big impact on him. I, I think he
19 felt rejected in many ways, and I think that was one area in
20 his life which was a big focus for him. He did feel
21 rejection. And especially, you know, if he's told he can't
22 come home or whatever. And when, you know, you're working
23 with him really to the point to where the plan is for him to
24 return home and he doesn't see that happening, so, or
25 realistically happening.

John Shackelford - Direct examination
By Mr. Allen

1 Q Okay. When he had worked to a level where he could
2 return home or, and that did not happen, I mean how was it
3 that he became aware that he was not going home?

4 I mean was it through the staff or was it through some
5 other---

6 A It typically, from my recall, would be staff. At times
7 I do recall staff having to tell him at times. But now he
8 was able to go home some time also. It just was not
9 consistent.

10 Q Yes, sir.

11 A But yeah, he would be informed by staff typically.

12 Q And you're not suggesting -- you're not saying that his
13 mother never took him home?

14 A Right. That's what I wanted to make clear, yeah,
15 right.

16 Q So, he had some home visits, right?

17 A He did, he did.

18 Q And did they last for a whole weekend?

19 A Sometimes it could be 24 hours, and sometimes it could
20 be the whole weekend, you know, from a Friday afternoon to a
21 Sunday.

22 Q Okay. But during those times, I think you mentioned
23 that if he, that they would, at times, have severe
24 incidents?

25 A Correct.

John Shackelford - Direct examination
By Mr. Allen

1 Q I mean what are you talking about there?

2 A Tony, the best way I can describe it, and I worked with
3 him, you know, like I say, for a while, and it was, it was
4 always amazing to us, really 85, 90 percent of the time,
5 Tony worked the program. Very calm, very -- the staff
6 really liked him. He was a great personality. I mean very,
7 a joy to be around.

8 But there would be that 10 percent or 15 percent of the
9 time that he could go into a rage, and whether it's a
10 reaction about not going home or a incident where he may of
11 been provoked or unprovoked, you know, it could really come
12 on pretty quick. But it would, it would require several
13 staff to restrain him if need be if he could not verbally be
14 deescalated, and, and, and he could be verbally deescalated
15 also at times.

16 But, but I -- when I say severe incidents, those
17 particular times he would go into a huge rage and just
18 totally out of control. It was, you know, throwing desks
19 around or in that classroom or, and staff just trying to,
20 you know, to contain him so he couldn't harm anyone.

21 But I don't know if you want me to keep going on and
22 describe the incidents to you?

23 Q Well, I mean did verbal deescalation work every time
24 with Tony?

25 A It did not work every time. I, I, I -- and I guess

John Shackelford - Direct examination
By Mr. Allen

1 that's what I was trying to pinpoint. I mean that could
2 work and Tony could be responsive. But I think if, if it
3 was one of those where he really lost it, and when I say go
4 into a rage, it was almost going where you, he couldn't
5 return from an emotional standpoint. Once he, he crossed
6 that threshold, it was hard to get him to come back. And
7 so, it was more of a safety issue.

8 And, and I recall, cause kind of standard protocol,
9 which anybody should do anyway, but, you know, we really
10 want, we would want to talk to the, to the child after the
11 incident occurred, and once they calmed down enough. And my
12 recall, especially with the severe type incidents, is that,
13 you, you know, you want to walk through them through and,
14 and look at, you know, casual factors, what was going on,
15 and why such a response, and what he could of done
16 differently.

17 And he, he did have difficulty recalling, during the
18 big incidents, any details. And so, you know -- and that
19 seemed to be pretty consistent when you would try to walk
20 him through it and talk him through it. You essentially had
21 to tell him what happened, and, you know, I mean -- I, I
22 guess my personal belief or anybody that would be working
23 closely with him would of, you know, didn't, I didn't see it
24 as a, as a dishonesty. It truly was some memory loss there.

25 So -- but that is typical with big big emotional

John Shackelford - Direct examination
By Mr. Allen

1 incidents with a lot of severely emotionally disturbed kids,
2 and you kind of -- that's why you do that therapy. You kind
3 of walk them through it.

4 Q And when you say some memory loss, are you talking
5 about memory loss about what triggered the incident.

6 A Usually what triggered him and beyond, that's right.

7 Q And---

8 A And he wasn't always cognizant of what triggered him
9 anyway, you know. But, but yes, once he began to lose it
10 and you started trying to intervene in a verbal way, and,
11 and, you know, yes, he really couldn't recall a lot of times
12 whether he hit somebody or thrown something at someone or,
13 you know, that kind of thing. So --.

14 Q So, it would not -- he would not, he would not be able
15 to remember what happened during this severe incident as
16 well?

17 A Right. And it, it was like he tended to believe, you
18 know, if you walked him through it and talked to him about
19 it. But you just didn't get a sense that he really could
20 remember it.

21 Q I believe a moment ago you mentioned there were times
22 that Tony was brought back early from weekends from his
23 visit home, is that right?

24 A He may -- yeah, there were, there, I think, times he
25 would come back early if things didn't go well. But, you

John Shackelford - Direct examination
By Mr. Allen

1 know, it was all, it was all based on his behavior. So,
2 maybe he, maybe he and his mom didn't get along well or
3 something happened, you know, or whatever and that he would
4 return home or return back to the program.

5 Q And how did it affect Tony to be brought back to the,
6 to the home early on the weekend?

7 A Well, I mean I, I think there was always, and I think
8 staff tried to allow him that, an adjustment time.
9 Obviously he was, you know, to the standpoint emotionally I
10 think he was, he was very distraught over it and very
11 deflated, and I, and I think that's where you saw his
12 self-esteem. It's like one more time I failed, you know,
13 and I think he always looked to fail. You know, that was an
14 expectation for himself. I think his self-esteem was so low
15 he, he anticipated he would fail.

16 Q Was -- during the time that Tony was under your
17 counseling and supervision, did he see psychiatrists?

18 A The set up would be, because he was on Lithium, any
19 kids that would be receiving psychotropic medication, we
20 would take them to the local Spartanburg Mental Health and,
21 on a quarterly basis I think was the monitoring schedule.
22 But they'd have a case manager at mental health that
23 essentially we would escort the kids, take them, and talk
24 with the mental health counselor and the psychiatrist for
25 about ten minutes. They would just kind of assess, in that

John Shackelford - Direct examination
By Mr. Allen

1 short period of time, they would assess, you know, what the
2 impact of the medication was, and actually, you know, ask
3 the child, the child a few questions and then either
4 continue or adjust as needed.

5 Q Okay. But would they see -- would they be -- how
6 often, how long would they stay with the psychiatrist?

7 In other words, how long would they, the psychiatrist
8 see the individual visit?

9 A Oh, yeah, a brief period of time. Probably ten minutes
10 at the most.

11 Q Okay. Was it always the same psychiatrist or---

12 A They probably rotated around. I'm, I'm not sure I
13 remember consistent, you know, cause you essentially took
14 the, the whole group, you know, of kids up there and then
15 they just, they kind of did their rounds or whatever. But I
16 don't recall it being a consistent psychiatrist.

17 Q Were they seeing psychiatrist specifically like
18 employee, employees of the Continuum of Care or did you take
19 them somewhere else?

20 A No, it would be Department of Mental Health, their
21 psychiatrist.

22 Q Do you know, from your review of the records, how long
23 Tony was in -- well, first, first of all, Pioneer Ridge?

24 A Within Pioneer Ridge, I think he entered the program in
25 August of '91 and exited out February of '94.

John Shackelford - Direct examination
By Mr. Allen

1 Q Exited out in February of '94 or---

2 A Yeah, yeah, around that time.

3 Q And where did he go in February of '94?

4 Do you know?

5 A I was no longer with the program myself. I mean the
6 records indicated maybe Crane House. I remember, before I
7 left the program, we were trying to transition him to public
8 school, and it was home, and I think we were working out a
9 community based wrap around system where there would be a
10 therapist in the home, which I think occurred, an in-home
11 kind of therapy service to, to maintain that stability
12 because he had shown some stability toward the end of the
13 program.

14 Q From your review of Tony's records of when he left
15 Pioneer Ridge, did he leave the Continuum of Care?

16 A No, I think he continued in the, the Continuum of Care
17 as far as the service coordination because I think they
18 placed him at Crane Home, which is another program that they
19 also contracted.

20 Q Did the Continuum of Care ever close its case on, on
21 Tony?

22 A The case was closed. I apologize. I do not know the
23 date for the closure. But yes, the case was closed.

24 Q Do you know approximately how old Tony would of been at
25 that time if you have any idea?

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By Mr. Allen

1 A We have about -- I don't know how old he was. There's
2 about 14 reasons why a case would be closed. We have case
3 closure criteria, and so, it could range from withdrawal,
4 you know, just self-withdrawal from the Continuum and it
5 could be lack of participation or it could be, at that time,
6 if they weren't in a special ed program, even though we
7 serve up to 21, if they were not in a special ed type
8 education case environment, the case could be closed. And
9 so, we have since made that a little more flexible if the
10 child stays in any form of education because we, we want to
11 capture older kids also. So --.

12 Q Okay. So, since you've become director, you've made
13 the, the guidelines more flexible as far as keeping kids in?

14 A Yes, we have.

15 Q About the time Tony was in, there were different rules?

16 A Well, they were the old rules and that's the one that
17 was made more flexible in that we saw, we saw we weren't
18 capturing kids that were of the transition age that would go
19 into vocational kind of programs. And so, we could serve up
20 to 21. And so, we thought it was restrictive. And so, we,
21 we lightened up that particular criteria to allow for any
22 form of education.

23 Q Did you know whether Tony had a bipolar diagnosis back
24 when he was in the program?

25 A I don't know if, if he had it. What I, what I guess

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By Mr. Allen

1 would tell you about all of that is from strict memory. So,
2 reviewing the record, I would -- I saw that. But as far as
3 when, when I reviewed the record, I saw that. But as far as
4 when he entered the program, was I aware what, what he came
5 in with was, was intermittent explosive disorder. So, we
6 didn't really focus on bipolar.

7 And so, when you -- that's the thing about kids in the
8 system and that's what Continuum tries to do is there is a
9 break down in continuity of care. You know, they can, they
10 can have multiple diagnosis that doctors give them when they
11 go into a crisis facility, and then that may not carry over
12 the next year for the other doctor sees them. So, those
13 diagnosis can be lost over time.

14 Q Okay. And by lost, you mean the next doctor wouldn't
15 know what a, some doctor in the, before had---

16 A They may not know historically a pattern of diagnosis
17 that had been given today, right.

18 Q I see. Okay. And, therefore, the later doctor would
19 not know to follow-up on a prior diagnosis or history?

20 A That would be the case. And whether, and what
21 medications they may actually prescribe.

22 Q Okay. If it had been known that Tony were bipolar,
23 would it of had a different closure criteria at the time
24 that this case was closed?

25 A Well, I can't speak for an agency changing its system

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By Mr. Allen

1 of case closure based on diagnosis. But there -- and I, and
2 I can't speak to, you know, the closure at that time cause I
3 was not with Continuum. So, but -- you know, if, if bipolar
4 was a prevalent diagnosis or, or it was known that we were
5 aware of it, obviously consideration would of been given to
6 his level of participation and initiation of things because
7 that's, that's very difficult for someone that's
8 experiencing bipolar sometimes, you know, you know -- so,
9 there could of been times that there might of been a lack of
10 participation and there may of been more efforts to engage
11 him.

12 Q Okay. Was there any follow-up for Tony after he left
13 the program?

14 A I'm not aware of any. I know, you know, I was in a
15 different function. I was actually working for a program
16 that, you know, that Continuum had actually contracted with.
17 But later on I have been with Continuum of Care officially
18 for ten years. And to my knowledge, we've never had an
19 extension of Continuum or, or an arm of Continuum that would
20 do follow-up. We just -- we don't have a budget for that.
21 So --.

22 Q I see.

23 A Usually what we try to do, we, we have a, the ability
24 to facilitate a reentry, which, which we created a matter of
25 fact a few years back, also created some flexibility for --

John Shackelford - Direct examination
By Mr. Allen

1 so, if there were someone like Tony that exited our program,
2 but felt the need to come back, say within a three year
3 period, they could actually enter back into the program.
4 But I don't think that was available then. That's a more
5 recent development also.

6 Q Okay. Throughout your efforts to help Tony, while he
7 was, while you were helping him, did you see whether he
8 could make or whether he did make any efforts to improve his
9 behavior?

10 A I felt Tony often tried to improve his behavior. You
11 know, he probably tried harder than a lot of kids I
12 remember, you know as far as on a daily basis. Obviously
13 some of those incidents were pretty heavy impact, you know,
14 on whether it was his level or what was going on in his
15 life. But yes, he, he was, he was a very positive kid, a
16 large amount of the time.

17 Q Okay. And would that stay -- and would he stay at that
18 same positive level?

19 I mean once he got there, did he stay there?

20 A He could maintain it for periods of time. But yes, as
21 I've described incidents before, that's, that's what he, you
22 know, would go into incidents of rage, you know, which could
23 be severe. And yes, it, it was like starting over and then
24 there's a lot of other things to deal with. His, you know,
25 self-esteem regarding that or rejection of that. It's like

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By Mr. Allen

1 I failed again, you know. So, it was hard to start back
2 over, which he had to do a lot of the times because of that,
3 because of that rage that he couldn't control.

4 MR. ALLEN: All right. One moment please, Your Honor.

5 THE COURT: Yes, sir.

6 (Pause.)

7 Q Thank you, sir. If you answer any questions of the
8 State.

9 THE COURT: Mrs. Crick.

10 SOLICITOR CRICK: Yes, sir.

11 THE COURT: You may proceed with cross-examination.

12 SOLICITOR CRICK: Thank you, Your Honor.

13 THE COURT: Yes, ma'am.

14 CROSS-EXAMINATION

15 BY SOLICITOR CRICK:

16 Q Mr. Shackelford, I know you're the director of the
17 Continuum of Care now, and I may have missed this. I'm not
18 sure if Mr. Allen asked.

19 But what is your background, your educational
20 background?

21 A I have an undergraduate degree. It was in psychology.
22 And I have a Master's Degree or graduate degree in human
23 resources now.

24 Q So, are you -- I guess what I'm trying to get at what
25 your title -- are you a licensed social worker or

John Shackelford - Cross-examination
By Solicitor Crick

1 psychologist or---

2 A Yeah, I, I want to make very clear, I'm not a licensed
3 social worker or credentialed worker. In the group home
4 system, the treatment system, it is allowed, and as a matter
5 of fact, that is the common, it's in every group home at
6 that level, that when you have so many years experience in a
7 Bachelor's Degree, you're allowed to, to do counseling.

8 So---

9 Q Okay. But you are not able to diagnose mental---

10 A No.

11 Q ---disorders or---

12 A I am not.

13 Q You are not able to prescribe medication or, or
14 anything of that nature?

15 A No.

16 Q And as far as being able to determine whether someone
17 is actually experiencing memory loss versus just not wanting
18 to talk about an incident, you're not quite able to make
19 that diagnosis, are you?

20 A Well, that's not a diagnosis. But what I would tell
21 you is working with -- I guess I've worked with E.D. kids
22 now, I've been in the system 21 years. But even early on
23 that would of been my first what, five years in the, in the
24 system. You know, I can only tell you those are the kids I
25 work with, and the behavior we saw, and, and the typical

John Shackelford - Cross-examination
By Solicitor Crick

1 symptoms you saw and, and I'm just telling you honestly what
2 I saw. So, judgment wise or not, I guess, you know, you
3 just have to make that judgment yourself.

4 Q That's based on what you're told by the child I guess
5 at the time?

6 A Well, based on behavior that you've experienced with
7 that child and the patterns that you see, yes.

8 Q Your last actual personal interaction with the
9 defendant was quite a while ago I guess in the 80's?

10 A Well, it would of been I guess '93.

11 Q '93.

12 A Right.

13 Q And I think that -- and I'm looking at, actually it
14 looks like maybe a letter from you in nine, February
15 18th of '93 where I believe he was getting ready to
16 transition back home into public school.

17 A Right.

18 Q And at that time, and correct me if I'm wrong, you had
19 noted that he made great progress while at your facility?

20 A That's correct.

21 Q And that he was a role model and a resource to others
22 in the program.

23 Is that accurate?

24 A That's accurate.

25 Q There were also, I think in 1993 when you did that

John Shackelford - Cross-examination
By Solicitor Crick

1 letter, you noted that there were no physical crisis
2 situations since January of 1992, which would of been about
3 a year---

4 A Right.

5 Q ---of no crisis situations?

6 A Right.

7 Q Okay. You also noted that the defendant, Tony, has
8 developed problem solving skills in which he's able to
9 remove himself from potentially crisis oriented situations
10 and then process that later.

11 Is that accurate?

12 A Yeah, that's accurate.

13 Q I think you also noted that he's able to cope with
14 situations without physical confrontation?

15 A He had shown the ability to do that, yes.

16 Q And that he had shown the ability and coping skills
17 necessary in order to transition home full-time with his
18 mother and to public school.

19 Is that -- does that sound right?

20 A Right, that was the plan.

21 Q Okay. And I guess also the last one, he developed very
22 positive peer relations with other students in your
23 facility?

24 A Right, he had shown a lot of progress by that time.

25 Q And some of that progress, I guess in what you call

John Shackelford - Cross-examination
By Solicitor Crick

1 behavior modification, was the ability to deal with some of
2 those anger issues?

3 Would that be fair to say that he had done that at that
4 point?

5 A What I guess I would want to make clear is that he's
6 chronically mentally ill. So, you, you wouldn't consider
7 him cured in that he was showing progress at the time. And
8 as I, as I mentioned before, the goal was to return him home
9 and have him in public school. And I think, if you would of
10 read further past when I left that program, I think he did
11 have physical altercations in the avoidance of school and,
12 and the, the whole thing of the planning. He disrupted
13 several times and had physical altercations with staff and
14 had to be deescalated a lot after I left. But, but that was
15 my plan and that's what I was trying to do before I left the
16 program.

17 Q Well, correct -- I may of misunderstood you a second
18 ago. I think you stated to Mr. Allen that you weren't aware
19 if he was diagnosed with the, I think chronic mental illness
20 at that time.

21 A When I say chronically mentally ill, all the kids are
22 chronically mentally ill.

23 Q Okay.

24 A Okay. I'm not diagnosing anything.

25 Q I got you.

John Shackelford - Cross-examination
By Solicitor Crick

1 A If they have an Axis 1 diagnosis, which he did---

2 Q Uh-huh. (Affirmative).

3 A ---they're, there's not a cure for that. Whether it's
4 bipolar or anything else, they would be experiencing it.
5 It's, it's maintained through medication and treatment,
6 ongoing maintenance. But you have to continue to address
7 it. You don't just stop.

8 Q Right.

9 And what I -- if I'm understanding you correctly, he
10 did -- he was able to modify his behavior and comply with
11 the rules that you had?

12 A He was able to, yes.

13 Q He was able to earn the highest level?

14 A He was able to, yes.

15 Q He was able to deal with his anger issues and remove
16 himself from those situations?

17 A Yes, he was.

18 Q He was able to problem solve and deal with potentially
19 crisis situations?

20 A He was.

21 Q Okay. And if I understood you correctly, that's not
22 necessarily consistent with a diagnosis of bipolar, being
23 able to modify your behavior in that way, but what I'm
24 hearing is he was successfully able to modify his behavior.

25 Is that accurate?

John Shackelford - Cross-examination
By Solicitor Crick

1 A It would be correct that he could modify his behavior
2 at times.

3 Q You did review some records and you mentioned some
4 things, treatment he received after leaving your care.

5 A Right.

6 Q Are you familiar with Nikita Harrison, a service
7 coordinator---

8 A I am.

9 Q ---who was with Continuum of Care at that time I guess?

10 A Right. Well, you know, what, I would not have known
11 her then if she was the service coordinator in that period
12 of time, which I'm not sure she was while I was working with
13 him back in the -- I think she was his last service
14 coordinator.

15 Q Right.

16 A Right.

17 Q So, in the records you reviewed I guess from his later
18 treatment with Continuum of Care, she would of been the
19 service coordinator?

20 A Well, honestly, I didn't -- I wanted to focus on,
21 because all I wanted to talk about was the period of time
22 that I worked with Tony. So, I thought, you know, just from
23 a historical standpoint. So, I didn't really focus on
24 records beyond too much, I mean a few months or whatever.

25 Q So a little bit?

John Shackelford - Cross-examination
By Solicitor Crick

1 A But I was looking at the residential. Yeah, I didn't
2 go much beyond a few months.

3 Q Well, let me ask you this.

4 In the few months that you did review beyond where you
5 treated him, did you review a record where she indicated
6 that the defendant told her he could be good when he wanted
7 to be good?

8 Did you review that record?

9 A No, I'll be honest with you, the records I remember
10 reviewing I think Darlene Vandusen was still the service
11 coordinator. So, I didn't really look at Nikita's records.
12 But, but I would agree with that statement. I wouldn't
13 disagree that, you know, he's able to do that.

14 Q Okay. You also mentioned no consistent participation,
15 and I don't recall if you were able to know when the case
16 was closed.

17 But if, if something in the record indicated that Tony
18 and his aunt do not see the need for services at this time,
19 would that be a reason to close the case, someone refusing
20 services?

21 A They could refuse service or withdraw service. They
22 could.

23 SOLICITOR CRICK: One moment please.

24 THE COURT: Yes, ma'am.

25 SOLICITOR CRICK: Your Honor, I have nothing further at

John Shackelford - Cross-examination
By Solicitor Crick

1 this time.

2 THE COURT: Redirect?

3 MR. ALLEN: Briefly, Your Honor.

4 THE COURT: Yes, sir.

5 REDIRECT EXAMINATION

6 BY MR. ALLEN:

7 Q When you indicated in the, in the letter that he had
8 shown the ability to I think quantify behavior or to
9 recognize stressors or, or remove himself, could he do that
10 consistently?

11 A I personally didn't feel he could do that consistently.
12 She's quoting a year or something. But honestly my memory
13 was he could do periods of time, and could go through
14 plateaus of doing very well, and, and at the time that we
15 were probably trying to transition him, I'm sure he was
16 showing a very consistent time frame of when he was able to
17 put his behavior together. So, so, he, he could do it. I,
18 I don't feel consistently over a long long period of time I
19 don't think so.

20 Q So, consistently over a long period of time you say?

21 A Over a longer period of time without continued
22 treatment or support. I think with, with supports in place,
23 which is what the plan was in that transition. Had -- if I
24 thought he was just gonna transition home with no supports
25 in place, it would not have been supported to transition him

John Shackelford - Redirect examination
By Mr. Allen

1 home. So, the plan was public school and to have a
2 therapist in the home and there were probably other supports
3 that were recommended.

4 Q Thank you. No other questions, Your Honor.

5 THE COURT: Recross.

6 SOLICITOR CRICK: No, sir.

7 THE COURT: Sir, you may step down.

8 Is there any objection from the State to this witness
9 being excused?

10 SOLICITOR CRICK: No, sir.

11 THE COURT: You're free to go, sir. Thank you very
12 much.

13 Ask the attorneys to approach briefly.

14 (Whereupon, a bench conference was held out of the
15 hearing of the jury at this time.)

16 THE COURT: All right. Ladies and gentlemen of the
17 jury, this is probably a good time to stop, take a break for
18 the evening. We're about seven or eight minutes from five
19 o'clock and it's been a long day. So, we're gonna take a
20 break. You'll, of course, be returning back to the, your
21 hotel.

22 I will advise you, as I always do, not to discuss the
23 case among yourselves. Please do not discuss the case with
24 anyone else, and don't allow them to discuss it with you.
25 Should anyone attempt to contact you concerning your

1 participation in this trial, please advise the Court and I
2 can assure you I'll take the appropriate action should that
3 occur.

4 We will be beginning again in the morning at nine
5 o'clock. I trust you'll have a good evening and at this
6 point in time you're free to go.

7 I'll ask that everyone remain seated while the jury
8 retires.

9 (Whereupon, the following takes place outside the
10 presence of the jury.)

11 THE COURT: All right. I'd ask everyone to remain
12 seated while the defendant retires.

13 Court is in recess until nine o'clock in the morning.
14 Thank you very much.

15
16 (Whereupon, Court was in recess for the evening.)
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wednesday, October 22nd, 2008

THE COURT: State ready?

SOLICITOR GOWDY: Yes, sir, Your Honor.

There was, there was one matter that we were gonna respectfully bring to the Court's attention.

THE COURT: Yes, sir.

SOLICITOR GOWDY: I, I suspect that today is gonna be a day, I don't know that for sure, but I suspect it's gonna be a day that's heavy on experts, which brings into play Rule 703. I, I understand that experts can rely on otherwise inadmissible evidence. I even understand that South Carolina's rule is more liberal than the Federal Court. But State versus Slocumb still does place some restraints. I found some episode of quadripole hearsay in one of the expert's reports.

So, I would respectfully ask the Court to consider, and I think Slocumb allows, a curative instruction to this jury that, that whatever experts rely on is not intended to prove the truth of the matter asserted. It's just what they rely on. That's with respect to some of the experts.

With other experts, and, again, I don't know exactly what they're going to say, I don't, I don't want a chart put up that I've seen for the first time that has a great grandfather with a mental disorder if there's nothing to

1 suggest it's hereditary and nothing to suggest that great
2 grandfather was a caregiver to this defendant, then it's
3 just not relevant.

4 And so, I, I would just -- I would ask the Court to
5 consider a Slocumb curative instruction to this jury because
6 I don't want this jury believing that because Donna
7 Schwartz-Watts was told something by quadripole hearsay that
8 they're suppose to take it as the truth.

9 THE COURT: From the defense?

10 MR. ALLEN: Your Honor, please the Court.

11 THE COURT: You're asking for this charge during the
12 charge?

13 SOLICITOR GOWDY: I mean I, I -- whenever the Court
14 thinks it's appropriate.

15 THE COURT: All right.

16 Yes, sir.

17 MR. ALLEN: Your Honor, if it please the Court.

18 I mean we believe that the hearsay exception -- that,
19 that experts may rely upon hearsay especially when we're
20 talking about experts in the area of psychiatric diagnosis
21 and care. I mean that's a part of what they normally rely
22 upon, you know, the history that's given to them -- I mean
23 that's part of what they normally rely upon in drawing their
24 conclusions, and for -- and it is admissible for the purpose
25 of showing the basis of their opinion.

1 Secondly, Your Honor, other experts such as life
2 history experts, as typically, typically used in death
3 penalty cases, you know, their, their, their testimony is
4 admissible to help us show the client's life and to explain
5 why the life of the client does have a right---

6 THE COURT: Yes, sir, I think the, the, the point the
7 solicitor's wanting to make is that he is asking for a
8 charge at some point in time concerning how a jury might
9 consider experts' testimony, and generally the Court gives a
10 charge along those lines. Certainly the -- solicitor, you
11 have the right to attack the reasons given for any expert's
12 opinion, and I will instruct the jury and normally instruct
13 the jury that you should not accept an expert's opinion
14 simply because it is an expert's opinion, and they should
15 look at the reasons given by an expert for the opinions they
16 have in making a determination as to what weight, if any, to
17 give to that expert's opinion.

18 So, I will review the case that you've given me, and,
19 and I do normally give a charge on how a jury can accept an
20 expert's opinion. And, of course, intend to do so again.
21 But in light of the testimony, and I don't know what's gonna
22 come out today either, but in light of the testimony, and
23 how it's given, I will make what I think to be the
24 appropriate charge. But certainly you have the right to
25 attack any expert's opinion based on the reasoning behind it

1 or the basis for the opinion through cross-examination, and,
2 of course, you certainly have the right to argue that to the
3 jury once the, once the case gets to the jury for argument.

4 SOLICITOR GOWDY: Yes, sir.

5 THE COURT: Now, if there's some other problem with
6 jury's, with a particular expert's testimony that you think
7 should be addressed during the trial, you may raise that by
8 objection and I certainly will consider it at that time.

9 SOLICITOR GOWDY: Yes, sir.

10 THE COURT: Anything else before we bring the jury back
11 from the State?

12 SOLICITOR GOWDY: No, sir, Your Honor.

13 THE COURT: Yes, sir.

14 MR. ALLEN: Yes, Your Honor.

15 THE COURT: Anything from the defense?

16 MR. ALLEN: I think there's a matter which the
17 solicitor and I can approach the bench and we can take up.

18 THE COURT: Please do.

19 (Whereupon, a bench conference was held at this time.)

20 THE COURT: All right. Mr. Allen, I was asking you if
21 you were ready to begin?

22 MR. ALLEN: Yes, Your Honor. The first witness I
23 intended to call this morning is Jonathan Howard. I have
24 his subpoena in my hand---

25 THE COURT: You want to show that to the solicitor?

1 MR. ALLEN: ---with proof of service. One -- it looks
2 like there's two copies of proofs of service. One looks
3 like Mr. Howard has signed.

4 THE COURT: Pass that up please, sir.

5 All right. It appears that Mr. Howard is under
6 subpoena.

7 Is he here and ready to testify?

8 MR. ALLEN: He is not outside. We've had, through one
9 of my investigators, Wendy Alley, she's had telephone
10 communication with people supposedly around him. We've made
11 telephone calls to the number that we've had before and have
12 reached him at before. We, we don't get any, any actual
13 response on that phone number. I understand that he may be
14 on the way. He was here yesterday afternoon until some time
15 before Court ended and left the courthouse.

16 There's been some contact -- I mean -- we're hearing
17 third and possibly fourth hand that he was under some
18 misunderstanding that he was not gonna be needed yesterday.
19 But I don't know the reasons why he left, but I---

20 THE COURT: Well, according to your subpoena, he was to
21 appear on October 17th of 2008 and remain until excused.

22 MR. ALLEN: Yes, sir.

23 THE COURT: I assume you have not excused him?

24 MR. ALLEN: No, Your Honor.

25 THE COURT: I know this Court has not excused him.

1 MR. ALLEN: No, I don't think the---

2 THE COURT: Now, are you asking the Court to take
3 action to ensure his presence?

4 MR. ALLEN: Yes, Your Honor, I am.

5 THE COURT: All right. Mr. Hawkins?

6 BAILIFF: Yes, sir.

7 THE COURT: Step outside on the steps and call the name
8 of -- is it Jonathan Howard?

9 MR. ALLEN: Jonathan Howard.

10 THE COURT: Call his name three times to be sure he's
11 not outside the courthouse.

12 BAILIFF: Yes, sir.

13 (Pause.)

14 THE COURT: Mr. Hawkins, if you would, come forward
15 please.

16 Madam Clerk, I'm gonna ask you to swear Mr. Hawkins.

17 (Whereupon, Mr. Hawkins was placed under oath at this
18 time.)

19 THE COURT: Mr. Hawkins, I asked you to step outside on
20 the courthouse steps and call the name of Jonathan Howard
21 three times.

22 Did you do that?

23 BAILIFF: I did, sir.

24 THE COURT: Did you have any response from Mr. Howard?

25 BAILIFF: None whatsoever. They's one lady out there

1 and she said he was on his way. I asked her did she know he
2 was and she said yes, he is. It's a lady that usually sits
3 over here. But I got no response from him.

4 THE COURT: None from him?

5 BAILIFF: No.

6 THE COURT: Thank you, Mr. Hawkins.

7 Now, my -- the address on your proof of service is ■
8 Riley Court.

9 Is that his last known address or is that just where
10 you served him?

11 I'm trying to find out -- if I'm gonna send the sheriff
12 after him, I want to know where we need to send the sheriff
13 out.

14 MR. ALLEN: One second please.

15 THE COURT: Yes, sir.

16 (Pause.)

17 MR. ALLEN: That is, to, to the best of our knowledge,
18 his last known address.

19 THE COURT: All right. Then I'm issuing a bench
20 warrant for the arrest of Mr. Jonathan Howard. Last known
21 address is ■ Riley Court. I'll direct the Sheriff's
22 Department, if you would, to see that a detail is sent out
23 to try to locate him. Thank you, sir.

24 These documents will be made a Court's Exhibit.

25 (Whereupon, the subpoena was marked as Court's Exhibit

1 No. 12 for identification purposes only at this time.)

2 MR. RECKENBEIL: Judge, can we have five minutes to
3 talk with our client before we proceed forward with the
4 jury?

5 THE COURT: Yes, sir, we'll be in recess for five
6 minutes.

7 MR. RECKENBEIL: Thank you, sir.

8 (Whereupon, a short recess was taken at this time.)

9 THE COURT: All right. Is the defense now ready to
10 proceed?

11 MR. ALLEN: Yes, Your Honor.

12 Before we proceed, however, we ask the Court to recall
13 the bench warrant for Mr. Howard, and we ask the Court to
14 excuse Mr. Howard from his subpoena. We have -- I have --
15 Mr. Reckenbeil and I have discussed this with Mr. Torres,
16 and he has made his desires known that he wishes us to take
17 this action. I've advised him of what I believe -- well,
18 without going into our detail, our discussion, but basically
19 we had a full discussion on this issue during the Court's
20 break at our request, which we appreciate. And at this
21 point, we ask the Court to release Mr. Howard from his
22 subpoena and to recall the bench warrant.

23 THE COURT: Any objection from the State?

24 SOLICITOR GOWDY: Your Honor, no objection to the
25 withdrawal of the bench warrant. I think we also have him

1 under subpoena, and because we theoretically, I guess, could
2 put up a rebuttal case if we wanted to, I would ask that he
3 not be released from the subpoena.

4 MR. ALLEN: Well, then I guess---

5 THE COURT: Well, are you asking -- he's asking to
6 withdraw the bench warrant.

7 SOLICITOR GOWDY: Yes, sir, I agree with that.

8 THE COURT: Do you agree, you agree with the
9 withdrawing of the bench warrant?

10 SOLICITOR GOWDY: Yes, sir.

11 THE COURT: All right. I see, I see Mr. Reckenbeil
12 discussing something with Mr. Torres. I'll give him an
13 opportunity to do that before I take any action.

14 (Pause.)

15 THE COURT: Mr. Reckenbeil, is, is there any change in
16 the, the recommendation or the request made by Mr. Allen?

17 MR. RECKENBEIL: No, sir, Your Honor. I just discussed
18 with him the State's motion.

19 THE COURT: All right. Based on the defense's request,
20 Mr. Deputy, I'm withdrawing the bench warrant for the arrest
21 of Mr. Howard. He does remain under subpoena, however. But
22 I'm withdrawing the bench warrant.

23 OFFICER: Yes, sir.

24 THE COURT: Thank you, sir.

25 Now, Mr. Allen, you ready to proceed?

1 MR. ALLEN: Yes, Your Honor.

2 THE COURT: All right. You may call your first -- wait
3 a second. Let's get the jury back in here.

4 Bring the jury in.

5 (Whereupon, the following takes place within the
6 presence of the jury.)

7 THE COURT: The record will reflect the jury has
8 returned to the courtroom. I trust you've had a good
9 evening and you're ready to begin the case this morning.

10 I think the heating and air conditioning system is
11 gonna work. A little earlier it was very chilly in here and
12 I notice it's starting to warm up. We've had a little
13 problem with the boiler kicking out as you knew on Sunday.
14 That was a problem and hopefully we won't have that problem
15 and we'll be okay today.

16 When we broke the case yesterday for the evening, the
17 defense was in the process of calling any witnesses they
18 wish to call in this matter.

19 Mr. Allen, you may call your next witness.

20 MR. ALLEN: Thank you, Your Honor.

21 We call Lisa Lamb.

22 THE COURT: Ma'am, come forward to my right to be
23 sworn.

24 LISA LAMB, being first duly sworn,
25 testified as follows:

Lisa Lamb - Direct examination
By Mr. Allen

1 THE COURT: All right. Ma'am, once you're seated, move
2 toward the microphone and state your name for the record
3 please.

4 WITNESS: Lisa Lamb.

5 THE COURT: Mr. Allen, your witness.

6 MR. ALLEN: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 DIRECT EXAMINATION

9 BY MR. ALLEN:

10 Q Mrs., Mrs. Lamb, are you related to Tony Torres?

11 A Yes, sir, I'm his mother.

12 Q Are you currently married?

13 A No, I'm divorced.

14 Q Are you divorced from Tony's father?

15 A I've been divorced from his father, but I remarried,
16 and I'm divorced from my second husband.

17 Q Okay. And your second husband's name is?

18 A Eddie Lamb.

19 Q Eddie Lamb.

20 Do you have any other children?

21 A No, sir.

22 Q I want to talk with you a little bit about yourself for
23 just a minute.

24 You are the daughter of whom?

25 A Glenda Bull.

Lisa Lamb - Direct examination
By Mr. Allen

- 1 Q Okay. And your father's name?
- 2 A My adopted father is Frankie Bull. He's passed.
- 3 Q He's passed.
- 4 Mrs. Bull is still alive?
- 5 A Yes, sir.
- 6 Q Okay. And are you related to Ruth Rogers?
- 7 A Yes, sir, she is my grandmother, which is Tony's great
- 8 grandmother.
- 9 Q Okay. And she's the mother of which of your parents?
- 10 A My mother.
- 11 Q Okay. And is Mrs. Rogers still alive?
- 12 A No, sir, she passed away April the 8th of this year.
- 13 Q Did you live with Mrs. Rogers?
- 14 A Yes, sir.
- 15 Q Okay. And how long have you lived with Mrs. Rogers?
- 16 A I first moved in with her when I was 17, and I lived
- 17 with her on and off three-fourths of my life.
- 18 Q How old, how old was Mrs. Rogers when she passed away?
- 19 A Ninety. She would of been 91 in August.
- 20 Q And did you help care for your grandmother?
- 21 A Yes, sir.
- 22 Q And where did you and your grandmother live?
- 23 A At [REDACTED] Houston Street in Spartanburg.
- 24 Q And is -- has this been the only house in which you've
- 25 lived with your grandmother?

Lisa Lamb - Direct examination
By Mr. Allen

1 A Yes, sir.

2 Q In addition to caring for your grandmother, have you
3 taken care of other people?

4 A Yes, sir, I've helped take care of my mother, my --
5 when I was growing up, my sisters, my grandmother, and Tony
6 especially.

7 Q Okay. Why was, why was it that you helped take care of
8 your sisters?

9 A Just being there for them through troubled times.

10 Q Okay. How old were you when you began to take care of
11 your sisters?

12 A I've took care of my sisters starting at the age of
13 six.

14 Q Okay. You were six or when they were six?

15 A I was six. I was the oldest.

16 Q You was the oldest?

17 A (Witness nods affirmatively.)

18 Q How many sisters did you have?

19 A I've got four sisters and a brother and I practically
20 raised them myself.

21 Q Tell me, how did you meet Tony's father?

22 A Just through friends of mine.

23 Q How old were you when you met him?

24 A I was twenty.

25 Q And were you -- and what is Tony's father's name?

Lisa Lamb - Direct examination
By Mr. Allen

1 A The same as Tony's, Andres Antonio Torres. But they
2 call him Andy.

3 Q He's, he's called Andy?

4 A Andy.

5 Q And do you know anything about Andy's background like
6 where he's from?

7 A He's from Puerto Rico.

8 Q And do you know, at the time you met him when you were
9 around twenty, do you know how long he had lived in the
10 United States?

11 A He had been here roughly maybe seven years. He came
12 over here to work at the peach orchard in Gaffney.

13 Q Does he still live in or does he live in Spartanburg
14 County?

15 A He lived -- yeah, he lives in Chesnee. On Chesnee
16 Highway.

17 Q Is he still alive to the best of your knowledge?

18 A Yes.

19 Q Were you and Andy married?

20 A We were common law married.

21 Q Okay. So, there was no civil or church ceremony?

22 A No. But I did have to go to Court to file. I had to
23 go through a lawyer to prove that I used his name in public
24 and medical when I had Tony to be covered on the insurance,
25 and I had to go through the Court hearing to apply for child

Lisa Lamb - Direct examination
By Mr. Allen

1 support and get my child support.

2 Q All right. That's jumping ahead a little bit, but
3 let's talk a little more. Did you -- so, you and Andy,
4 obviously then if you're common law married, y'all lived
5 together for a while, correct?

6 A About a year and a half.

7 Q And when was Tony born?

8 A Tony was born [REDACTED] 1980.

9 Q And did you have any problems or complications or
10 incidents during Tony's pregnancy?

11 A Yes, when I was three months pregnant, Tony's daddy,
12 Andy, was running around on me, and I caught him and he
13 brought his girlfriend to our apartment, and he said she was
14 just a friend, and I got really upset, and I left and I went
15 to my grandmother's house, and I had to go to the emergency
16 room because I was in premature labor because of getting
17 upset. But I didn't have to be hospitalized.

18 Q And were there any other incidents or problems during
19 the pregnancy?

20 A He hit me twice.

21 Q While you were pregnant?

22 A Yes.

23 Q Do you know approximately how far along you were when
24 you were hit?

25 A He hit me when I was seven and a half months pregnant.

Lisa Lamb - Direct examination
By Mr. Allen

1 He hit me in my stomach and he backhanded me across my face
2 with his fist.

3 Q Okay. And those were the two times?

4 A Uh-huh. (Affirmative).

5 Q And both of them occurred about the same time or did
6 they occur at separate times?

7 A About a month apart.

8 Q After Tony was born, did you and -- well, let me ask
9 you this.

10 Did you and Andy live together the whole time that you
11 were pregnant?

12 A Uh-huh. (Affirmative).

13 Q Was that a yes?

14 A Yes.

15 Q Okay. I have to have an, an actual yes or a no to all
16 the questions and, and so the court reporter can take it
17 down.

18 A I got pregnant -- I found out I was pregnant -- I got
19 pregnant in October and then I had Tony in July. We lived
20 together at Davis Trailer Park over on 221. Then we moved
21 there, from there. When I come home from the hospital, I
22 had him at the, at the trailer and then we moved to Spartan
23 villa Apartments out towards Hillcrest and we were still
24 together.

25 Q Okay.

Lisa Lamb - Direct examination
By Mr. Allen

1 A Tony was 14 months old when I left him.

2 Q Okay. I want to clarify one, one thing.

3 When you said that you had him while you were living at
4 the mobile home park---

5 A Uh-huh. (Affirmative).

6 Q ---did you have Tony while, I mean actually in the
7 hospital?

8 Did you actually have the delivery in the---

9 A I had him in the hospital, but that's where we were
10 living---

11 Q Okay.

12 A ---in the trailer park.

13 Q Now, why did you leave -- did you leave Andy?

14 A Yes.

15 Q And why did you leave him?

16 A He threatened me. He would not ever help me with the
17 baby. When I first found out I was pregnant, he wanted me
18 to, his exact words were, get rid of it. He wanted me to
19 have an abortion. He didn't want to have anything to do
20 with the child. And the, the day that I left, I was going
21 to my grandma's, me and Tony, I was going to my grandma's to
22 wash clothes. He had never ever offered to watch the baby,
23 to baby-sit, anything. I had full responsibility of that
24 child, and I got ready to leave and he told me that he was
25 gonna watch the baby. And he said it in a tone that sounded

Lisa Lamb - Direct examination
By Mr. Allen

1 strange to me.

2 First of all, the tone was strange. Second of all, he
3 never volunteered to watch the baby, and I told him, I said,
4 I'm just going to wash the clothes, and I said I'm taking
5 Tony with me. He said I'll watch the baby. So, I left and
6 went to a convenience store and I called the cops and told
7 them that he wouldn't let me have my baby, that I wanted to
8 take him.

9 SOLICITOR GOWDY: Your, Your Honor, I, I---

10 THE COURT: Yes, sir.

11 SOLICITOR GOWDY: I have tried to show patience. But
12 it, it is hearsay for her to quote someone else, and I would
13 lodge an objection based on that.

14 THE COURT: Mr. Allen.

15 MR. ALLEN: Your Honor, this is something that she
16 heard. It's not necessarily a statement. What she's
17 relating as to what somebody said to her is not necessarily
18 a statement of fact which falls under the hearsay rule. But
19 rather it is a statement that she actually heard and took
20 action from that statement. I think she can testify as to
21 what someone else said to her which caused her to react in a
22 certain way.

23 THE COURT: You're stating it's not being offered for
24 the truth of the matter asserted?

25 SOLICITOR GOWDY: Well---

Lisa Lamb - Direct examination
By Mr. Allen

1 MR. ALLEN: I---

2 WITNESS: It is the truth.

3 THE COURT: Ma'am---

4 SOLICITOR GOWDY: I guess my point is she's, she's not
5 only just quoted her ex-husband. She also described the
6 tone of the words and what she thought it meant.

7 THE COURT: I'll sustain the objection.

8 Q Okay. So, as a result -- and don't go into what was
9 said, but as a result of what Andy said to you, you did
10 what?

11 A I packed up everything that I had and me and Tony left.

12 Q Okay. Where did you go?

13 A I got everything out of my house and me and Tony went
14 and spent the night with my sister, and then we started, we
15 moved in with my grandmother, and then I went to, just a few
16 days later, I went to see a lawyer.

17 Q Okay. Did you subsequently get a divorce from Andy?

18 A Well, since---

19 Q At some point in time did you get a divorce?

20 A It was common law and it was like we had to wait a
21 year.

22 Q Right.

23 Okay. So, you subsequently got a divorce from Andy---

24 A Yes, sir.

25 Q ---at some point in time?

Lisa Lamb - Direct examination
By Mr. Allen

1 A Yes, sir.

2 Q Tell me, if you would, did you notice anything unusual
3 about Tony when he was very young?

4 A Yes, when he was about 14 months old -- he did
5 everything early. He crawled early. He walked early. He
6 got into things early playing with toys. He was extremely
7 extremely active.

8 Q Did you notice anything unusual about how he would act,
9 any unusual characteristics about Tony?

10 A Yes, he would -- I don't know how to describe it. He
11 would have like episodes.

12 Q Okay. Tell me about those episodes.

13 A He would get real excited and like trying to get his
14 clothes on. He wouldn't -- I couldn't put his, get his
15 clothes on him. He wouldn't let me put his clothes on him.
16 And times that I had taken him to the doctor we had trouble
17 in the doctor's office even when he was, when he was that
18 young.

19 Q What kind---

20 A For the doctor to examine him, I had trouble, you know,
21 trying to hold him for the doctor to examine him.

22 Q What would he do during these episodes?

23 A He would kick. He would wiggle. He would holler. He
24 would just like let go, let go, let go.

25 Q How old was he when you first started seeing these

Lisa Lamb - Direct examination
By Mr. Allen

1 episodes?

2 A He was about 14 months old.

3 Q Did you see any episodes involving Tony in his crib?

4 A Yes, I did. He had a crib that had the long skinny
5 poles. I put him in his crib. We had -- we was living in a
6 one bedroom apartment, and he was in the crib. I -- when I
7 moved in with my grandma, when I left Tony's daddy, he was
8 14 months old. We stayed there for two months and I saved
9 up money and we moved to an apartment, and I got everything
10 set up in the apartment, and I put him in his crib, and he
11 got in his crib and he literally shook it till the side,
12 till the little pole rails came out on one side.

13 So, I had to turn the crib -- it came out on the front.
14 I had to turn the crib around the other way. He shook it
15 that hard till the rails came out on the other side. So, I
16 had to take the crib down. I had to take my bed off of the
17 frame, put it in the floor so he could sleep with me in case
18 he rolled off the bed he wouldn't have far to fall. He
19 would be right there on the floor.

20 Q During that episode, did you do anything to try to calm
21 him down?

22 A I tried to hold him. I tried to hold him as tight as I
23 could and rock him and I rocked him this way and I, and I
24 swayed back and forth this way and I laid him on, across my,
25 my legs and with his belly hanging down and I rubbed his

Lisa Lamb - Direct examination
By Mr. Allen

1 back to try to calm him down.

2 Q Did that do any good?

3 A After maybe a couple hours.

4 Q And was this the only -- well, let me ask it a
5 different way.

6 Did these episodes continue or did they stop after a
7 while?

8 A They continued.

9 Q For how long?

10 A They never stopped.

11 Q Did you try to seek help for Tony?

12 A Yes, I tried calling. I literally sat down one day
13 with the telephone book and I started with the A through the
14 Z and I called everything that looked like a medical
15 assistance to try to seek help. I even ended up calling a
16 medical department at a prison, which I had no idea because
17 it just said medical, trying to seek help and I told the
18 woman what I was trying to do, and she said you've reached a
19 prison medical department. She says I'm sorry. We can't
20 help you. But I hope that you get help and I hope you find
21 what you need.

22 Q Okay. Did you, at some point, make a list of all the
23 people that you called?

24 A Yes, sir, I did.

25 Q When did you make that list?

Lisa Lamb - Direct examination
By Mr. Allen

1 A When I make, started making all the phone calls.

2 (Whereupon, a list was marked as Defendant's Exhibit
3 No. 1 for identification purposes only at this time.)

4 Q Okay. I'm going to show you a copy, which is marked as
5 Defense Exhibit 1.

6 Do you know what that is?

7 A This is the list of all the people that I called.

8 Q Do you remember when that was that you made those
9 calls?

10 Is there a date on the list?

11 A I don't remember exactly what, what date I called. But
12 he was, he was very small. We were living at my
13 grandmother's then.

14 Q Okay.

15 A So, he couldn't have been no more than two or three.

16 Q Well, look on Page 7.

17 Do you have any dates referred to there?

18 A Yeah, 7/18/88.

19 Q Okay. Does that refresh your memory as to when you may
20 of made this list?

21 A Yeah.

22 Q When was that?

23 A Probably then.

24 Q In 1988?

25 A Uh-huh. (Affirmative).

Lisa Lamb - Direct examination
By Mr. Allen

1 Q Okay.

2 A But I had started calling people before and different
3 kind of doctors. But I didn't, you know, like a behavior
4 place to see if I could get him in a doctor. Doctor Daniel
5 Moore was treating him when he was young. He was treating
6 him for being hyperactive.

7 Q Okay. If I may first show this list to the solicitor.

8 SOLICITOR GOWDY: No objection.

9 THE COURT: Without objection.

10 Do you wish to have it admitted?

11 MR. ALLEN: I do, Your Honor.

12 THE COURT: All right. It will be admitted without
13 objection.

14 Is it already marked?

15 MR. ALLEN: It is marked, Your Honor.

16 THE COURT: All right. As marked.

17 (Whereupon, Defendant's Exhibit No. 1 was received into
18 evidence at this time.)

19 Q Now, let me first back up a little bit and you can
20 refer to this if you need to refresh your memory, and this,
21 what I'm handing you back is Defense Exhibit 1.

22 Do you recall how old Tony was when you first started
23 trying to get help?

24 A Gosh, it's, it's -- they're just been so many times
25 that I've tried to get him help. I can't remember exactly

Lisa Lamb - Direct examination
By Mr. Allen

1 the date. I mean he was really young.

2 Q And by really young, approximately how old do you think
3 he was?

4 A Like two or three.

5 Q You -- did you first attempt to get him help here in
6 Spartanburg through doctors?

7 A Yes, Doctor Daniel Moore started seeing him and he had
8 two baby doctors. Doctor Gilliam and Doctor Wooten were his
9 pediatricians.

10 THE COURT: I'm gonna ask the attorneys to approach for
11 just a moment.

12 (Whereupon, a bench conference was held out of the
13 hearing of the jury at this time.)

14 THE COURT: All right. Mr. Allen, you may proceed.

15 MR. ALLEN: Thank you, Your Honor.

16 Q You were -- I think you, you had mentioned that you had
17 gone to some doctors here in Spartanburg for assistance with
18 Tony?

19 A Uh-huh. (Affirmative).

20 Q Is that correct?

21 A Yes.

22 Q Did you take Tony to the Medical University of South
23 Carolina?

24 A Yes, sir.

25 Q When or how old was Tony when you first took him to the

Lisa Lamb - Direct examination
By Mr. Allen

1 Medical University?

2 A He was a little over three years old.

3 Q And what part of the Medical University did you take
4 him to?

5 A I had to take him to the Psychiatric Unit at the
6 Medical University Hospital in Charleston, and I had to
7 leave him there at a little over three, three years old.

8 Q And when you say leave him there, he was admitted?

9 A Yes, sir.

10 Q How long was he there?

11 A He was there about a month and a half and I would have
12 to go down and visit. I would have to go down and meet with
13 the doctors every Friday. I'd get off work and I would have
14 to drive down to Charleston and go down there and meet with
15 the doctors to see how his progress was doing.

16 Q Okay. And did you -- would you go alone or did you go
17 with anybody?

18 A I went one time by myself and then most of the time my
19 grandmother went with me.

20 Q And you were -- were you divorced from Andy at this
21 time?

22 A Oh, yes.

23 Q Did, did you ever go down there with Andy?

24 A With Andy?

25 Q Yes, ma'am.

Lisa Lamb - Direct examination
By Mr. Allen

1 A No, I called him one time. We, we stayed at the Ronald
2 McDonald house. You could stay there for ten dollars a
3 night. It was right across the street from the hospital,
4 and I called him the first part of the week and I told him I
5 was going.

6 Q Okay. You can't get into what he said.

7 But after you -- you, you informed him that you were
8 going?

9 A Yes, and if he wanted to go he could.

10 Q And as a result of that did he go with you?

11 A No, sir.

12 Q You said Tony was down there that time for about a
13 month and a half?

14 A Yes.

15 Q And was -- did he come home at the end of that stay?

16 A He come home for a little while.

17 Q And then what?

18 A And then I put him in The Children's Learning Center, a
19 day care center.

20 Q Okay.

21 A They had a special class out there for him.

22 Q By special class, do you know what we're talking -- I
23 mean can you describe that a little bit for me?

24 A Like a 4-K, like 4-K -- it's called 4-K kindergarten
25 class, and he participated in the class rooms. He

Lisa Lamb - Direct examination
By Mr. Allen

1 graduated. He did, he did good in it.

2 Q Was it a regular class or was it---

3 A It was a regular, a regular class, but they had -- some
4 of the teachers could give special attention to children
5 that needed a little more attention.

6 Q Okay. Did, did Tony -- after the 4-K class, was there
7 another place that you took Tony to?

8 After The Children's Learning Center, was there another
9 place?

10 A He went to -- he started first grade. Well, he, he
11 went to kindergarten out there, and then he went to 5-K
12 kindergarten. And then when he started first grade, he went
13 through the first grade, but not straight through the first
14 grade. There were, there were episodes that I had to go
15 pick him up from school. So, he didn't complete the whole
16 year everyday like a normal child. I would have to go pick
17 him up.

18 Q Now, what school did he attend in the first grade?

19 A Loan Oak Elementary.

20 Q And when you said there were episodes -- I mean when
21 you arrived to pick up Tony, what was he like when you were
22 called to pick him up?

23 A He would be anxious, excited, upset. They would have
24 to take the children out of the classroom for his protection
25 and he just couldn't -- he would get -- I don't know how to

Lisa Lamb - Direct examination
By Mr. Allen

1 explain it. He would get to where they wanted me to come
2 pick him up to take him out of school so he wouldn't be
3 around the other children to, you know, prevent him from
4 harming any children or any of his classmates or harming
5 himself.

6 Q Okay. And this was when he was how old?

7 A That was in the first grade.

8 Q And he was how old when he went into the first grade?

9 A He was six.

10 Q Six years old.

11 When you would see him, when you pick him up from
12 school is when they would call?

13 A Yes.

14 Q Can you give me a comparison as to how he was like as
15 to other episodes that you had seen before then?

16 A After his episode, he would just be calm just like he
17 had an episode and then he calmed down and he was like
18 normal.

19 Q Now, when you received these calls from first grade,
20 where would, where were you?

21 Were you at home?

22 A I was at work.

23 Q What type of work did you do at that time?

24 A Back then I did office work.

25 Q And did you work all his life?

Lisa Lamb - Direct examination
By Mr. Allen

1 A All of his life I have worked.

2 Q Have you, have you had the same jobs or had different
3 jobs?

4 A I've had different jobs.

5 Q When you would receive these calls and have to go get
6 him from school, how, if any way, did that affect you at
7 your job?

8 A My supervisor knew that I had a child that had problems
9 and they understood. So, they let me leave to go pick him
10 up.

11 Q Did you take Tony, at some point, back to the Medical
12 University of South Carolina?

13 A Yes.

14 Q How old was Tony when you did that?

15 A He was -- that was in 1987.

16 Q Okay. So, what grade?

17 A That was in the, in the second grade.

18 Q Okay. Why did you take him to the, to the -- was it to
19 the same place, the psychiatric unit?

20 A The psychiatric unit, yes.

21 Q Why did you do that?

22 A For the same reason. For his episodes.

23 Q Episodes of, of what?

24 I mean that you'd been talking about before?

25 A Yes.

Lisa Lamb - Direct examination
By Mr. Allen

1 Q Okay. Was he admitted at the Psychiatric Unit at that
2 time?

3 A Yes.

4 Q How long was he there?

5 A At that time I can't remember exactly how long he was
6 there. Let me see. He was there from 8/17 to 10/2 of '87.

7 Q Okay. When -- how did you feel when you left him at
8 the Medical University Psychiatric Hospital?

9 A I felt terrible because I had to take my baby and leave
10 him at a psychiatric hospital. Not just a regular doctor.
11 But a psychiatric hospital and him a child. And to know
12 that I had to take him there and I had to leave him, and
13 they had to get him in a room to where they couldn't, I
14 couldn't see him and he couldn't see me because it was so
15 upsetting for me to have to leave him at a hospital two
16 hours away.

17 Q When he came back from the Medical University or did he
18 come back?

19 When he was, when he was released from the Medical
20 University Hospital, was he released back to you?

21 A Yes.

22 Q Now, he had been going to what school in the second
23 grade?

24 A Loan Oak Elementary and he got expelled from Loan Oak
25 Elementary, and I had to go through the District Six school

Lisa Lamb - Direct examination
By Mr. Allen

1 office because that was in District Six. And I had to go
2 out there and talk to, I can't remember the gentleman's
3 name, but I had to talk to the man over special education,
4 and he got him in the Charles Lea Center, the McCarthy
5 Tesler School, and I took him out there for evaluations to
6 see if he qualified to go to that school and he did qualify.

7 Q Now, when you -- so, he went to McCarthy Tesler School
8 then?

9 A (Witness nods affirmatively.)

10 Q In what grade?

11 A That was in the second -- he went out there in the
12 second grade.

13 Q And what type of classes or environment was he in?
14 Do you know?

15 A Special ed classes, special behavior classes. They had
16 school teachers in there to monitor them.

17 Q How long was he in the McCarthy Tesler School?

18 A He went there a couple years.

19 Q And would, when he -- was this a residential program?
20 In other words, did he live there or did he---

21 A No, he just, he just went there and then he would come
22 home everyday.

23 Q And during the times that he was at the school and he
24 would come home, how was his behavior during this period of
25 time that, that you noticed?

Lisa Lamb - Direct examination
By Mr. Allen

1 A When he was in a, in a controlled environment, his
2 behavior was better.

3 Q How about when he was home?

4 A When he was at home, sometimes he would have episodes
5 and they would start to escalate and then they would, he
6 would teach himself -- they taught them to teach their self
7 how to calm their self down.

8 Q Could Tony do that?

9 A Yes, he would.

10 Q Every time?

11 A No.

12 Q What would happen when he could not calm himself down?

13 A When he could not calm himself down, he got aggravated,
14 agitated, verbal.

15 Q Did he do anything else when he could not calm himself
16 down?

17 A Yeah, he would throw, he would throw toys. He would
18 throw things and he would -- sometimes he would lash out at
19 me.

20 Q By lashing out at you, you mean --?

21 A Try to hit me.

22 Q Did he -- also during the time that he was at the
23 McCarthy Tesler School, did he have any other admissions to
24 any other hospitals?

25 A Oh yeah.

Lisa Lamb - Direct examination
By Mr. Allen

1 Q Where?

2 A He went to the Psychiatric Unit at Spartanburg Regional
3 Medical Center from January the 13th through January the
4 20th of 1988.

5 Q Is that the only -- without going into a great deal of
6 detail about each day, I mean is that the only time he was
7 at Spartanburg Regional Psychiatric Unit during that period
8 of time?

9 A Yes, sir.

10 Q Did he have any other hospitalizations?

11 A Yes, he's been to Patrick Harris in Anderson.
12 You want to know the dates?

13 Q No. Well, if, if you know them.

14 A He was at Patrick Harris in Anderson on 8/11 of '88.
15 Then he got transferred to the, to the Continuum of Care,
16 York Place, the group home.

17 Q Now, what happened, if you know, that got him placed in
18 a, Patrick Harris?

19 A His episodes. His major episodes that he had.

20 Q By major, what are we talking about?

21 A Him getting mad, getting upset, throwing things,
22 lashing out, cursing. He would have episodes at school.
23 He's been at Patrick Harris four different times down at the
24 psychiatric ward.

25 Q And Patrick Harris is what kind of a hospital?

Lisa Lamb - Direct examination
By Mr. Allen

1 A It's a psychiatric hospital.

2 Q Do you know why he was transferred to York Place?

3 A Continuum of Care sent him there because it was a, a
4 controlled environment. It was like -- I mean it was a
5 residential home. He lived there and he would come home
6 sometimes on the weekends and they had him in a special
7 education class.

8 Q Okay.

9 A And they thought, they thought -- Continuum of Care
10 thought that that was a good place for him because they had
11 a slot for him.

12 Q Do you know approximately how long he stayed at York
13 Place?

14 A From January of '89 till August of '90.

15 Q Did he get to come home every weekend?

16 A Not every weekend.

17 Q Was he -- did you have conversations with Tony like
18 over the telephone or anything during that time?

19 A Yes, and I would go, I would go down there on the
20 weekends and visit him and meet with the teachers and
21 everything and see how, see how he was doing.

22 Q Okay. And were you allowed to take him home every
23 weekend?

24 A If possible, yes.

25 Q Okay. And was that possible at all times?

Lisa Lamb - Direct examination
By Mr. Allen

1 A Sometimes if he didn't earn, earn his points system,
2 like clean his room, do all of his chores, do his home work,
3 sometimes he would get to come home and sometimes he
4 wouldn't get to come home. And there have been times that
5 he did come home and I had to take him back early.

6 Q why was that?

7 A Because he would have an episode at home.

8 Q What kind of episode again?

9 A Just a -- the same thing over and over, the verbal, the
10 throwing things, not calming his self down.

11 Q After York Place, did he come home?

12 A After York Place, when he was in York Place, he came
13 home for I guess about two and a half weeks and then he went
14 back to Patrick Harris. The emergency committed him to
15 Patrick Harris in Anderson.

16 Q Because of?

17 A Of his episodes. He was still having them at home and
18 having them at school.

19 Q Were you able to deal with these episodes?

20 A Very hard.

21 Q why?

22 A Because I didn't have the strength to -- I was
23 taught -- at the time, we had family counselors that would
24 come in and show us the holds of how to, how to do and how
25 to maneuver him when he would have an episode, and sometimes

Lisa Lamb - Direct examination
By Mr. Allen

1 I just couldn't do it. The older he got, the bigger he got.

2 Q At this time we're talking about, about Tony when he
3 was approximately how old?

4 A About eight or nine.

5 Q Okay. And has Tony always been a big child?

6 A Yes, when he turned, when he turned about three months
7 old, he started gaining weight, and he's been a little
8 chubby ever since then.

9 Q Okay. So, after his hospitalization again this time,
10 did he come back home?

11 A Yeah, he -- from 8/24 to 10/13 of 1990 he stayed at
12 Patrick Harris, and then he came home and he had to go back
13 to Patrick Harris from 11/15 to 11/20 of '90 for the same
14 reason, the episodes, and then he went to Patrick Harris
15 from 6/8 of '91 to 6/26 of '91, and then he went to Hall
16 Institute from 6/26 of '91 through 8/19 of '91.

17 Q Why -- and Hall Institute is what?

18 A It is a controlled environment a, for -- it's like a
19 children's home.

20 Q Do you know where it is?

21 A It's in -- I believe it's in Greenville. I'm not
22 positive.

23 Q You're not sure.

24 You didn't take him?

25 Did you actually take him to Hall Institute?

Lisa Lamb - Direct examination
By Mr. Allen

1 A Yeah, but he's been so many places I can't remember
2 exactly where it was at.

3 Q Why was he taken to Hall Institute?

4 A For his behavior. That was another placement that they
5 had room for.

6 Q Now, at this time when you keep saying they have
7 placement, who are you---

8 A Continuum of Care.

9 Q So, do you recall how old Tony was when you got
10 Continuum of Care involved?

11 A It was early in his early ages because he had big
12 brothers through Continuum of Care. They would get him --
13 like after school, they would pick him up and spend a couple
14 hours time with him or they would come to the house and take
15 him out for an outing for a couple hours.

16 Q Did that seem to help?

17 A It helped some.

18 Q During this period of time, did Tony have or what kind
19 of relationship, if you know, did Tony have with his father
20 Andy?

21 A None. He didn't want to have -- his, his daddy never
22 come around to pick him up. He was suppose to pick him up
23 Friday from six o'clock to Sunday at six o'clock. When we
24 first split up, he did it for a while and then he started
25 slacking off, slacking off, and then he just quit. If he --

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By Mr. Allen

1 on the times that he did take him home, if he took him home
2 with him over the weekend, he might take him home Friday
3 night and bring him back Saturday morning.

4 Q How did this affect Tony if -- I mean do you see how
5 this affected Tony?

6 A It affected him a lot because he couldn't understand
7 why his daddy would bring him back home. And the times that
8 he didn't come to pick him up, I had to tell him, you know,
9 his daddy had to work.

10 Q Okay. During this time, you were working?

11 A Yes.

12 Q And at -- also, during this period of time, what was
13 your household like and who was in your household?

14 A When, when Tony's daddy wouldn't come get him?

15 Q Well, I'm talking about up to the time where we are,
16 where he had been to York Place and up at Hall Institute.

17 who were you -- were you living with anyone?

18 was anyone else in your household?

19 A At one point in time I was living at my grandmother's,
20 me and Tony, and then I got married in '89.

21 Q This---

22 A And I lived in Inman.

23 Q This was with whom?

24 A Eddie Lamb.

25 Q During your marriage with Mr. Lamb, were there any

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By Mr. Allen

1 other stressors or were there any other incidents involving
2 family life and how would you describe family life with
3 Mr. Lamb?

4 A He was an alcoholic and there was plenty of times that
5 we would want to do, do outings and he couldn't do it
6 because he was, he was drunk. But he -- a lot of the times
7 he would try not to drink when, when Tony would come home on
8 the weekends and try to spend time with Tony. But the
9 things that Tony were involved in, like video games, and
10 music, and playing basketball, Eddie wasn't involved in none
11 of that. But he did, he did try to spend time with him. He
12 did take him fishing. He took Tony and one of his little
13 friends fishing several times.

14 Q And how long were you married to, to Mr. Lamb?

15 A I was married from 1989 to '92.

16 Q Okay. Now -- and since the, your divorce from
17 Mr. Lamb, do you know if, if Tony has had any other contact
18 with Eddie Lamb?

19 A No.

20 Q No, you don't know or no, he hasn't had any contact?

21 A He, he might of, he might of went down there -- we
22 lived at Greer. We moved from Inman and moved to Greer and
23 bought a double wide trailer, and Tony might of went down
24 there to visit him or mainly his sister, Doris. She had a,
25 a dog grooming company and Tony loved the dogs and he went

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By Mr. Allen

1 down there and he might of saw Eddie. But as far as having
2 anything to do with him, he really didn't.

3 Q Okay. After, after Tony was in Hall Institute, do you
4 know where we went from there?

5 Did he come back home?

6 A From Hall Institute he went to Pioneer Ridge at South
7 Carolina Deaf & Blind School.

8 Q And did he live there?

9 A We lived there from 8/19 of '91 through 2/19 of '90,
10 2/11 of '94.

11 Q And when we say lived there, that was a -- was that a
12 residential place?

13 A Yes.

14 Q Did you -- would you see Tony during this period of
15 time?

16 A Yes.

17 Q How often?

18 A He would come home on the weekends when he earned his
19 weekends, and sometimes they would have, to start off with,
20 they would have supervised visits. They would bring him to
21 my apartment. I had moved to another apartment. They would
22 bring him to my apartment and there would be a, a counselor
23 or a case worker that was there, and Tony might be there for
24 a couple of hours. And me and Tony would get to visit and
25 the case worker would sit in another room, but where he

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By Mr. Allen

1 could hear everything. And we done fine with that. And
2 then eventually he started building up, coming home over the
3 weekend, and I would go pick him up and then I would take
4 him back.

5 Q Would you do that every weekend?

6 A Every weekend that I could.

7 Q When you say every weekend you could, what types of
8 things would keep you from being able to get him for the
9 weekend?

10 A Sometimes he wouldn't earn his visits to come home, and
11 sometimes I was just so stressed out from work and home life
12 and worrying about trying to take care of him and sometimes
13 I just needed a break.

14 Q Were there times that he had earned or were there times
15 that you had been informed that he had earned a weekend that
16 you did not pick him or could not pick him up?

17 A Yes.

18 Q Do you know how often that would happen?

19 A Not, not very often.

20 Q Okay. But it did happen?

21 A Yes.

22 Q During the times that you have him for the weekends,
23 while he was at Pioneer Ridge, did things go well at home---

24 A Yes.

25 Q ---when he was home?

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By Mr. Allen

1 A Yes.

2 Q Did he have any episodes?

3 A He had a few.

4 Q Again, these were the type episodes that you previously
5 described?

6 A Yes.

7 Q Was he able to calm himself down along those?

8 A Most of the time, if he's in a controlled environment,
9 he can calm himself down. He can -- it's like mentally
10 talking to yourself to calm you down.

11 Q Now, were there times that you took him back early
12 while he was at, you know, from the weekend visits---

13 A Yes.

14 Q ---for anything?

15 And that would be because of what, not bring -- but
16 Pioneer Ridge.

17 A Pioneer Ridge. There was -- they told me that when I
18 brought him home on the weekends for me to start letting him
19 stay two hours by himself at home to see how he would do.
20 And one time that I had to bring him home, I had to take him
21 back early is I went to a wedding. I got back before the
22 two hours was up, and when I came in, I couldn't find my dog
23 and he was sitting in the living room watching TV. And I
24 found the dog and the dog had been injured.

25 So, I got Tony in the truck. I borrowed my, my

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1 step-daddy's truck. Tony held the dog while we went to the
2 vet. When we, when we got there, I had to leave the dog.
3 Then we went to my grandmother's house and I called Pioneer
4 Ridge and told them that they was gonna have to come pick
5 him up and what the circumstances were. But now he did
6 hold, he did hold the dog while I carried him to the vet.

7 Q After he was at Pioneer Ridge, do you know -- did he
8 come home then, I mean after, after he finished with Pioneer
9 Ridge?

10 A After he finished at Pioneer Ridge he went straight to
11 the Crane House.

12 Q What was that?

13 Do you know?

14 A Another Continuum of Care placement home.

15 Q And was that similar to Pioneer Ridge as far as like
16 he'd come home on the weekends --

17 A Yes.

18 Q -- when he could?

19 A He was there from 2/11 of '94 through 4/30 of '96.

20 Q Did he come home every weekend?

21 A Not all the time.

22 Q And from -- you say he was there for about two years?

23 A Yes, sir.

24 Q And from there did he, did he come home?

25 A He went to -- he went to the detention, which I, I'm,

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By Mr. Allen

1 I'm -- I think it was D.J.J. He went from 4/30 of '96
2 through 5/16 of '96, and he stayed there the whole time.

3 Q And from there did he come home?

4 A He came home -- no, after there he, they sent him to
5 Lancaster Children's Home, and he was there from 5/16 of
6 '96 to some time in '97 when they released him.

7 Q Okay.

8 A Because they did not, they did not have another
9 facility open for him and he was 17, and they told him that
10 you're 17, you have to go cause they couldn't find another
11 placement for him.

12 Q What kind of place was Lancaster Children's Home?

13 A It was a controlled environment.

14 Q Was it a, a treatment place?

15 A Yes.

16 Q Sort of like Pioneer Ridge?

17 A Yes.

18 Q Did he get -- did you see him at all during that period
19 of time?

20 A Yes.

21 Q When would you see him?

22 A I would see him on the weekend.

23 Q Would he come home or would you have to go?

24 A He would come home and then I'd go visit him, visit him
25 sometimes.

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By Mr. Allen

1 Q When -- did he come home -- I mean did you get to see
2 him every weekend?

3 A Just about. They had the same, the same system. He
4 could earn his time to come home and if he didn't earn it
5 then he didn't get to go home.

6 Q Okay. When he came home, while he was at Lancaster
7 Children's Home, were things okay?

8 A They were somewhat better.

9 Q Okay. Did he still have episodes?

10 A Yes.

11 Q Did you take him back early while he was at Lancaster
12 Children's Home---

13 A Yes, I did.

14 Q ---on weekends.

15 Because of his episodes?

16 A Yes, and sometimes he couldn't come home for the, for
17 like whatever he did through the week he couldn't come home,
18 but I could go visit him and have a visit there for like a
19 couple hours. At least I would get to go there to visit
20 him. But he wouldn't get to come home.

21 Q You said he left or that you were --, when you said, by
22 the way, that they placed him in Lancaster Children's Home,
23 they again are?

24 A Continuum of Care.

25 Q Okay.

Lisa Lamb - Direct examination
By Mr. Allen

1 A Continuum of Care covered him from the very beginning
2 to the very end. They always had tried to find a placement
3 for him. They always had a hand in putting him somewhere,
4 and the times that he had been -- like he would be emergency
5 committed to Patrick Harris, the doctor that was treating
6 him, Doctor Christopher Caston, would emergency commit him
7 to Patrick Harris.

8 Q Do you know why he couldn't come home?

9 Like why he had all these placements?

10 A For his episodes.

11 Q As you described them earlier?

12 A Yes.

13 Q Could you control Tony?

14 A Sometimes I could and sometimes I couldn't.

15 Q Do you, do you know if, at least, while he was in your
16 care during the weekend that you might have him if he was
17 under medication?

18 A Yes.

19 Q Always?

20 A He was, he was always under, on medication. Doctor
21 Daniel Moore started him on medication when he started
22 treating him for being hyperactive.

23 Q Do you know or were you advised of any, if you received
24 during the time that he was in Continuum of Care, any other
25 diagnosis or was it---

Lisa Lamb - Direct examination
By Mr. Allen

1 A From Continuum of Care or a doctor?

2 Q While he was in Continuum of Care, were you advised of
3 any other diagnosis that he may of had?

4 A They did, they had did evaluations on him ever so
5 often.

6 Q Uh-huh. (Affirmative).

7 A And it was a behavior problem, but I did not find out
8 what was medically wrong with him until he was seven years
9 old. He was being treated by Doctor Moore from when he was
10 little up until he was seven years old for being
11 hyperactive. He was on Mellaril. He was on two other kinds
12 of drugs, and he wasn't hyperactive.

13 I finally got in touch with a Doctor Christopher
14 Caston. I had to go -- me and Tony had to go in and meet
15 with a psychologist and then we got an appointment with
16 Doctor Caston. Doctor Caston run blood work on him and
17 found out that he was bipolar, chemical imbalance, and that
18 was when he was seven years old.

19 Q While he was in the Continuum of Care, while Tony was
20 in Continuum of Care, do you know if they were aware of
21 that?

22 A I do not. I know he was on medication during, during
23 the time. But some of his -- like his school records got
24 misplaced and his medical records got misplaced. So, I
25 don't know if they carried from one, one facility to the

Lisa Lamb - Direct examination
By Mr. Allen

1 next facility as far as his medical evaluation.

2 Q Okay.

3 A And at one time he was on five different kinds of
4 medication.

5 Q But your understanding -- but when you would talk with
6 Continuum of Care and with placements that Tony has had
7 under Continuum of Care, they were, as far as you
8 understood, treating him for what, behavior, or were they
9 trying to treat him medically or do you know?

10 A For behavior and medically.

11 Q Okay. When was Tony released from Continuum of Care?

12 A He was released when the last place that he was at,
13 Lancaster Children's Home. They said that he was 17 and
14 they had no other placement for him. So, he was released to
15 come home. And when he got released, I went and picked him
16 up and brought him home, and he lived with me and my -- I
17 had a boyfriend living with me, and he lived with me and him
18 and he had a daughter, and he stayed with me for a while.
19 Then me and my boyfriend split up. Then it was me and Tony.
20 And then after a period of time I told Tony he was gonna
21 have to leave.

22 Q Again because of his episodes?

23 A Yes.

24 Q When he lived with you at that time were there
25 additional episodes?

Lisa Lamb - Direct examination
By Mr. Allen

1 A Yes.

2 MR. ALLEN: One second please, Your Honor.

3 THE COURT: Yes, sir.

4 (Pause.)

5 Q Thank you, Mrs. Lamb.

6 THE COURT: Cross-examination.

7 SOLICITOR GOWDY: May it please the Court, Your Honor.

8 THE COURT: Mr. Gowdy, you may proceed.

9 CROSS-EXAMINATION

10 BY SOLICITOR GOWDY:

11 Q Morning, Mrs. Lamb.

12 A Good morning.

13 Q My name is Trey Gowdy. I am going to ask you a couple
14 of questions. Okay. I'll go as briefly as I can.

15 All right?

16 A Okay.

17 Q I want to start with the Children's Learning Center.

18 How many other children were at the Children's Learning
19 Center?

20 A That was a day care center.

21 Q All right. How many other children, children were
22 there?

23 A I don't know how many they had.

24 Q Fifteen, twenty, twenty-five, thirty?

25 A Maybe thirty.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q Thirty, thirty other children at the Children's
2 Learning Center?

3 A Uh-huh. (Affirmative).

4 Q How about York Place, how many other children were
5 there?

6 A I couldn't tell you. I don't know.

7 Q You visited him there though, right?

8 A Yeah, but I, I---

9 Q Ten, fifteen, twenty?

10 A Maybe twenty.

11 Q Twenty.

12 How about Pioneer Ridge program, how many other
13 children were a part of that?

14 A At Pioneer Ridge, he was in a -- it was like one of
15 these school trailers, and I think there was, I think there
16 was six kids in that trailer that, that, the little home
17 that he lived in.

18 Q I mean throughout the entire program, do you know how
19 many other children?

20 A Oh, my God, it's the whole school for the deaf and
21 blind.

22 Q Well, some of the children there, are there because
23 they are deaf or blind---

24 A Yes.

25 Q ---probably. So, I'm not talking about them. I'm

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 talking about children that would of been similarly situated
2 to your son that would of been in this Pioneer Ridge program
3 because of either behavior problem or other medical issues.

4 A Well, he, he stayed at one house, but I don't know, at,
5 at the one little trailer. But I don't know how many other
6 children were in --

7 Q So, at least six and probably more.

8 Is that fair?

9 A Yes.

10 Q When you took him to MUSC, were there other children at
11 MUSC?

12 A Yes.

13 Q How many did you see in the waiting room if you were
14 down there?

15 A About four or five.

16 Q Was it full, was the waiting room full?

17 Wasn't it four or five others?

18 A They were in there in just a, little activities.

19 Q So, five other children.

20 How about the Hall Institute, how many other children
21 were there when you went to visit him?

22 A I don't recall. I---

23 Q Just give me a conservative number.

24 Twenty, twenty-five?

25 A Maybe.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q How about Crane House?

2 BAILIFF: Ma'am, quit doing that.

3 THE COURT: Just one second.

4 Would you ask her to step out please?

5 Talk to her for me.

6 Having a member of the gallery taken from the courtroom
7 for using hand signals to a witness.

8 You may proceed.

9 SOLICITOR GOWDY: Thank you, Your Honor.

10 Q Let me repeat the question in light of that.

11 How many other children did you see at the Crane House?

12 A Maybe eight to ten.

13 Q We'll go with the most conservative number. We'll go
14 with eight.

15 How about D.J.J., any idea how many?

16 A I have no idea.

17 Q A lot?

18 A Cause I never did, I never did visit him at D.J.J.

19 Q But a lot?

20 That's why we have a juvenile justice system?

21 A Yeah, I'm sure there were.

22 Q They're so many.

23 How about the Lancaster Home?

24 A I never did see all the kids. So, I don't know.

25 Q But he wasn't the only one I guess is my point.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

- 1 A No.
- 2 Q Every single place he was---
- 3 A There were other children.
- 4 Q ---there were other children who had the same---
- 5 A Yes.
- 6 Q ---issues and the same problems?
- 7 A Yes.
- 8 Q And were fighting the same mental illnesses or behavior
- 9 problems?
- 10 A Yes.
- 11 Q And at every stage they're others?
- 12 A Yes.
- 13 Q All right. You talked about Doctor Dan Moore, who's a,
- 14 a pediatrician with a subspecialty in Attention Deficit
- 15 Disorder?
- 16 A Yes.
- 17 Q And he prescribed Ritalin to your son?
- 18 A He put him on Mellaril.
- 19 Q Doctor Moore did?
- 20 A Yes.
- 21 Q I thought you said he -- is that for Attention Deficit
- 22 Disorder?
- 23 A He put him on Mellaril for being hyperactive.
- 24 Q Okay. And then Doctor Wooten was your primary care
- 25 pediatrician?

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 A Doctor Wooten and Doctor Gilliam.

2 Q All right. Who referred him to MUSC?

3 A Doctor Daniel Moore.

4 Q There weren't local psychologist and psychiatrist?

5 A I saw Doctor Christopher Caston when Tony was seven
6 years old. That's when I found out that he was
7 bipolar/chemical imbalance.

8 Q But, but I thought you took him to MUSC when he was
9 three?

10 A Yes.

11 Q Well, I guess my question---

12 A And he saw a psychiatrist down there.

13 Q And there weren't any doctors in Spartanburg that could
14 of, that could of done it because you said you had to drop
15 him off down there, and how traumatic that was.

16 I guess my question to you is were there doctors in
17 Spartanburg or Greenville or somewhere in the Upstate that
18 also could of helped him?

19 A He saw Doctor Moore for several years, and he treated
20 him for being hyperactive, and he was the doctor that was
21 treating him.

22 Q Doctor Moore is not a psychiatrist?

23 A No, sir.

24 Q And he's not a clinical psychologist?

25 A No.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q He's a pediatrician?

2 A No, he works out at the deaf and blind school.

3 Q He is a pediatrician. He's a baby doctor.

4 Doctor Daniel Moore, I mean that's what he does?

5 He is a pediatrician with a subspecialty in---

6 MR. ALLEN: Objection, Your Honor. I'm, I'm not sure
7 if the solicitor's asking a question or is trying to make a
8 statement, but---

9 SOLICITOR GOWDY: well, I'll rephrase it.

10 THE COURT: I'll ask you to rephrase the question.

11 He is on cross-examination, Mr. Allen. He's allowed to
12 lead.

13 You may proceed.

14 Q Do you know whether or not Doctor Moore is a baby
15 doctor, a pediatrician?

16 A No, he's not.

17 Q Doctor Dan Moore is not a pediatrician?

18 A As far as I know he's not. He worked out at the deaf
19 and blind school.

20 Q Okay. well, those two aren't mutually exclusive. You
21 can be both.

22 Agreed?

23 A Yes.

24 Q Okay. You mentioned a dog injury, and having to take
25 him back to Pioneer Ridge.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 How were those two related?

2 A That's the day that, that when they started telling me
3 to leave him at home, leave Tony at home for two hours at a
4 time, to see how he done, and I went to a wedding and I came
5 home and my dog wasn't, I couldn't find my dog anywhere in
6 the house. And I found my dog. He had been injured. And I
7 got Tony to hold the dog. We took him to the emergency vet,
8 and I had to leave the dog at the vet, and then I had to
9 call out at Pioneer Ridge and tell them to come and pick him
10 up.

11 Q Well, I guess that's what I struggling with. You took
12 the dog to the vet. So, it's not requiring your care, and
13 you suggested that that was the reason you had to take him
14 back early.

15 How were those two related?

16 A Because Tony hurt the dog.

17 Q Well, that's what I'm getting at.

18 But how do you know he did?

19 You were at a wedding, right?

20 A Well, there was nobody there in the house but him and
21 Tony.

22 Q Did he tell you he did it?

23 A I asked him where the dog was and he said, he said he's
24 walking around here somewhere.

25 Q What were the injuries to the dog?

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 A He was, had been kicked in his nose. His eye had been
2 kicked. He had been kicked in his chest, in his groin area.
3 He had blood coming from his rectum, from his penis, and
4 from his nose.

5 Q So, you actually took Tony back because you suspected
6 he had done all those things to the dog?

7 A Yes.

8 Q Okay. I want to move to 2007, May 11th, 2007, May
9 10th, 2007.

10 He wasn't living with you, was he?

11 A No.

12 Q He was living with the Hughey's?

13 A Yes.

14 Q Do you know if he was working?

15 A Yes, he was working at Burger King.

16 Q Do you know whether he was seeking mental health
17 treatment?

18 A He was suppose to be going through it, through, for the
19 probation that he was on.

20 Q I know what he was suppose to do.

21 Do you know whether or not he was?

22 A I don't know a hundred percent positive.

23 Q Would you have given him a ride if he'd asked you for
24 it?

25 A Yes.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q would you have helped him get to mental health if he
2 wanted to go?

3 A Yes.

4 Q I mean do you know whether or not he was seeking
5 substance abuse counseling in 2007?

6 A He was suppose to.

7 Q Again, same question. Being suppose to and doing are
8 two different things.

9 Do you know whether or not he was?

10 A I know he might of went some. But if I could of tooken
11 him, given him a ride I would have. As a matter of fact,
12 when he got his job at Burger King, me and him went to the
13 unemployment office. He got a job that day. They hired him
14 that night.

15 Q So, you would have helped him get mental health
16 treatment even as late as May the 10th, 2007, if he had---

17 A Oh, yes.

18 Q ---asked for your help?

19 A Yes.

20 Q And you would of helped him get substance abuse
21 treatment as late as May 10th, 2007?

22 A Yes, he's my son.

23 Q When did he, when did he first start using illicit
24 drugs?

25 A I couldn't tell you that because I don't know for sure.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q Did he ever do it in your presence?

2 A No.

3 Q He ever do it in your home?

4 A He wanted to do it in my home when I, when he lived
5 with me, when he came out from the last place he was at and
6 I told him no.

7 Q What drug was it?

8 A Marijuana.

9 Q Is that the only drug you saw him with?

10 A Yes.

11 Q Did you know Ann and Ray Emery?

12 A I knew -- I didn't know Ann. I knew Ray because I
13 was -- the car that I was driving, when I went to see my
14 sister, my door locked automatically by itself, and he had
15 to come down there and unlock my door.

16 Q Well, he didn't have to. He did it.

17 A Yes, I asked him.

18 Q Right.

19 A And he come down there to unlock my door.

20 Q Is that the first time you met him?

21 A I've seen him several times. But that's the first time
22 I've really, really got to talk to him.

23 Q But y'all didn't have an ongoing friendship or ongoing
24 relationship?

25 A No, sir.

Lisa Lamb - Cross-examination
By Solicitor Gowdy

1 Q But yet you asked him to help you get inside your car
2 when you locked the doors and he did it?

3 A Yes.

4 Q Thank you, Mrs. Lamb.

5 THE COURT: Redirect?

6 MR. ALLEN: No, Your Honor.

7 THE COURT: Ma'am, you may step down.

8 Mr. Allen, you may call your next witness.

9 MR. ALLEN: Thank you, Your Honor.

10 We call Pam Gordon.

11 THE COURT: Ma'am, come forward to the witness stand to
12 my right to be sworn.

13 PAM GORDON, being first duly sworn,
14 testified as follows:

15 THE COURT: Ma'am, once you're seated, move toward the
16 microphone. State your name for the record please.

17 WITNESS: Pamela Gordon.

18 THE COURT: Mr. Allen, your witness.

19 MR. ALLEN: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. ALLEN:

22 Q Mrs. Gordon, do you know Tony Torres?

23 A Yes, sir..

24 Q How do you know him?

25 A He is my nephew.

Pam Gordon - Direct examination
By Mr. Allen

1 Q You are the sister of -- who are you the sister of that
2 makes you---

3 A Lisa Lamb.

4 Q Okay. So, you've obviously known Tony all his life?

5 A Yes, sir.

6 Q Okay. I want to draw your attention to an incident.

7 Did you have an occasion, at one point in time, to
8 transport Tony from York Place to Spartanburg?

9 A Yes, sir.

10 Q Why did you do that?

11 A Lisa couldn't get off work. So, I volunteered to go
12 and get him and bring him home for her.

13 Q Okay. Do you know how old Tony was at that time
14 approximately?

15 A I'm wanting to say about eight or nine.

16 Q Okay. And when you brought him to Spartanburg, did --
17 where did you bring him?

18 Where did you bring him to?

19 A I brought him to his, to my grandmother's house.

20 Q Okay. And did anything unusual happen at that time?

21 A Not at that time.

22 Q Okay. Did anything unusual happen at anytime when you
23 picked him up?

24 A No, the next day I kept him because she had to go to
25 work.

Pam Gordon - Direct examination
By Mr. Allen

1 Q Okay.

2 A And he stayed with me the, for the full, the full day.

3 Q Okay. And you kept him where?

4 A At my home.

5 Q Is that located here in Spartanburg?

6 A It's in Wellford.

7 Q In Wellford.

8 Spartanburg County?

9 A Yes, sir.

10 Q Okay. And did anything unusual happen then?

11 A Yes, sir, it did.

12 Q Please tell me about that.

13 A We were -- me and my daughter and Tony were all
14 standing out in the front yard, and he had wanted to go to
15 West Gate Mall, and I said well, we can't go right now. And
16 then we all was standing out in the front yard. And all of
17 a sudden he reached out to me like this and said help me,
18 help me, I feel it coming, and then the next thing I know,
19 he's pulling up my garden, hit my mailbox, broke my front
20 windows out, my front door, full glass door.

21 And when I'm looking at him, his eyes look like they're
22 nothing but the pupil, not color, but the pupil. And then
23 after a few minutes he's standing there and he's just
24 looking around at with, you know like I don't know what just
25 happened. I mean he didn't understand. He looked at me and

Pam Gordon - Direct examination
By Mr. Allen

1 like I don't know what just happened.

2 Q And what did -- I mean when you say he pulled up your
3 garden, what was it?

4 A It was flowers. It was a big giant flower bed.

5 Q In the, what part of your---

6 A In the front of my house right in front of the
7 sidewalk.

8 Q Okay. And he, and he did what else?

9 A He tore the mailbox up.

10 Q This was the mailbox that's located where?

11 It's on the house or out on the street?

12 A It's, it's right at my driveway at the corner of my
13 yard.

14 Q Okay. When you say tore it up, what did he do?

15 A He bent it all up.

16 Q And then you said he did something to the house?

17 A He went and busted out the front windows of the,
18 their -- it's like a big double window. It's almost to the
19 floor. He busted those out. Then the front glass door, and
20 then he got a, use to be what they use to put on telephone
21 poles, they're like a glass knob, and beat the back of my
22 car, hit it, and put dents all in it. And then after that
23 is when he just, I guess, like come out of it and he just
24 didn't know what he done.

25 Q And how long did this take?

Pam Gordon - Direct examination
By Mr. Allen

1 A I really couldn't tell you. I don't, I don't really
2 know how long it took.

3 Q How did you, you feel?

4 I mean what were your thoughts about Tony?

5 A I was worried he was gonna hurt his self. I mean
6 that's glass and stuff. I mean I was worried for his
7 safety. I mean he could of cut an artery or something and
8 bled to death, you know. It scared me. I, I was scared for
9 him.

10 Q And he said what to you?

11 A He kept reaching his hands out and begging me to help
12 him. He said I feel it coming, and I, I didn't know what to
13 do.

14 Q Okay. Thank you, Mrs. Gordon.

15 THE COURT: Mr. Gowdy, your witness.

16 SOLICITOR GOWDY: Very briefly, Your Honor.

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY SOLICITOR GOWDY:

20 Q Morning, ma'am.

21 A Good morning.

22 Q I'll ask you a couple questions.

23 The incident, the incident that you relayed to the jury
24 happened 20 years ago?

25 A I guess it would be about 20 years ago.

Pam Gordon - Cross-examination
By Solicitor Gowdy

1 Q If -- and you wanted to help him?

2 You would of helped him if you could?

3 A If I knew what I could of done to help him, yeah.

4 Q Exactly. Exactly.

5 You also strike me as the kind of person that if he
6 called you on May the 10th, 2007, and asked you for help
7 you would of helped him then too?

8 A If I could of helped him, yeah.

9 Q If he needed a ride to mental health counseling you
10 would of given him a ride?

11 A If it would of helped him, yes.

12 Q If he needed a ride to substance abuse counseling you
13 would of given him a ride?

14 A Yeah.

15 SOLICITOR GOWDY: Thank you, Your Honor. That's all I
16 have.

17 THE COURT: Redirect?

18 MR. ALLEN: No redirect.

19 THE COURT: You may step down, ma'am. Thank you.

20 MR. ALLEN: Judge, can she be excused from her---

21 THE COURT: Any objection?

22 SOLICITOR GOWDY: No, sir.

23 THE COURT: Ma'am, you're free to go.

24 All right. We've been going for a couple of, couple
25 of, almost a couple of hours now. We're going to stop at

1 this point in time, give you an opportunity to stretch your
2 legs. This will serve as our morning break.

3 As I always instruct you when you leave the courtroom,
4 please don't discuss the case even among yourselves or with
5 anyone else until I've advised you to do so, and that would
6 be after you've heard all the evidence, and I've charged you
7 concerning the law and you've heard the arguments of
8 counsel.

9 At this time I'll allow you to retire to the jury room.
10 I'll ask that everyone remain seated until the jury
11 retires.

12 (Whereupon, the following takes place outside the
13 presence of the jury.)

14 THE COURT: I'll ask that everyone in the courtroom
15 remain seated while the defendant retires.

16 Court's in recess for about ten to fifteen minutes.
17 (Whereupon, a short recess was taken at this time.)

18 THE COURT: Is the defense ready to proceed?

19 MRS. HODGES: Yes, sir, Your Honor.

20 THE COURT: State ready to proceed?

21 SOLICITOR GOWDY: Yes, sir, Your Honor.

22 THE COURT: All right. Let's bring the jury in.

23 (Whereupon, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. The record will reflect that

1 all jurors have returned to the courtroom. The defense is
2 in the process of calling its witnesses.

3 And Mr. Allen, you may call your next or, Mrs. Hodges,
4 you're gonna do that.

5 MRS. HODGES: Thank you, Your Honor. I will, Your
6 Honor.

7 THE COURT: Yes, ma'am.

8 MRS. HODGES: Please the Court.

9 We call Doctor Alex Morton.

10 THE COURT: Sir, if you would, come forward to the
11 witness stand to be sworn.

12 WITNESS: Yes, sir, morning.

13 THE COURT: Good morning.

14 ALEX MORTON, being first duly
15 sworn, testified as follows:

16 THE COURT: Sir, once you're seated, move toward the
17 microphone. State your name for the record please, sir.

18 WITNESS: Yes, sir, thank you. My name is William
19 Alexander Morton, Junior.

20 THE COURT: All right. Just a moment.

21 WITNESS: That's spelled M-O-R-T-O-N.

22 THE COURT: If you'll talk over that microphone rather
23 than into it we won't get that blow back sound when you talk
24 into it.

25 WITNESS: Yes, sir.

Alex Morton - Direct examination
By Mrs. Hodges

1 THE COURT: Thank you, sir.

2 WITNESS: Is this okay?

3 THE COURT: All right. Mrs. Hodges, you may proceed.

4 MRS. HODGES: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MRS. HODGES:

7 Q Doctor Morton, good morning.

8 A Good morning.

9 Q Would you -- you've already introduced yourself to the
10 jury.

11 Would you tell us what your profession is please?

12 A I am professor emeritus pharmacy practice and clinical
13 associate professor of psychiatry and that's at the Medical
14 University of South Carolina in Charleston.

15 Q And do you currently teach?

16 A I teach there as a emeritus, professor emeritus. I
17 actually am retired from the full-time work. I was there
18 for 28 years full-time. Professor emeritus is a life long
19 appointment. So, I will teach maybe three lectures a year
20 versus 60 lectures a year. I'll consult on a, when they
21 need me basis. So, I might consult there once or twice a
22 month.

23 Q And when you teach, what, what subject do you teach?

24 A I teach about psychopharmacology or psychiatric drugs.
25 Psychopharmacology are, is, is the, is the study of the use

Alex Morton - Direct examination
By Mrs. Hodges

1 of psychiatric medicines or any medicines that really affect
2 the brain. That would include prescribed medicines such as
3 Prosac, Lithium, Xanax, Clonopin, as well elicit drugs such
4 as marijuana, cocaine, as well, as well as those drugs that
5 are legal like alcohol and nicotine.

6 Q And tell us a little bit about your educational
7 background.

8 A I received my Bachelor's in Pharmacy from the
9 University of, of North Carolina at Chapel Hill, and then I
10 received my Doctorate of Pharmacy from the University of
11 Tennessee in Memphis. That was in 1972 and then in 1975.
12 And then I received my residency in clinical pharmacy at the
13 University of California San Fransisco in 1976.

14 Q And are you licensed currently to practice pharmacy?

15 A Yes, I'm licensed in several states, North Carolina,
16 South Carolina, and California.

17 Q And are you board certified?

18 A Yes, ma'am, I am board certified in psychiatric
19 pharmacy practice.

20 Q In psychiatric pharmacy practice, is that a relatively
21 small group of people in that, in that practice?

22 A It's, it's a relatively small group of people. When
23 you're board certified, you have to have had the experience
24 and then you sit for an examination, and currently world
25 wide they're 509 people that would be in the world, and

Alex Morton - Direct examination
By Mrs. Hodges

1 every year it may increase or decrease a little bit
2 depending on who takes the board and who passes the board.

3 Q Okay. Do you see patients yourself?

4 A I do. I actually see patients for primarily
5 psychiatric disorders where medicine is essentially the, the
6 main treatment, and I always do that under the supervision
7 of a psychiatrist. But I, I see them, evaluate them. I
8 prescribe medications. That's under the conjunction of a
9 collaborative agreement with a psychiatrist because I have
10 my doctorate in pharmacy. I am, I'm not a psychiatrist.
11 I'm not a psychologist. But I do see patients and evaluate
12 their medicines and then would adjust their medicines as
13 needed.

14 Q And do you work with patients that have addiction
15 and/or psychiatric disorders?

16 A Yes, I pretty much specialized in the area of
17 addictions as well as psychiatric disorders. Mostly the
18 psychiatric disorders, I work with, have been with the mood
19 disorders, which is depression, manic depression, and then
20 the anxiety disorders, which is, has a whole spectrum of, of
21 different disorders.

22 Q How long did it take you to, to understand some
23 important issues about addiction?

24 A That's, that's, that's an important point because I,
25 I'm always faced with that when I talk with my students.

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1 When I look back, it, it really took me about a year and a
2 half to understand what withdrawal was about, and that was
3 something, after seeing patients on a regular basis, the
4 withdrawal wasn't quite like what it was in the text book.
5 And as far as really coming to truly understand that
6 addiction is a medical disease, probably about four and a
7 half years. I'd always heard people talk about it being a
8 disease, but to truly believe it, about four and a half
9 years.

10 So, it's interesting when I talk with students, even in
11 my substance abuse course, which they'll get maybe 40 or 50
12 hours of, of contact, they still struggle with that concept,
13 is it a medical disease. And in my mind, there's absolutely
14 no question nowadays although I certainly wrestled with
15 that. And early in my career, I really didn't want to work
16 with people with, that had addictive diseases. I mean I, I
17 turned down jobs.

18 Now, I, I really look forward to working with people
19 because they get better. They, they, they incredibly get
20 better if treated. If not, they, they follow quite a
21 predictable course, which I think is nice, that, that it is
22 predictable, both ways, treated/untreated.

23 Q And have you developed that understanding based on your
24 clinical experience at the Medical University of South
25 Carolina?

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1 A From the Medical University, I've worked in a, a number
2 of different areas. Also at Fenwick Hall Hospital, which
3 was a private alcohol drug treatment center at, in
4 Charleston. It's no longer there. They, they've
5 transferred that and sold that. But over the period of
6 time, it was -- it came from contact of working on inpatient
7 and out-patient units both our, our center for drug and
8 alcohol programs at the Medical University of South
9 Carolina. I was involved with that when it started up in
10 '87 to '88. It was slowly functional. Now all five floors
11 of our hospital there have some alcohol and drug treatment
12 centers.

13 But one whole floor is, is that. It's totally
14 dedicated to, to the treatment of alcohol and drug whereas
15 the other floors are, are psychiatric floors.

16 Q And have you testified in Court before?

17 A Yes, ma'am.

18 Q How many times would you say?

19 A In trials, probably about 48 times and, and, and maybe
20 two or three times with those were hearings such as adult
21 hearing or hearing---

22 Q And have you been testified, qualified as an expert
23 witness in psychopharmacology, addictions, and
24 psycho-pharmacy practice before?

25 A Yes, ma'am, I have always been qualified in, as one of

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1 those or often all of them, in psychopharmacology, expert in
2 addictions, as, as well as psychiatric pharmacy practice.

3 MRS. HODGES: Your Honor, at this time we would offer
4 Doctor Morton as an expert in psychopharmacology, as an
5 expert in addictions, and psycho-pharmacy practice.

6 THE COURT: Any objection?

7 SOLICITOR CRICK: No, sir.

8 THE COURT: Without objection, he'll be qualified as an
9 expert within that, that field. I've explained to the jury
10 what that designation means.

11 You may proceed.

12 MRS. HODGES: Thank you, Your Honor.

13 Q Doctor Morton, did you review any records in
14 preparation, in, in relation to this case?

15 A Yes, ma'am, I, I reviewed quite a number of records. I
16 did.

17 Q All right. And were those records related to the, the
18 prior treatment of Mr., we call him Tony, but Andres Antonio
19 Torres?

20 A Yes, ma'am.

21 Q Okay. And did you have an opportunity to meet with
22 Tony himself?

23 A Yes, I met with Tony twice.

24 Q And approximately how long were your meetings with him?

25 A The first meeting was for about an hour and a half.

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1 That was in early August. And then in early October,
2 approximately an hour or so, two and a half hours.

3 Q And just basically, based on your review of those
4 records and your meetings with Tony, were you able to
5 develop an opinion regarding his prior psychiatric treatment
6 as relates to your field of expertise?

7 A Yes, ma'am, I did.

8 Q All right. And did you prepare some slides to help
9 demonstrate your testimony today?

10 A Yes, ma'am, I put together a program and I think I, I
11 feel like it's helpful for me as well as helpful for anyone
12 learning, and it's kind of a standard what I would use in
13 teaching resident students as well as presenting to
14 psychiatrist attendings at the Medical University. You're
15 pretty much expected to have a presentation because visually
16 it helps people understand some of the, the ideas.

17 MRS. HODGES: Your Honor, I have provided a copy of his
18 slides to the State. At this time we would ask Doctor
19 Morton to be able to step down from the witness stand, and,
20 and be able to, to show through his power point---

21 THE COURT: Any objection?

22 SOLICITOR CRICK: No objection.

23 THE COURT: You may do so.

24 (Witness comes down from the stand.)

25 THE COURT: Mr. Hawkins, if you'll bring the lights

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1 down slightly please.

2 A This is the hardest part, getting it started.

3 Q And that first slide is you and what you're here to
4 talk about, is that correct?

5 A Correct. That's where I have practiced and do practice
6 as a---

7 Q Okay. And the next slide, do we have somebody that
8 shows sort of the brain and where drugs can affect, what
9 areas of the brain drugs can affect?

10 A Yes. Drugs affect numerous parts of the brain. I
11 think it's important, and I did want to point out one,
12 besides affecting someone's judgment -- let's see if I can
13 get this to work.

14 Besides affecting someone's judgment, the area of the
15 brain it affects, perceptions as well as sensations, vision.
16 That's important. What -- the, the part that I think is so
17 important is the reward circuitry in the brain. I'll come
18 back to that later. Because it helps, helps me understand,
19 as well as other people understand, why people might do
20 something over and over again.

21 Q I want to talk to you a little bit about or ask you
22 some questions about Tony's substance abuse and/or substance
23 use and prescribed drugs.

24 Do you know what drugs Tony was using between May
25 10th and 11th of 2007?

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1 A The next slide -- as far as May 10th and 11th, yes.

2 Q Okay.

3 A He was using three drugs, methamphetamine, alcohol, and
4 Clonopin also known as clonazepam. Methamphetamine, he was
5 using it throughout the day as well as into the evening
6 somewhere between three and five grams at different times.
7 That was approximately the total amount. It's generally
8 referred to as an eight ball. Eight ball is referring to an
9 eighth of an ounce. And an eighth of an ounce is
10 approximately three and a half grams, give or take some.

11 His alcohol use was somewhere around drinking a 12 pack
12 of beer plus some as well as drinking at least one liter of
13 vodka and perhaps drinking some amount of, from another
14 bottle before that bottle was broken. So, it's hard to
15 quantify exactly how much was in the second bottle.

16 Clonopin, also known as Clonazepam, is in the class of
17 medicines called a Benzodiazepine, and that's very similar
18 to like Xanax or Valium. But it's mainly used to treat
19 panic disorders, seizures, and has been used to treat manic
20 and depressive disorders.

21 Q And Clonopin is a, a drug that, that can be prescribed?

22 A Yes, this can be prescribed. But that amount of 19 to
23 25 milligrams is excessively high. I would never recommend,
24 in treatment settings, probably over about 18 milligrams, if
25 that much in, in treating someone who's acutely manic.

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1 That's, that's a medicine I, I was interested in in the
2 mid-80's when we were finding out how to treat someone's
3 manic depressive illness and it has relatively few side
4 affects.

5 Q And when you say 18 milligrams, are you talking a, a
6 daily dose?

7 A Throughout the day. That would be about the max that,
8 that, at one time, yes.

9 Q Okay. On the next slide, do we have some affects these
10 substances would of had on Tony?

11 A The affects or side affects I think is an, important to
12 differentiate because you can have, you can have affects
13 while you're using, you can have affects when you stop,
14 withdrawal affects, and then you can have affects long after
15 the drug is out of your body because it actually will affect
16 the cells of, of the different parts of the brain so that
17 they are either hyperactive or very slowed down.

18 And, and this -- these residual affects can last weeks,
19 months, and some, some people even you can see those affects
20 in years. So, I think it's always important to
21 differentiate when we're talking about affects.

22 Often there's overlap and I think that's part of what
23 took me a while to learn in treatment settings is that you
24 may be taking several drugs. So, you're trying to put
25 together everything you know from a controlled setting to

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1 the setting where people have been using large quantities of
2 several drugs. And, and so, there's often overlap of, of,
3 of these three, three affects.

4 Q Based on your review of the information and the drugs
5 that Tony was taking in May of 2007, specifically the 10th
6 through the 11th, do you have an opinion as to whether he
7 would of been experiencing one of these, two of these, all
8 three of these, some combinations?

9 Do, do you know?

10 A I would expect him to be experiencing some affects.
11 These three affects from potentially all three of the drugs
12 that he was using as well as some of the substances that he
13 might of used earlier that week because what he reported to
14 me using earlier that week he was not using that particular
15 evening.

16 Q Okay. Can you tell us some of the symptoms and his
17 responses to medical treatment based, based on your review?

18 A Yes, I, I looked at records from him from about age
19 three years old up through about age 16. And, and basically
20 what I found was that consistently he had symptoms of an
21 impulsive control disorder. He also had symptoms of a
22 bipolar disorder, and Doctor Donna Schwartz-Watts is gonna
23 be telling you more about what those diagnosis are. I do
24 not make diagnoses. But I certainly know about symptoms and
25 he had those symptoms consistently over those periods of

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1 time documented in, in the records.

2 when I talked with him, I, I got a sense that he was
3 really ashamed of having these symptoms as well as having
4 mental health problems, and, and really does not want to be
5 seen as a person with a mental health disorder. Not that --
6 a lot of people don't like to have that. But specifically
7 Tony does not want to be seen that way I think in the prison
8 world. He doesn't, he doesn't want to be seen that way.

9 His treatment, with medications, I looked at a number
10 of medicines that he received, and he was nonresponsive at
11 times. And I looked at why is that and how often it was.
12 Because they did not give him enough. With some of the
13 drugs you can measure levels. In fact, one of the drugs,
14 I'll have a slide here, it was Lithium. It's the one drug
15 that we know the most about as far as how much is in your
16 blood with, with what kind of response you'd have, and it
17 was often that he just did not get enough based on his blood
18 levels.

19 Later on I know he struggled with taking the medicines.
20 Every adolescent I know, at some point, struggles with do I
21 need this, I should be able to control it. Some people have
22 that idea later on that they should be able to control what
23 they're feeling, thinking, seeing. Sometimes the staff
24 recommended that he not continue with this medicine, that he
25 didn't really see that, that he needed. Other staff members

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1 thought that he did do well when he took the, the medicine
2 that was prescribed.

3 He certainly self-medicated, in my opinion, his
4 psychiatric disorders when he got out, outside of the
5 setting of, of group homes and psychiatric facilities. He
6 self-medicated with drugs that worked instantly whereas most
7 of the medicines that I'm involved with take weeks,
8 sometimes months to, to work, sometimes a year to work cause
9 we're often saying how was this year compared to last year.
10 Let's look and see what the next year, if it works.

11 Sometimes, in, in my field, we're looking at decreased
12 hospitalizations. If you have five hospitalizations and now
13 you have one, you're responding quite well even though that
14 one hospitalization, that's a hospitalization. You're
15 experiencing problems other people might be experiencing
16 problems. But it's not unusual that people will
17 self-medicate.

18 Q What are the---

19 A Methamphetamine---

20 Q I was, I was gonna ask just what are the substances
21 that somebody might use to medicate, self-medicate.

22 A Methamphetamine, alcohol, others, other drugs. Tony
23 went on to develop the disease of addiction, which also I
24 think has its predictable problems. So, not only did he
25 have a psychiatric disorder or disorders, but he also had a

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1 substance abuse disorder or disorders, and, and I think
2 Doctor Watts will address specifically how these drugs went
3 on to develop disorders, but they certainly had symptoms of
4 aggressiveness and agitation.

5 All of these drugs are well known to produce
6 impulsivity and aggressiveness. And, and earlier this year
7 I had an opportunity to look at methamphetamine from the
8 prospective of, of coming up and acting like it was 1987.
9 And I had to take everything I knew about methamphetamine
10 out of my brain and, and just act like it was '87. And I
11 was amazed at how much we knew in the 60's and the 70's and
12 the 80's.

13 I was saying how come?

14 Why aren't we doing something about methamphetamine in
15 the 90's and the 2000's and 2010's because it's essentially
16 the same?

17 It makes you incredibly aggressive and incredibly
18 psychotic.

19 Q What were you able to learn about Tony's lifetime use
20 of substances?

21 A His lifetime use is fairly extensive.

22 Q Do we have a slide for that?

23 A Yes, not, not unusual for someone's first drug to be a
24 legal drug, nicotine. Quite a potent drug if you give it
25 intravenously. Not so potent if you take it by oral or take

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1 it by smoking.

2 started off smoking slowly. Currently smoking about
3 two packs per day when he was arrested. Alcohol, 16 years
4 old, he first started drinking a few beers, drinking a shot
5 of alcohol that relaxed him. He liked it. Later he
6 developed I would say tolerance because when people are
7 drinking a liter a day and still walking around, and not
8 like totally incapacitated, drunk, their body is developed
9 tolerance. So, they can move around. They're still
10 impaired. But they, they have -- they're having side
11 affects, but they're not out cold.

12 Marijuana smoking initially at 15 years old. About a,
13 a few joints occasionally when he could get them. He was in
14 often controlled setting. But marijuana can find it's way
15 into controlled settings. Currently, when he's out, he's
16 smoking about a quarter to a half ounce a, a day depending
17 on, on the quantity.

18 His Clonopin, and the cousin, Xanax, he first really
19 started using it illicitly although he was prescribed
20 Clonopin when he was eight years old in, in a treatment
21 setting at, at Spartanburg where they were giving him
22 four milligrams a day to control some of these manic
23 symptoms. But starting to buy it off the street which he
24 pays somewhere between seventy-five cents to a dollar for a
25 tablet.

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1 He, he would use, and up to the point in the night, he
2 would, he would routinely take nine or ten. Sometimes he
3 would take ten tablets, put them in a bottle, a liter of
4 alcohol so it would have some additive effect, and then
5 sometimes he would just take them all, all at one time and
6 that kind of a, what the term we use, it's called
7 disinhibited.

8 We have inhibitions and we know, we know we're not
9 suppose to talk real loud or, or I'm not suppose to stand up
10 there and walk back and forth. I know that. If I had Xanax
11 or Clonopin a lot, I would be disinhibited and maybe I would
12 be jumping up and down. I would want to walk up and down.
13 You can see people that are disinhibited in bars sometimes.
14 That's displaying behavior that shows disinhibition. So,
15 Clonopin will do that.

16 Cocaine really caught his attention at 18, 19 years
17 old. He was using it fairly frequently. He, he came across
18 methamphetamine about the same time and his report is he
19 really did not care for it at that time because he cared
20 more for the cocaine, and it might have been that they were
21 just mixed together at that point.

22 He, he said at one point he was hearing so much about
23 methamphetamine when he was like 26, when he, when he came
24 out of one of the judicial programs that he was in, he came
25 out and he had heard so much about methamphetamine,

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1 methamphetamine, as, as I think most of us have, that he had
2 to try it again. And he really basically fell in love with
3 it. And when I say fell in love with it -- it's -- later on
4 I'm gonna say -- I'll, I'll show you why that word love is,
5 is important because literally people do affect the part of
6 the brain that people can show, the researchers can show
7 this is where the center gets activated when people do fall
8 in love.

9 He's used Ecstasy or meth, methamphetamine, a, a
10 designer drug where you take methamphetamines and you put a
11 little molecule on it, and now it's a hallucinogenic drug.
12 It's mostly making your body feel real good. It's not the
13 speedy affect that you get from methamphetamine.

14 The drug, if he had any drug that he would use if it
15 was available to him, would probably be LSD. And he liked
16 that because it kind of put him in a setting where he didn't
17 feel his feelings, didn't, he, he, things were relatively
18 good. Never experienced or reported, never reported any,
19 any unusual or bad trips. So, all of his experiences on LSD
20 were relatively positive and that's his first drug of
21 choice.

22 Now, sometimes LSD is available. Sometimes it's not.
23 But it generally was not available to him in the, the last
24 four or five years.

25 He's used Ritalin. Kids will snort anything. He

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1 snorted Ritalin. He did not like that. Didn't help him.
2 Didn't make him calm down, and he has snorted some narcotic
3 pain medications, Oxycontin, Lortabs, crushing them up and,
4 and snorting them, again, producing affects, affects fairly
5 quick. That's his -- basically his life history of what,
6 what he reports and what I've read in, in his medical
7 records.

8 Q And have you had an opportunity to review his progress
9 notes?

10 A Yes, I did.

11 Q Okay. I guess he's self-medicated?

12 A He self-medicated. In my opinion, again, not only does
13 his impulsivity and aggressiveness get worse, but then he's
14 got this other problem of substance abuse problem. So, he's
15 got this brain that's sparking for whatever reason, you're
16 adding these drugs or alcohol, and then you have a brain
17 that's even more unpredictable.

18 His progress notes, what, I, I put down some things, as
19 I reviewed these, things that caught my attention that made
20 sense to me of someone that needed treatment. The fact that
21 he destroyed his crib at 16 months old, that his first
22 psychiatric inpatient setting hospitalization was at the
23 Medical University at three years and eight months. The man
24 has had 11 inpatient psychiatric hospitalizations on locked
25 units by age 14. Eleven, which is, is---

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1 Q Is that a lot?

2 A That's a lot. That is---

3 Q Meaning for somebody with psychiatric problems, is
4 that, is that a lot?

5 A I can say, yes. It says someone---

6 Q Okay.

7 A ---not responding, not doing well. Either their
8 diagnosis is off or the medicines are off. And, doctor --
9 diagnostically, I'm not gonna -- I only really talk about
10 symptoms, and Doctor Schwartz-Watts will talk about
11 diagnoses. I notice that he was in eight residential
12 treatment homes by age 17.

13 Q Based on your review, could you tell whether his
14 bipolar illness was being treated in those homes
15 appropriately?

16 A Mostly it focused on Tony controlling his symptoms,
17 that he needed to control his anger, and, and that's like us
18 trying to say let's wish hurricanes away. You can't control
19 a hurricane anymore than I've been able to see someone being
20 able to control a bipolar episode. So, I think you can
21 control certain behaviors that might add to a bipolar
22 episode. But actually trying to control this biological
23 entity or bipolar illness, also called manic depressive
24 illness, I think is next to, next to impossible.

25 Q And we know---

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1 A Because there was really -- a lot of times I did not, I
2 couldn't even see that he was being treated other than it
3 said continue medicines at someplace. So, I did not get the
4 sense that treatment was being focused on this mood disorder
5 in his brain.

6 Q And then also we know that he's been incarcerated, at,
7 at some, some points in his life, in the Department of
8 Corrections?

9 A Yes, yes, on several times.

10 Q Okay. Were you able to review what psychiatric
11 medications had been previously prescribed to Tony?

12 A Yes, I, I listed them. These were, these were some of
13 the psychiatric symptoms that he was being treated for,
14 tantrums, head banging, irritability, threatening behavior,
15 crying, kicking, screaming, cursing, irritability,
16 impulsivity, attacking relatives, caregivers, and others.
17 This was generally before he was age 11 or 12 that he would
18 have these symptoms.

19 He frequently required physical restraints, and I can
20 understand why he may not want anyone to touch him because
21 he's been touched all his life by people restraining him.
22 At, at one facility I was working at, at MUSC and I don't
23 know that I remember Tony when he was three or seven there.
24 I worked near that unit. But I have seen it take three or
25 four large adults to essentially lay on a small child and

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1 contain them. And I, I think, I think Tony does not like to
2 be touched.

3 Q Okay.

4 A The medicines, you asked about the medicines---

5 Q Right.

6 A ---what he had, he had been taken. He has been
7 prescribed Ritalin to treat his Attention Deficit Disorder
8 at age three. He did not really respond. An
9 antidepressant, Anipromene was tried. Tegretol, which is a,
10 a antiseizure/anti-manic medicine, a bipolar medicine, was
11 used from age four to seven. Ritalin was retried. A doctor
12 said let's give it an adequate trial because they looked
13 back and didn't think that he had an adequate trial. He did
14 not respond to that.

15 He was given Lithium, which is kind of a standard
16 treatment for most people with bipolar disorder from age
17 eight to fourteen. He was also prescribed Clonopin. He was
18 also prescribed an antipsychotic medicine, which was used to
19 treat manic symptoms from age eight to eleven. And then it
20 was decided to switch him to Depicot, which is
21 antiepileptic, anti-bipolar medicine at age 14, and he took
22 that from age 14 to age 16. Then they agreed to try him off
23 of it.

24 That was the last time he was ever treated as far as
25 my, my information by anyone in the psychiatric field until

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1 he was incarcerated now.

2 Q Okay. Were these medications able to adequately treat
3 his psychiatric symptoms?

4 A They were -- at times, there was a good response. But
5 again, I would say no, because he kept requiring
6 hospitalization. He, he kept requiring a lot of
7 disciplinary problems in, in the programs that he was at.
8 He, he could not be contained at home. One person, there
9 would be no way that one person would be able to manage him.
10 It really required, required kind of a, a group effort or
11 requiring hospitalization.

12 I think he, he did have a positive response to
13 medicines. But again, he did receive quite low doses and I
14 would say most of his symptoms were under treated especially
15 when you look at, at some of the levels he had. But there
16 is a tendency to not want to give a child medicine at all,
17 much less an adequate amount of medicine. So, there's a
18 tendency to want to air on the low side. But airing on the
19 low side I think probably resulted in more hospitalizations.

20 Q It looked like he had been, actually been taking
21 Lithium for the longest.

22 What can you tell us about his Lithium or response to
23 his Lithium treatment?

24 A Lithium is a medicine that I've study extensively since
25 the 70's and, and what I know about it is that Tony did not

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1 have an adequate chance to respond. We know, when people
2 are in an early phase of manic, they need a level between
3 one and 1.5 to prevent future episodes, and that's where it,
4 as one of the best treatments. It prevents future episodes
5 next week, next year. You need it somewhere between this
6 big level of point, low level of .5 and big level of 1.5.

7 In the late 80's, someone compared this low dose versus
8 standard dose, which produces levels of between .4 and 0.8
9 and the level .8 and 1.0, and they found that if you were on
10 that low dose regimen, if you were in that level between .4
11 and .6, there was about two and a half times more likelihood
12 of you relapsing, and almost always if you relapse with a
13 manic episode, you go into the hospital. If you relapse
14 with a depressant episode, a lot of times you don't go in
15 the hospital because people can treat you at home. But a
16 manic episode, manic episode will be better to go ahead and
17 hospitalize someone.

18 Q What about Tony's -- do we have records of Tony's blood
19 Lithium levels?

20 A I looked at his blood levels as early as '88, and
21 generally they were running in the low range. It was only
22 occasionally that you would see it in the range where people
23 respond at best, .8 to 1.0, and I highlighted that one. I
24 think that was at William Hall Institute where they, where
25 they got that. I don't know the, the levels for '93 and

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1 '94. I could not find them in the chart. The doctor said
2 we got them. They're there. They're okay.

3 So, I don't, I don't know what, what they were. It was
4 shortly after '94 that he was switched to Depicot. So,
5 that's where it stopped. But he really only had one level
6 in '91 that fell in the range where Lithium is gonna work
7 for the best.

8 Q And you can go to the next slide.

9 what is kindling?

10 A Kindling, I think everybody really knows what kindling
11 is. Kindling is a fat wood. It's a pine wood. It's got a
12 lot of fat, tar in it, and the idea is that if you're gonna
13 start an oak log to burn, you can't do it by match. But you
14 start some kindling and little fires lead to bigger fires.
15 It's used extensively in neurological and psychiatric
16 literature because we know that little sparks lead to bigger
17 sparks. Little seizures lead to bigger seizures, more
18 seizures, and that's why, in epilepsy, we know, we know to
19 treat any little spark with an EEG that, if the patient can
20 tolerate, because the less sparks you have the less you
21 might have.

22 And the same is true for mood episodes. The less mood
23 you, episodes you have, the less you're going to have. So,
24 the more symptoms you have with mood disorders, the more
25 you're going to have Lithium and Depicot prevent kindling.

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1 Stimulate drugs such as methamphetamine, cocaine,
2 anything that stimulates the brain, is gonna make it spark
3 and produce more mood episodes. This is an example of
4 kindling, someone being, having an episode at age 18 and
5 then not having any more until age say 26 or so, and then
6 having two and then having an episode of mania at age 27
7 followed by several episodes, black episodes of, of
8 depression, and, and that point is you get more and more and
9 more. The more you have, the more you're going to have.

10 Q Do they become more frequent?

11 A More frequent and more intense. But -- and it use to
12 be, before we had medicines, people stayed in a psychiatric
13 hospital and never left because they were always in a state
14 of either depression or manic.

15 Q If we'd go to the next slide.

16 What is this?

17 A This is a visual time line to help me make sense of
18 when Tony started, how he used. Colors signify different
19 drugs. The, the length of time to taper up is they didn't
20 start using on a regular basis. For instance, he didn't
21 really start smoking regularly until about age 19, 18, 19.
22 So, there the line stays essentially the same. He can still
23 smoke now.

24 Marijuana tapered up. At times he did not smoke any
25 marijuana. I asked Tony why weren't you smoking marijuana

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1 when you were arrested during this incident. Mainly cause
2 they test his urine. These other drugs come out of the
3 urine fairly quickly and they don't show up even though he
4 does have a positive urine test for marijuana.

5 Alcohol varies. He does try to get alcohol when he's
6 incarcerated. It is available. It's, it's more controlled,
7 but you can find some somehow.

8 Hallucinogenic drugs, he liked LSD. He liked, he liked
9 Ecstasy. He didn't have to use a large amount to produce an
10 effect. Two tablets of LSD for him would produce a whole
11 day of, of desired effects. So, he didn't have to use a
12 lot.

13 Clonopin, using off and on finding it at, in, in the
14 group homes. And again, it's on the, it's on the street
15 developing some tolerance and later on using large amounts.
16 Cocaine really diminished, he didn't like cocaine, mostly
17 methamphetamine. He used it early. He did not like it.
18 Later on really used it daily on a regular basis. And the
19 same way with narcotic pain medicine.

20 At times he was treated with narcotic pain medicines.
21 But then later he would buy them on, on the street in an
22 illicit manner. And later -- his later years was buying them
23 on the street.

24 Q The next slide, what were the affects that these were
25 having on Tony, these drugs?

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1 A well, initially they would make him feel better. I
2 mean they would either make him feel better relieving some
3 depressive symptoms or helping him slow down his mind racing
4 or the hyperactivity that he is experiencing. So, he could
5 focus. Sometimes he would talk about putting a stereo
6 system in his car. He said it would take him some times up
7 to six hours to do a job that normally would take 30 minutes
8 because he couldn't focus, and he was all over the place.
9 He related that to some of the negative affects of the
10 methamphetamine.

11 Although he's trying to -- he uses it to help him a
12 little bit. It overall makes his disorder worse. And I
13 think that's very hard to, to see. It's, it's hard
14 sometimes to see unless you put someone's medicines on a, on
15 a time frame and look at them.

16 Q In the next slide, why do most people use, start using
17 street drugs?

18 A There, there are hundreds of reasons, and, and in my
19 class I'd probably give you 13 primarily reasons why people
20 might start using. Let's just say they're lots of reasons.
21 Peer pressure would be one. Initial use is a lot different
22 than later use in my experience.

23 The people I see, the people I consult, people that
24 come asking for treatment, the reason they're using now is
25 seldom the reason they started. People generally are not

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1 enjoying they're alcohol, their marijuana, their cocaine.
2 They're using it for a number of reasons I think, and I see
3 it as either to treat psychiatric symptoms or to treat
4 withdrawal symptoms.

5 It's also an addictive brain disease, which an
6 addiction you don't have to really have a reason why you're
7 continually using because the definition is there is no
8 control there biologically to give you some feedback to stop
9 it. That's different than a casual social user and someone
10 that has developed addiction.

11 Q And then let's go ahead and start talking about
12 addiction.

13 what is addiction?

14 A Chronic, meaning once you've got it, you've always got
15 it. Relapsing, you're gonna have episodes where you go back
16 to use. Brain disease characterized by compulsive, meaning
17 just using repetitively over and over, looking for it, and
18 going through some withdrawal symptoms. And one of the
19 hardest things I think for most people to, to understand,
20 whether they're in health care education or, or anywhere, is
21 why someone would use that, and I hear it all the time on
22 the unit. They would say why would someone do that. why
23 would you use if you just had a heart attack.

24 Tony didn't have a heart attack. But you see it all
25 the time. Someone has a heart attack, secondary to

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1 cocaine/methamphetamine, and they use it again. It's like
2 cardiologist just, just can't comprehend it. I can kind of
3 comprehend it with some of the drugs. Only that I know it
4 falls into addictive behavior.

5 Q And then does that use continue despite the
6 consequences?

7 A Almost always unless you get someone in treatment. It
8 continues where people lose basically everything or they get
9 in treatment and, and change. So, that's what I think is
10 predictable about addictive disorders.

11 Q On the next slide, does the voluntary use become
12 compulsive use?

13 A It does. And, and the way that I conceptualize it is
14 that once you have addiction, it's like you're on a
15 different track, and you don't ever get off of that track.
16 You'll always have addiction, and you'll always have the
17 likelihood of using and being in remission is work, and you
18 have to really be in a treatment program I think of some
19 sort. I don't say one program is so much better than the
20 other. But usually it's, it's three or four things
21 together. It's, it's pharmacologic treatment. It's a
22 behavior treatment. It's other psychiatric treatments.
23 It's, it's a number of things.

24 But once you get on this side track, you're pretty much
25 there and how it happens, biologically, I think a switch

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1 occurs such that you no longer have control of being able to
2 stop.

3 Q What is some of the affects for the prescribed
4 medications?

5 A Prescribed medicines such as Lithium or Depicot ideally
6 should help slow you down, slow your brain down, slow your
7 mouth down, slow, slow so you can focus. Not be so
8 irritable, not have poor judgment. It takes months for that
9 to work sometimes if you give, if you give someone enough
10 medicine. Depicot, days to weeks, if you give someone
11 enough medicine.

12 Tony would need, and it be a guesstimate, would be
13 somewhere between 1,500 and 3,000 milligrams of Depicot. He
14 would need somewhere between, based on his levels as a
15 child, Lithium, he needed somewhere between 1,200 and
16 2,400 milligrams of Lithium, and then you'd, you'd adjust it
17 to the level where most people do well. That, that would be
18 most people. And it would, it would be important to
19 individualize it for Tony though.

20 Adverse affects, they occurs in days, and if you don't
21 warn people that this medicine is gonna cause you some side
22 affects, they'll quit taking it. I've had any number of
23 medicines literally thrown at me.

24 Why did you give me such a medicine, it made me sick,
25 or why did you give me a medicine that makes me feel like I

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1 was throwing up everyday. I had this same affect when I was
2 pregnant. Well, I don't need this kind of medicine.

3 If you don't tell people that this is the, the affect
4 and then, side affect in that you can see the good affects
5 in winter, if you start a medicine now, you might say by
6 wintertime, in February, as it's starting to ease off, or
7 March, you're gonna be seeing some affects. It's, it's that
8 unremarkable. The problem is people find drugs that are
9 incredibly fast.

10 Q In fact, I think the next slide shows the, the kind of
11 speed of onset for abused drugs.

12 A There's really not anything any faster than
13 methamphetamine or cocaine if you smoke it. It really
14 avoids the heart, the lungs, other parts of the body, and
15 essentially goes through the nose, through the lungs, and
16 immediately to the brain. And you're talking about five
17 seconds, eight seconds for most people. Sometimes a little
18 bit later depending on, on the quantity. But you get really
19 the affect and the affect is incredible. And, and it's like
20 instantaneous.

21 Cannabis, not quite as fast. People smoke marijuana.
22 It's within probably a minute to five minutes that they get
23 the full impact.

24 Alcohol, if alcohol took five or six hours to have an
25 affect, people wouldn't be drinking it. People are use to

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1 having a drink and within five, ten, fifteen, twenty
2 minutes, I usually say thirty minutes at least, you start
3 noticing a relaxant affect on you.

4 Clonopin, very similar, fifteen to thirty minutes cause
5 it's got to get into the stomach, into the blood, and be
6 pumped around eventually to the brain. So, that sometimes
7 what we're up against is that people have found these drugs
8 that work instantly as far as relieving certain symptoms.

9 Q All right. Now, in the next slide we've got just
10 talking about withdrawal I think.

11 A Withdrawal occurs in everyone. Now, sometimes it's not
12 even worth noticing. You don't feel it. You don't -- it
13 doesn't cause you any problems. You don't have to go to the
14 doctor. It goes away the next day. Withdrawal from alcohol
15 is hangover basically, part of hangover and people feel
16 better.

17 If you have a beer in the morning or a glass of wine in
18 the morning, your withdrawal goes away quicker. People that
19 drink in the morning to go to work are not drinking to get
20 drunk. They're drinking so they can go do their work as a
21 pharmacist, as a physician, as an attorney, as a teacher
22 because their job would be better if they were able to focus
23 and in withdrawal you can't focus. So, you use the drug
24 again and essentially you normalize, and that's part of what
25 I think maintains the cycle addiction besides not being able

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1 to stop biologically.

2 Q And how does -- what are, what are the symptoms that
3 we're gonna experience in with, in withdrawal?

4 A Say that again.

5 Q Well, actually I mean the, the withdrawal actually
6 essentially makes you go back to normal, is that right?

7 A Back to normal.

8 Q Okay. You have mentioned earlier though the reward
9 pathway.

10 Is there a, a, an -- what are, what exactly is the
11 reward pathway in the brain?

12 A The reward pathway in certain areas of the brain that
13 are well defined over the years and we know that they're,
14 when that part is activated by a certain behavior, you're
15 likely to do it again because you feel something positive,
16 you feel good, and that feeling good has been correlated
17 with a release of certain brain chemicals.

18 Q Do we have natural rewards?

19 A Natural rewards, you do this naturally. If you look at
20 these behaviors, if you have something to eat, or if you
21 drink water, if you reproduce, and if you nurture your
22 young, all those are experienced positively because if you
23 only ate occasionally, you would possibly die. If, if
24 people only reproduced once every 30 to 50 years, there
25 would not be very many kids around. And if you didn't hold

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1 your kid, feed your kid, love your kid, your kid would run
2 off, maybe run off the cliff, run out in front of a car.
3 They're not going to be around. So, in the brain, when you
4 do these things, you feel good, and you want to do it again.
5 You want to eat. You want to reproduce. You want to take
6 care of your young because it feels good doing that, and
7 that's important.

8 It's this part of the brain that these drugs have been
9 identified as essentially working on. It releases our
10 natural brain chemicals, but in a way that you've never ever
11 experienced before. It's like all those chemicals occurring
12 at one time.

13 Q Do the addictive drugs, where do they fall in the
14 hierarchy?

15 A They now become number one. They become the, the, the
16 most important things in your life, and, and all you have to
17 do is look at people's behavior. They don't take care of
18 themselves. They're -- they lose weight. They, they have
19 problems. They're not interested in sex. They're not
20 interested in taking care of their kids. All these
21 things -- you see these incredible behaviors.

22 You see people leaving their child to go get this drug
23 because essentially the part of the brain is saying I need
24 this drug because it releases this brain chemical and that's
25 the most important thing in my life. That's how I make some

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1 sense out of why people do some of the things that they do
2 that are, that are just outrageous to me.

3 Q Let's go forward to the next slide.

4 what are they think -- yeah, I think you just talked to
5 us about that.

6 A Well, they do artificially stimulate this brain system.
7 We know that. And you can measure certain activity in that
8 brain area. You can measure that certain chemicals are
9 released and we think it's Dopamine. Dopamine is a chemical
10 that's the chemical of love really.

11 when you meet someone and you basically fall in love,
12 and that's all you can think of is that person continually,
13 and if you ever kiss someone when you were a teenager,
14 that's all you might of thought about for days and, and
15 weeks. And that is because Dopamine is released and it was
16 pleasurable, and you would like to do that again. In fact,
17 you may just day dream all the time.

18 It really does stimulate the release of Dopamine, and I
19 would, I would say it tricks the brain into thinking this
20 has to be done. You have to get this drug. Without it,
21 you're gonna die. So, essentially it, it -- you're not
22 gonna die. But that's the, the message that's being sent
23 back and forth, you know, in the brain and essentially holds
24 it hostage.

25 So, I think initial drug use is voluntary and later

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1 drug use I think is pretty much involuntary. And that's,
2 that's with the people I see. The people that come to
3 treatment. That there are people that do not go on to
4 develop addictive disorders and do they have some troubles.

5 Q Just briefly, is addictive brain disease like other
6 medical conditions that are recognized?

7 A Very similar, if you compare it, and I have compared
8 it. It's very similar to high blood pressure and diabetes.
9 We know that there is a genetic component. Doesn't explain
10 it at all. But it runs in families.

11 We know where it works. We know that an addiction,
12 that it affects certain areas of the brain, and we try to
13 design medicines to help protect those parts of the brain.
14 We know that there are multiple factors, but, again,
15 genetics are one factor. Fairly predictable. Although
16 diabetes does follow some unpredictabilities. Someone could
17 lose a kidney or lose an eye earlier than you might expect
18 even though they're controlled.

19 We know people relapse and have to be hospitalized,
20 re-hospitalized. We know, that if you have high blood
21 pressure, a third of the people don't take their medicines
22 even though they might be at risk for stroke. Same way for
23 diabetes. You have elevated blood glucose, 30 to 50 percent
24 of people may not take their medicine and all of these
25 people can respond positively if, if treated. So, it's very

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1 similar to other medical diseases except it involves the
2 brain.

3 Q Let's go ahead and, and start -- though you mentioned
4 Dopamine earlier. I think that we've got some slides that
5 are gonna deal with Dopamine and how methamphetamine affects
6 Dopamine in the brain.

7 A Again, I think, I think this is similar to what I would
8 say to medical residents that here's the essential brain
9 chemical which produces pleasure and reward. We know that.
10 And methamphetamine causes an immediate release of Dopamine.

11 Unfortunately, for people, it doesn't just release
12 Dopamine in that one area. It releases it in lots of areas
13 of the brain. And I, I've, I've listed some.

14 So, it's affecting the reward system as far as feeling
15 pleasurable. But it's also affecting the, the way people
16 move. It can affect the way people see things. It can
17 cause hallucinations, abnormal thinking, aggression, and
18 loss of impulse control. For the most part, things that
19 Tony was struggling with already before he used this drug.

20 Q Okay. Let's go to the next slide.

21 Just briefly how the brain communicates.

22 A Simple way how one nerve cell would communicate to
23 another, another nerve cell. An impulse comes down over
24 here on the left. It stimulates that brain. It releases
25 Dopamine. Dopamine crosses over to the right, and knocks on

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1 the door, and sends a message further on down. what
2 Dopamine does is cause a tremendous amount to just fill that
3 spot and cause stimulation on another side.

4 Now, the problems with that, because eventually they
5 get depleted, as well as overstimulated. So, sometimes you
6 have more Dopamine.

7 Q And, in fact, do you, do you, does, does science
8 understand how different drugs affect Dopamine and other
9 brain chemicals?

10 A Yes, methamphetamine not only affects Dopamine. But it
11 affects Epinephrin. Epinephrin is the name for adrenaline.
12 So, we get bursts of adrenaline. We, we know that's partly
13 related to why people might agitate or, or move around or
14 not be able to keep still.

15 Paranoia, we know that excess Dopamine makes most
16 people paranoid. In fact, methamphetamine is kind of used
17 as a drug induced model of schizophrenia because we know all
18 the drugs that work in schizophrenia block Dopamine. We've
19 learned that. We know that if you hallucinate or if you
20 think that you can control other people, or delusion, when
21 you think other people are controlling you, it's related to
22 excessive Dopamine.

23 And the violence and homicidal behavior that's found
24 with methamphetamine is not so much just Dopamine. It's
25 related to not having enough of the brain chemical serotonin

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1 as well as some of the excessive Epinephrine or the
2 adrenaline as well as it's cousin norphenphrine and
3 Dopamine. So, it's all these excessive amounts as well as
4 being not having enough.

5 Q Go to the next slide.

6 what causes addiction?

7 A These are factors that we know. We, we know that the
8 first one is genetics. If you have a history of not being
9 able to control how much you take in, it's gonna be passed
10 on. What happens in your first six months is important.
11 Where you live, if you're taken care of, is it warm, is it
12 predictable, that's important. Things that you lose. If
13 you lost your mother, that would be a big loss. If your
14 mother beats you, that would be an insult physically, that
15 would be a problem. Personality is an issue. Having
16 untreated psychiatric disorders, and then they're certain
17 other drugs that, that push people towards addiction. And
18 not one of these is generally the one thing that causes
19 addiction. But they are factors that people will look at in
20 trying to understand how people got to this place.

21 Q Based on your review of the records and your, in this
22 particular case, do you have an indication as to what may,
23 what caused Tony's addiction?

24 A The things that jumped out -- I can't say absolutely
25 what caused Tony's addiction. But I know genetically, his

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1 father had a problem controlling alcohol and drugs. I know,
2 genetically, his grandmother and other family members have
3 mood disorders. I know his grandmother was hospitalized,
4 his great grandmother was -- no, his grandmother was
5 hospitalized at, at, in Columbia and received ECT, and it's
6 not clear.

7 Q What is ECT?

8 A Elector Convulsive Therapy or Electro Convulsive
9 Shocks. It's where you shock someone. They don't respond
10 to anything else but shock, and that was either for
11 depression or manic depression. It's not clear. They're
12 other family members that have problems with bipolarity,
13 bipolar disease, symptoms as well as the disorder.

14 Losing your father, not everyone that loses their
15 father to divorce becomes an addict. But it's a factor.
16 All of a sudden this main person is gone. Environmentally,
17 having a setting where it's predictable, where you've got
18 limits imposed, those are factors. Where it's predictable
19 is real important, and, and his environment varied. I think
20 being in group homes, it was predictably unpredictable
21 sometimes. Different group homes would have different
22 settings.

23 Again, having untreated psychiatric symptoms, his
24 bipolar symptoms. If you find something that makes you
25 better, there's a tendency to want to use it, and the fact

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1 that he finds these rapid active drugs, these would be five
2 things that I would consider as these were factors. So, if
3 I'm involved in a treatment setting where we're working up
4 something if, to identify these factors, let's try to
5 address each one of these factors. Let's don't ignore these
6 factors even though we have other things to deal with.

7 Q And go on to the next slide.

8 A So, again, what I said earlier, those affects, we,
9 affects when you're using, affects when you stop, and then
10 affects after the drug is out of your body.

11 Q And what affects were Tony's -- methamphetamine, you've
12 talked a lot about it.

13 A I think most people know about it. It's, it's gotten a
14 lot of attention of, of it's, of it being a problem. It's a
15 stimulant drug. You can find over 140 different names. The
16 names that most people might know it by is meth or, or crank
17 or the way it's smoked. It can be swallowed orally. It can
18 be injected. It can be smoked. It can be snorted. Those
19 are the four ways that you could take it. It has all these
20 different names. Initially produces that burst of brain
21 chemical called Dopamine, and it makes you euphoric. It
22 makes you feel the best you probably ever felt in your life.
23 If you've not felt good stuff, all of a sudden, kabam, five
24 seconds, you can not believe that you're feeling that good.
25 Short term side affects, you see irritability and

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1 paranoia. Long term, mood instability and paranoia. In
2 abstinent cocaine users, you can still find people having
3 brain affects 18 months after they last used, that certain
4 parts of the brain are not working very well.

5 Q And go to the next slide.

6 A Some of the affects that I noticed that Tony reported
7 that I saw were, in general, worsening of his symptoms that
8 he already had of impulsivity, irritability, aggressiveness,
9 being agitated, not being able to think clearly, not being
10 able to put things together, and come up with a organized
11 plan. We call this executive type thinking.

12 Distorted perceptions of, of people. He has had
13 visions, auditory hallucinations as well, hearing his name
14 called, increased anxiety, paranoia. There's hardly anyone
15 that doesn't have some paranoia with these drugs.

16 Hallucinations. He definitely would crash and have
17 irritability when the drug would come out of his body, and
18 we're talking about somewhere between two and four hours
19 after using you're gonna start to crash. That's part of why
20 people are using continuously, and worsening of his bipolar
21 symptoms that he had.

22 Q Do we know how alcohol affects Tony?

23 A We know that he used this alcohol aggressively, and he
24 would become very aggressive. He would become violent. He
25 reported wanting to fight people. I talked with one of his

Alex Morton - Direct examination
By Mrs. Hodges

1 friends, and he talked about getting rid of alcohol at one
2 point. That was his friend, Jonathan, threw away the
3 alcohol that he was drinking on May the 10th of 2007
4 because Tony was trying to fight everybody, and he almost --
5 he didn't fight Jonathan. But they did get in an argument
6 and, and went different ways. So, Jonathan essentially
7 burst the bottle that Tony was drinking because Tony was
8 gonna get in trouble.

9 Q On the next slide, we deal with, if you could flip to
10 it, the psychiatric affects from, from Clonopin.

11 A Again, he's, he's using it -- physicians use it to make
12 people less hyper, more in control, more focused. But the
13 doses usually are, are like three to six milligrams. When
14 you use higher doses, you're not gonna fall asleep.
15 Sometimes you may. But you're gonna be doing things you
16 normally wouldn't do. Memory wise, you're not gonna
17 remember things as well. It really does cause a state of
18 intoxication.

19 Q All right. Go to the next slide.

20 The -- was, was he using all three of these drugs
21 compulsively?

22 A He was, on that evening, that week. Basically he's
23 chasing things. I, I asked him about methamphetamine. He
24 really doesn't like the affects of methamphetamine. He --
25 but he will use compulsively, and that's -- he really likes

Alex Morton - Direct examination
By Mrs. Hodges

1 alcohol and Clonopin the best because it slows him down.

2 why would he use methamphetamine?

3 well, partly because it's really captured part of the
4 brain. The brain says use it. It doesn't make sense.

5 Q Okay. Addiction is not logical?

6 A No, it's not a logical thing at all.

7 Q Okay.

8 A Our whole setting here is based on logic, and it has to
9 make sense what we're doing. So, we're use to thinking
10 logically.

11 why would someone use a drug if they didn't like it?

12 It doesn't make sense. It's not normal.

13 Q Okay. Go to the next slide.

14 At this particular time in May of 2007, what were the
15 probable affects of these drugs on Tony?

16 A If you look at the three different areas, the probable
17 affects was while he was using he would be more aggressive,
18 more agitated, paranoid. Alcohol, more likely to be
19 violent. Clonopin, more likely to not restrain yourself.
20 He would be unrestrained. Stopping the drug, all drugs or
21 those three drugs would cause you to be more irritable,
22 possibly more hyperactive.

23 Clonopin, you would see that later on. Alcohol,
24 methamphetamine, you would see it within hours. Clonopin a
25 few more hours. And then the residual affect. You don't

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By Mrs. Hodges

1 see the residual affects from Clonopin for the most part.
2 But you do see residual affects after using methamphetamine,
3 and that is you can see people that are paranoid weeks after
4 they have never used any more methamphetamine. They're
5 still paranoid. The same with alcohol. You can see
6 irritability for days after using, using on a regular high
7 dose basis.

8 Q And go to the next slide, do we know how psychiatric
9 symptoms we're dealing with medications?

10 A Well, in the, in the past, his psychiatric symptoms
11 were not treated adequately. He was never really given
12 enough medicine to respond, and he's throwing in these other
13 drugs to make his disorder worse too. He's trying to treat
14 it, but it, overall, is getting worse. And, and the bottom
15 line is he's got an untreated psychiatric disorder or
16 disorder symptoms. In the future I think he can have a
17 positive response especially in a predictable controlled
18 environment.

19 Q Does the history bear that out that he did better in a
20 controlled environments?

21 A He is had a lot of good responses in different group
22 homes. If he could of stayed in those, he, he does well.
23 He has periods of time that, when I consult with the social
24 worker, Doctor Marti Loring, consult with Doctor
25 Schwartz-Watts, they remind me that he did have times where

Alex Morton - Direct examination
By Mrs. Hodges

1 he was quite lovable and he did good work. He, he did well.

2 So, I think those are potentially things that are
3 available to him if we, if we treat him adequately. He's
4 not really received any psychiatric medicine since he was
5 17.

6 Q And---

7 A Sixteen.

8 Q And do you think that, that if he's able to receive
9 psychiatric medicine, what do you think the prognosis is?

10 A I think the prognosis is quite good that he would
11 respond. My opinion, I said Tony could receive appropriate
12 medical treatment for his psychiatric disorders, and have,
13 have a positive response. I think the question is it will,
14 will that be allowed.

15 Q Okay.

16 A I mean will, will we give him that, that opportunity.

17 Q If you'd have a seat. I think those are all the
18 questions I have for you. If you just bear with me one
19 moment?

20 A (Witness returns to the stand.)

21 Turn, turn this off?

22 I'm sorry, what?

23 Q Yeah, I, I---

24 SOLICITOR CRICK: You can leave it. That's, that's
25 fine.

Alex Morton - Direct examination
By Mrs. Hodges

1 Q Okay. Thank you. If you'd answer any questions the
2 solicitor might have, Doctor Morton.

3 A Okay.

4 Q I appreciate your time.

5 THE COURT: Mrs. Crick, your witness.

6 SOLICITOR CRICK: Thank you, Your Honor.

7 May it please the Court.

8 THE COURT: Yes, ma'am.

9 CROSS-EXAMINATION

10 BY SOLICITOR CRICK:

11 Q Now, Doctor Morton, you were hired by the defense to
12 testify today.

13 Is that accurate?

14 A Yes, ma'am, they, they asked me in July to look at
15 Tony's medicines and his course of treatment.

16 Q So, they are paying you to be here today?

17 A Yes, it's, it's approved by the Court. Judge Couch I
18 think approved some. He, he thought that it would be good
19 to have a psychopharmacologist look.

20 Q Okay. Essentially, you do use this Power Point quite
21 often, is that correct, to testify?

22 A Yes. Yeah, I've, I've -- I will use a Power Point to
23 testify. I will use it in, in teaching when, whenever I
24 present. Sometimes I think it's, it's a better idea to, to
25 put it up visually.

Alex Morton - Cross-examination
By Solicitor Crick

1 Q And you basically use the same Power Point each time
2 you testify?

3 A Not the same one, no.

4 Q Essentially the same?

5 A Some of the same slides. Again, like methamphetamine
6 has really not changed in the last 50 years as far as the
7 side affects. I, I really wouldn't need to change the slide
8 as far as side affects. As far as treatments go, that would
9 be important. But, but predictably, what kind of side
10 affects you would see with methamphetamine---

11 Q Be the same slide?

12 A ---stayed about the same, yeah.

13 Q You spent, total, about two and a half hours with the
14 defendant, is that correct?

15 A Yes, ma'am, about two and a half hours.

16 Q Now, did you review his jail records when he was
17 arrested for this crime?

18 Was that part of your review?

19 A Yes, I did review some of his records, yes, ma'am.

20 Q So, you're aware that he told them at the time that he
21 was not using alcohol and drugs the day that this crime was
22 committed?

23 A I'm not aware of reading that. I'm aware of reading
24 something that said he was using. Those records -- if I
25 could refer to them?

Alex Morton - Cross-examination
By Solicitor Crick

1 Q Sure.

2 A This is on, this is on 5/12/07. It looks like it's
3 from Pod 5-3A, an evaluation when he came into Spartanburg
4 Detention Center. It said alcohol and drugs used, meth and
5 pills used two days ago.

6 Q Okay. That's I guess is what I'm getting at. Two days
7 prior.

8 A He was using -- that would, that would be on the
9 10th.

10 Q What reliable information do you have that he was
11 actually using it that night?

12 Methamphetamine specifically.

13 A What I -- that night, what I relied on were, were
14 several things. I relied on his history, which is real
15 important to, to, to talk about.

16 Why is it important to talk about someone's history?

17 Because someone can report too much, too little, or
18 accurately. So, that's one of the reasons I went back a
19 second time. I relied on consulting with other health
20 practitioners, what, what did they find, what did they get,
21 and I, I relied on talking to his friend who was with him
22 that night.

23 What, what did y'all use that night?

24 So, his similar -- it was all very consistent unless
25 you want to talk about amounts would, would of varied

Alex Morton - Cross-examination
By Solicitor Crick

1 anywhere from three to five grams of, of methamphetamine.

2 Q But you're also aware that the defendant said someone
3 had stolen his drugs that night, correct?

4 A I'm not aware of that statement. I'm not sure, I'm not
5 aware of that.

6 Q Did he tell you where he got the drugs that night if
7 someone had stolen his?

8 A I didn't ask him specifically where he got, where he
9 got those drugs.

10 Q You didn't ask him if he robbed the Emery's in order to
11 get money to buy more drugs, did you?

12 A No, I didn't, I didn't ask him that, no.

13 Q So, essentially you're basing your opinion on what the
14 defendant told you and what a friend of his told you and
15 essentially witnesses that, whose names were given to you by
16 the defendant?

17 A I -- actually he didn't, he didn't -- he gave me his,
18 his name of, of Jonathan. I had to track him down. He was
19 difficult to talk to. But yes, I relied on basically his
20 history, yes.

21 Q Well, I'm gonna assume for a second -- let's assume for
22 a second that maybe he was doing methamphetamine that night.

23 Did you review the statements from the other folks,
24 maybe about half a dozen people who were also doing meth or
25 drugs that night?

Alex Morton - Cross-examination
By Solicitor Crick

1 A No, ma'am.

2 Q Just his friend Jonathan?

3 A There, there was not any written statement that I was
4 aware of. But Jonathan, Jonathan, I talked with him on the
5 phone and talked with him this morning in person.

6 Q But he related to you that he also was doing drugs with
7 the defendant that night?

8 A Yes.

9 Q He didn't kill anybody, did he?

10 A No.

11 Q Actually being on meth does not make you per se kill
12 someone, does it?

13 A That, that's a good question.

14 Does methamphetamine per se make you kill someone?

15 Q Uh-huh. (Affirmative).

16 A No, it does not and I think that, that needs to be
17 explained a little bit. If -- it can be a major factor in
18 someone behaving aggressively. We, we know that
19 methamphetamine makes people violent, makes people
20 aggressive. So, it would be a factor to take into
21 consideration.

22 But does it absolutely make someone kill someone?

23 It possibly could if, if they were intoxicated to the
24 point that they, they were delirious and slashing out at, at
25 any and everyone. I don't think that was what was happening

Alex Morton - Cross-examination
By Solicitor Crick

1 with Tony that night. I don't think he was grossly
2 intoxicated to that point --

3 Q Okay.

4 A -- that he was not having any ability to control what
5 he did.

6 Q Well, because he didn't attack any of his co-workers at
7 Burger King that night, did he?

8 A I'm not aware that he attacked anyone else, no.

9 Q He didn't attack or harm his friend Jonathan that
10 night, did he, who broke his, I think you said, liquor
11 bottle?

12 A No, they had an argument and it was only verbal.

13 Q Okay. You said that there, that drugs can cause
14 unclear thinking and you mentioned Clonopin, meth, and that
15 sort of thing and I believe.

16 Are you -- well, let me ask you this since you're the
17 expert.

18 Things such as destroying evidence, trying to destroy a
19 crime scene, fleeing a scene in an effort not to be caught,
20 not returning back to the crime scene, using deceit to
21 obtain a ride, destroying evidence by putting clothes in a
22 washing machine, does that sound like unclear thinking to
23 you or clear thinking to you?

24 A It doesn't sound like he's confused. So, that would be
25 clearer thinking.

Alex Morton - Cross-examination
By Solicitor Crick

1 Q I'm gonna now skip a little bit over to the mental
2 issues I think that you had mentioned.

3 Now, there's another thing that you detected in the
4 records you reviewed that indicates that this defendant has
5 any kind of psychotic disorder, is there?

6 A Yes.

7 Q Psychotic?

8 A He has been psychotic at times in, in the past, yes.

9 Q So, he -- you saw someone where he's been diagnosed as
10 being psychotic?

11 A He's had hallucinations.

12 Q From drugs?

13 A Well, from drugs and from his condition. He was, he
14 was prescribed anti-psychotic medication.

15 Q Well, I realize he may of been prescribed some
16 medications, but you will agree with me that a psychotic
17 diagnosis means someone is unable to tell what is real
18 versus what is not real, correct?

19 A Right, yes.

20 Q Those would be the folks who hear voices telling them
21 to pick up a hammer and smash somebody's face in or
22 something like that, hearing or seeing some kind of
23 hallucination?

24 A He has had psychotic, psychotic symptoms. He's never
25 had a diagnosis of psychosis such as schizophrenia. He's

Alex Morton - Cross-examination
By Solicitor Crick

1 had the diagnosis---

2 Q Right.

3 A ---of bipolar disorder, which you can have psychotic
4 symptoms.

5 Q Right.

6 And also antisocial personality disorder, which is more
7 of a pattern of behavior in which you disregard the feelings
8 of others, correct?

9 A Yes.

10 Q So, he is violent, but he is not been declared
11 psychotic?

12 He has no diagnosis of being psychotic?

13 A He has bipolar disorder, which you can have psychotic
14 symptoms.

15 Q But that is not a diagnosis of being psychotic. That's
16 the question I'm asking you. That's bipolar, a bipolar
17 disorder.

18 MRS. HODGES: Your Honor, I'm gonna object to the form
19 of the questioning simply because Doctor Morton is not --
20 he's testified he's not someone who's able to give
21 diagnoses, and I think she's gone beyond his area of
22 expertise.

23 THE COURT: well, I would imagine the doctor can state
24 what he has the ability to give an opinion about. He can
25 say he's not qualified to give that opinion if he feels that

Alex Morton - Cross-examination
By Solicitor Crick

1 he's not. My understanding was he was qualified in the
2 psychotic, psychological, psychological reactions to drugs
3 and things of that nature. I will -- she's on
4 cross-examination, and, of course, the doctor has the right
5 to indicate that's not within his field of expertise.

6 MRS. HODGES: Thank you, Your Honor.

7 THE COURT: I'll allow her to ask the question.

8 Q Okay. Doctor, I'll just ask you. I didn't mean to go
9 off on a tangent. And if that's not in your field of
10 expertise, that's fine.

11 Have I gone a little too far?

12 A Diagnoses is not something I do. I do know that you
13 can have psychotic symptoms with bipolar disorder, and I, I
14 do know it use to be called manic depressive insanity. I, I
15 know it -- because people can be psychotic. So, that's more
16 of something that Doctor Schwartz-Watts would, would be able
17 to address.

18 Q We can ask her.

19 You also mentioned self-medication.

20 Can you tell the jury what is the difference between
21 self-medication and partying?

22 A I think self-medication is when you're having some
23 symptoms that are bothering you and you take the drug and
24 those symptoms are decreased. Partying is generally the
25 idea of, of taking the drug to get some other effect,

Alex Morton - Cross-examination
By Solicitor Crick

1 usually a positive effect, and I, I think partying and, can
2 lead to a state of addiction. Not everyone goes down that,
3 that path. But almost everyone starts off I think partying.

4 Q Uh-huh. (Affirmative).

5 So---

6 A And then later they, they may be self-medicating---

7 Q well -- so, if---

8 A ---some of their symptoms, yeah.

9 Q If the defendant told Doctor Schwartz-Watts that his
10 drug of choice, his favorite drug was LSD because he liked
11 to "trip and it makes me open minded", does that fall under
12 the partying classification or self-medication?

13 A You would, you would really have to ask her what, what
14 specifically that -- I, I got the sense of when I asked him
15 about LSD that it just put him in a state of relaxation and
16 not hyper or agitated or some of the manic symptoms that he,
17 that he described to me. So, he felt better. I didn't get
18 a sense that when he took LSD he was partying, but he just
19 felt better.

20 Q That's from what he told you?

21 A Yes. Yes.

22 Q when you talked to him?

23 A what he told me, yes.

24 Q He had multiple opportunities for treatment. I think
25 you mentioned treatment for addiction as being a possible --

Alex Morton - Cross-examination
By Solicitor Crick

1 I don't want to use the word cure because I know it's an
2 ongoing---

3 A It is ongoing, yes.

4 Q ---process, but it's, it's possible to recover?

5 A Yes, he did have opportunities and he didn't take
6 advantage of them.

7 Q And, in fact, he went from 2003 to all the way through
8 2006, while he was incarcerated, without doing any drugs
9 while he was in jail.

10 Are you aware of that?

11 A I, I know he was in jail, yes. I, I think he may of
12 used some drugs.

13 Q So, when he got out in 2006, any of that withdrawal
14 should not have been an issue?

15 A Should not be an issue, withdrawal, at that point.

16 Q So---

17 A However, he, he quickly started back.

18 Q Yes.

19 A And then he would of developed some withdrawal. After
20 using for one to three weeks he would start having some
21 withdrawal.

22 Q I think you also mentioned he told you he stopped doing
23 marijuana because it shows up in the urine, is that correct?

24 A Yes.

25 Q I guess while he was on parole or something?

Alex Morton - Cross-examination
By Solicitor Crick

1 A Right.

2 Q Are you aware he had a positive test for marijuana in
3 2007 even though he told you he wasn't doing it?

4 A I'm not aware of, of, of positive urine tests in '07.
5 I was aware of one in '03. That's the only one I was aware
6 of.

7 Q You're -- I'm just gonna skip ahead to your final --
8 oh, it's still up there. Your opinion. Which is that he
9 could receive appropriate medical treatment for his disorder
10 and have positive response in a controlled structured
11 environment.

12 Now, in order to receive that appropriate medical
13 treatment and have that positive response, he has to take
14 the medications prescribed and follow the treatment
15 prescribed.

16 Is that accurate?

17 A Yes, ma'am, he would.

18 Q And he hasn't done that in the past?

19 A In the past, he, he -- it's been a problem with
20 compliance. The last time that it was documented, when he
21 was 16 or 17, no, he would, he would not comply.

22 Q Well, even as late as when he was on parole when this
23 happened, he wasn't complying.

24 Is that accurate?

25 A I don't think -- he was, he was, he was using

Alex Morton - Cross-examination
By Solicitor Crick

1 marijuana. That would be not complying with treatment, and
2 I don't, I don't think he was going for treatment at any, at
3 any point.

4 Q And he was required to because of his parole?

5 A Right, he was not going to, for treatment, no.

6 Q Non-compliant---

7 A No.

8 Q ---as late as 2007?

9 A Through, throughout, yeah, throughout his whole parole
10 he was, he was not compliant with treatment.

11 Q You're aware that he, since he's been in jail for this,
12 has spit out his meds, and I'll quote from the report, "he
13 got caught spitting medication into a red cup while in
14 jail?"

15 Are you aware of that?

16 A I'm aware there was an incident and I'm not clear what
17 exactly that was about. But I was aware of him not
18 complying at that, that time, yeah.

19 Q So, your whole opinion essentially hinges on his
20 compliance in receiving that appropriate medical treatment?

21 A He would have to be compliant. He could be judged
22 incompetent and, and required to take medicines. I don't
23 think he's incompetent that, at this time.

24 Q No, we wouldn't have this trial if he was.

25 A Right. Right. So, yeah, he would have to take the

Alex Morton - Cross-examination
By Solicitor Crick

1 medications. I think he would have to -- he's not had a
2 positive response to treatment, and I think he would have to
3 develop some kind of relationship with someone that he
4 trusted through, be willing to give him medicines to try,
5 and he'd have to have a doctor that would be invested in
6 working with him too.

7 Q And if he didn't, it wouldn't work?

8 If he didn't, it wouldn't work?

9 A I don't know. I think it should be a chance though. I
10 don't know.

11 Q One more thing about compliance, and I forgot about it
12 cause it so recently happened.

13 Were you aware that he had to be pepper sprayed after
14 his conviction on, I can't even remember the day it was,
15 this past week for not complying with a pat down in jail?

16 A Yes, ma'am, I, I was -- I heard about that, and I was
17 concerned. I, I, again, I think he responds to being
18 touched. It's an issue and I, I -- hopefully that could be
19 treated. Because he does not -- he's been touched since
20 he's about age three in, in hospitals.

21 Q Okay.

22 A And I think that's, that's an issue for him, yeah, that
23 he, he will have compliance issues about being touched and
24 patted down.

25 Q One last question and I forgot to ask you about this---

Alex Morton - Cross-examination
By Solicitor Crick

1 A Yes, ma'am.

2 Q ---when we were talking about Mr. Jonathan Howard, his
3 friend.

4 Did he mention to you that he and the defendant had
5 been in the Emery's home dealing drugs the day that this
6 happened, that the murder happened?

7 A No.

8 SOLICITOR CRICK: All right. Nothing further, Your
9 Honor.

10 THE COURT: Redirect?

11 MRS. HODGES: Briefly, Your Honor.

12 THE COURT: Yes, ma'am.

13 REDIRECT EXAMINATION

14 BY MRS. HODGES:

15 Q This noncompliance issue, is that consistent with the
16 psychiatric symptoms and disease that, that you know Tony to
17 suffer from?

18 A Yes, noncompliance is an issue with every medical
19 disorder and certainly with bipolar and psychiatric
20 disorders, that people struggle with having to take a
21 medicine for affects, and I think they have to have some
22 trust in the person that, what someone's prescribing to them
23 it's gonna be beneficial and has to be clearly outlined
24 before someone's gonna take it. So, it's -- compliance is
25 an issue with everyone at some point in, in their treatment

Alex Morton - Redirect examination
By Mrs. Hodges

1 of anything, and they come to, they say yes, I'm gonna take
2 it or no, I'm not gonna take it or I'm gonna take it
3 sometimes.

4 Q Thank you.

5 I have nothing further, Your Honor.

6 A Sure.

7 MRS. HODGES: May this witness be excused?

8 THE COURT: Any objection to this witness being
9 excused?

10 SOLICITOR CRICK: No, sir, Your Honor.

11 THE COURT: Sir, you may step down. You're free to go.

12 WITNESS: Thank you, sir.

13 THE COURT: Ask the attorneys to approach briefly.

14 (Whereupon, a bench conference was held out of the
15 hearing of the jury at this time.)

16 THE COURT: Ladies and gentlemen of the jury, I, after
17 conferring with the attorneys, it appears the length of the
18 next witness is such that we probably ought to go ahead and
19 break at this point in time for lunch. Of course, we're
20 gonna give everyone in the courtroom an opportunity to step
21 out and have lunch as well. So, we'll be resuming at two
22 o'clock this afternoon. Lunch is going to be served to you
23 in the jury room. As soon as it's here -- is it here yet,
24 Tonya?

25 CLERK: It should be here in about five minutes.

1 THE COURT: They'll take about five minutes. It will
2 give you time to get settled good and it should be getting
3 here.

4 As always, when you leave the courtroom, I will advise
5 you not to discuss anything about the case, even among
6 yourselves, and don't allow anyone to discuss this case with
7 you. At this point in time we will break for lunch.

8 I'll ask that everyone remain seated while the jury
9 retires.

10 (Whereupon, the following takes place outside the
11 presence of the jury.)

12 THE COURT: And I'll ask that all remain seated while
13 the defendant retires. Then Court is in recess for lunch.

14 Thank you very much.

15 (Whereupon, Court was in recess for the lunch hour.)

16 (Whereupon, three charts were marked as Defendant's
17 Exhibit Nos. 2 through 4, and thirteen photographs were
18 marked as Defendant's Exhibit Nos. 5 through 17. All of the
19 above exhibits were for identification purposes only at this
20 time.)

21 THE COURT: All right. Is the State ready to proceed?

22 SOLICITOR GOWDY: Yes, sir, Your Honor.

23 THE COURT: Defense ready?

24 MR. ALLEN: Yes, Your Honor. I believe we might have a
25 matter that the State and, and we would like to, may want to

1 take up concerning some exhibits prior to the jury coming
2 in.

3 THE COURT: I'll be happy to hear from you.

4 MR. ALLEN: Your Honor, not with the next witness, but
5 with the second witness that we're going to call, we're
6 gonna -- she is made several charts. She's made three
7 charts, genogram, which is exhibit, Defense Exhibit, at this
8 point, Exhibit 2 for identification, a time line, which is
9 Defense Exhibit 3 for identification, and a list of Tony
10 Torres' placements, which is Defense Exhibit 4 for
11 identification, and also Defense Exhibit's 5 through 17
12 which are a series of photos which all of which I've shown
13 to the solicitor. I believe he may have an objection as to
14 some of these. We're not moving them into evidence at this
15 time. But if there---

16 THE COURT: Well, maybe the solicitor can make me aware
17 of any objections he might have were they moved into
18 evidence.

19 SOLICITOR GOWDY: Yes, sir, Your Honor. I'll be happy
20 to. With respect to State's Exhibit 4, I don't have
21 objection. With respect to State's Exhibit 3---

22 THE COURT: Well, that's defense exhibit?

23 SOLICITOR GOWDY: I'm sorry, Your Honor. I just get in
24 the habit of saying that.

25 THE COURT: I understand. It's been a long week.

1 Go ahead.

2 SOLICITOR GOWDY: Defense Exhibit 3 I do not have an
3 objection. With respect to Defense Exhibit No. 2, Your
4 Honor, which is referred to as a genogram, my understanding
5 is, not Doctor Schwartz-Watts, who is a psychiatrist, it's
6 someone who's not a psychiatrist, has labeled, by color
7 code, blue means bipolar, green means mentally ill, red
8 means violence. And near as I can tell, the validity behind
9 this color coding is she's just asked them are you mentally
10 ill, do you have anxiety disorders.

11 I just -- I mean to allow people to self-diagnose and
12 then come into a, in front of a jury and say this is the
13 psychiatric genealogy of the defendant, I just question the
14 reliability of it.

15 THE COURT: Well, it may be that when we get to that
16 witness that we'll need to do a, a proffer to find out
17 exactly what the testimony might be concerning the origin
18 and the, how it was prepared and what it's, what it's based
19 on unless -- do you agree that that's not based on any type
20 of diagnosis that was made by someone other than
21 self-reporting by individuals?

22 MR. ALLEN: It's certainly not a diagnosis of the, of
23 that witness, of Doctor---

24 THE COURT: Diagnosis done by that witness?

25 MR. ALLEN: That's, that's correct. However, part of

1 the methodology of this witness, we're talking about a
2 mitigation, a, a life from historian, a, who conducts
3 psychosocial assessments. Part of the methodology is to get
4 from, get information from, as I understand it, at least two
5 sources.

6 Now, one source might be an individual reporting or
7 self-reporting, and, of course, I, you know, it's not
8 simply, as I understand it, just simply saying well, I've
9 got this problem or that problem. But maybe -- I'm sure it
10 goes into further, you know, further questioning and that
11 type of thing to make sure that, that it could be relied on
12 information that that witness relies upon in coming to her
13 conclusions.

14 So, this---

15 THE COURT: Well, you know, the test though for using
16 that particular, that, that information to base an opinion
17 requires that there's, there's got to be some basis for it.
18 There's got to be a, a system or a method that's used
19 generally by experts within that field.

20 Do you follow what I'm saying?

21 MR. ALLEN: Yes, sir.

22 THE COURT: And so, there has to be some type of
23 testimony that this is what people who are experts in this
24 field base their opinions upon.

25 MR. ALLEN: Okay.

1 THE COURT: Since I haven't heard the witness, I don't
2 know that that's going to be the case. So, again, I think
3 what we're probably gonna have to do, if we get to that
4 witness, if you intend to use that exhibit, we'll probably
5 have to take a proffer concerning whether or not that is
6 proper methodology for people within that field, and that
7 kind of information is what experts within that field
8 ordinarily base their opinions upon, and we'll see what, how
9 that comes out.

10 SOLICITOR GOWDY: All right.

11 MR. ALLEN: Yes, Your Honor.

12 SOLICITOR GOWDY: With respect to the other Defense
13 Exhibits, Your Honor, they are a series of photographs. I
14 understand they're entitled to put in photographs. I'm not
15 suggesting otherwise. But there are I think seven
16 photographs before he turns age seven, and we're not
17 prosecuting a seven year old. We're not trying, we're not
18 having a sentencing hearing on a seven year old.

19 I understand one. I don't understand seven including
20 one sitting in Santa Claus' lap. I mean that's just -- I
21 don't know that seven are necessary to prove to the jury
22 that at one point he was a young man.

23 THE COURT: Are they, are they indicative of different
24 things?

25 I mean I---

1 MR. ALLEN: They're indicative of different stages of
2 his life. I mean we've got -- which essentially Doctor
3 Loring intends to use to illustrate the point that she's
4 gonna make throughout his life history. So, I mean---

5 THE COURT: well, I would, I would agree with the
6 solicitor that seven photos of a young person under the age
7 of seven would be duplicitous, and I have excluded State's
8 evidence for that reason except where it had some bit, that
9 particular photo bore on some issue in controversy and
10 slightly different from some other photo. I'll use the same
11 test on this as well. I mean there has to be some
12 indication that the different photos are being used for some
13 particular purpose other than just to say this is another
14 picture of him at a young age.

15 Do you follow what I'm saying?

16 MR. ALLEN: Yes, Your Honor.

17 THE COURT: It's got to bear on some matter that's in
18 question or needs to be proven. And that photo has to be
19 used for that purpose. Not just a repetitive photo of a
20 young, young person.

21 So, again, I think we're probably gonna have to rule on
22 it when it comes out. I'm not gonna let them in at this
23 time since the solicitor has the objection, and we'll just
24 have to see how they're going to be used by that witness and
25 why there's a need for those different photos.

1 MR. ALLEN: Yes, Your Honor.

2 THE COURT: All right. So, I'm, I'm not gonna rule on
3 them at this time. I'll wait until they're attempted to be
4 introduced.

5 MR. ALLEN: Yes, sir.

6 May I remove them from the courtroom to hand back to
7 the witness to bring to the courtroom when she comes in?

8 THE COURT: Yes, sir, they're not in evidence. You can
9 do whatever you want to with them.

10 MR. ALLEN: Yes, sir, thank you.

11 THE COURT: All right. Any other matters that we need
12 to discuss before we call the next witness?

13 SOLICITOR GOWDY: Not from the State, Your Honor.

14 MR. ALLEN: No, Your Honor.

15 THE COURT: Let's bring the jury back.

16 (Whereupon, the following takes place within the
17 presence of the jury.)

18 THE COURT: The record will reflect that the jury has
19 returned to the courtroom.

20 At this time, the defense may call its next witness.

21 MR. ALLEN: Thank you, Your Honor.

22 We call Doctor, Doctor Donna Schwartz-Watts.

23 THE COURT: Come forward to be sworn please, ma'am, to
24 my right.

25 WITNESS: Yes, sir.

Donna Schwartz-Watts - Direct examination
By Mr. Allen

1 DONNA SCHWARTZ-WATTS, being first
2 duly sworn, testified as follows:

3 THE COURT: Please state your name for the record.

4 WITNESS: Sure. Donna Marie Schwartz-Watts,
5 S-C-H-W-A-R-T-Z-W-A-T-T-S.

6 THE COURT: Your witness, Mr. Allen.

7 MR. ALLEN: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MR. ALLEN:

10 Q Doctor Schwartz-Watts, what is your current employment,
11 current position?

12 A I work at the University of South Carolina School of
13 Medicine, and I'm in the Department of Neuropsychology, and
14 there I have two positions. I am Director of Forensic
15 Services and I am a professor in clinical psychiatry.

16 Q What does that mean to be Director of Forensic Services
17 and professor of neuropsychiatry?

18 A Well, I, I wear two titles. Basically what I do is I,
19 for the University of South Carolina, I perform forensic
20 evaluations, which would be -- a forensic evaluation would
21 be any kind of evaluation with somebody's mental state, how
22 they think, how they feel, or how they act if that has some
23 kind of legal issue attached to it. So, perhaps I might be
24 working for an attorney or in different kinds of legal
25 cases.

Donna Schwartz-Watts - Direct examination
By Mr. Allen

1 So, I, I, I perform a number of evaluations and then I
2 also, because I am a professor, at the University I teach
3 and I teach young doctors that. The University of South
4 Carolina has a fellowship in forensic psychiatry, and that's
5 a subspecialty of medicine. And I trained the forensic
6 fellows that spend six months with me doing cases. I train
7 child psychiatrists. They spend, they spend all year with
8 me a few days a week performing evaluations. I train
9 medical students and also college students in general
10 psychiatric residents. So, I teach as well and I have to do
11 research, that sort of thing.

12 Q How long have you been at the University of South
13 Carolina?

14 A I've been at USC since 1997 now.

15 Q What did you do before that?

16 A Before that I worked at the Department of Mental Health
17 and there I had a, a number of titles as well. I performed
18 Court evaluations for the State of South Carolina for a
19 number of years. I would be asked, if we would receive a
20 Court order, and that's what the doctors at the Department
21 of Mental Health do if there is a legal issue. So, similar
22 work. And then also I worked in the, in the insanity unit
23 for a number of years and treated patients there.

24 Q Okay. What is your educational background?

25 A I went to college at Furman University, and I graduated

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1 in 1985 with a Bachelor of Arts in Psychology, and then I
2 went to medical school at the University of South Carolina,
3 and I graduated there in 1989 with a doctorate in medicine.
4 And then I completed a residency in general psychiatry at
5 the Department of Mental Health, and I finished that in
6 1993.

7 And then, to be a forensic psychiatrist, I had to spend
8 one additional year in residency in the forensic psychiatry
9 fellowship, and that was also at the Department of Mental
10 Health, and I finished that in 1994.

11 Q And again, forensic psychiatry deals with what?

12 A It's, it's a subspecialty of medicine. Just like
13 cardiology is a subspecialty of internal medicine, forensic
14 psychiatry is a subspecialty of psychiatry. And again, that
15 just means that you took an extra year of residency training
16 and did nothing but specialize in areas where psychiatry and
17 the law interface.

18 Q So, forensic, when we use that work forensic, that
19 refers back to --?

20 A Legal.

21 Q Legal.

22 Okay. And I think you said you received your medical
23 doctorate degree, is that correct?

24 A That's correct, in 1989.

25 Q You're licensed to practice medicine in South Carolina?

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1 A Yes.

2 Q How many -- have you testified before as an expert in
3 forensic psychiatry?

4 A Yes.

5 Q Do you know how many times?

6 A Between 500 and a thousand times now. Somewhere
7 in-between.

8 Q Have you ever -- have you ever worked with adults?

9 A Sure. Most, most of my work is with adults. In
10 forensic psychiatry, you work with children, but they have
11 to be ages 14 and older.

12 Q Have you ever worked with children?

13 A Yes.

14 Q Okay. And do you presently do any work in the prisons
15 or Department of Corrections?

16 A Yes, in going back to both, for 15 years I've worked in
17 the Department of Juvenile Justice. I was a contract
18 psychiatrist there, and I performed evaluations for Family
19 Court. When children were sent to the Department of
20 Juvenile Justice, they have what's called a predisposition
21 evaluation and that's to determine whether they needed
22 treatment or not, and also provided treatment to the
23 children there for about 15 years.

24 I took a break from that, and for the last four years
25 I've been working as a contract psychiatrist at the

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1 Department of Corrections in Columbia. And I work at the
2 psychiatric hospital there and I go one day a week and I
3 treat mentally ill inmates.

4 Q Have you testified before for the, for the defense in
5 death penalty cases?

6 A Yes.

7 Q Have you testified for the prosecution in death penalty
8 cases as a forensic psychiatrist?

9 A Yes.

10 Q And are you presently retained by a prosecuting agency
11 on a death penalty case now?

12 A Yes.

13 Q Not in this county?

14 A No.

15 Q Okay. I---

16 A I'd be glad to work with them. They're very
17 professional and they're -- I enjoy working with them as
18 well.

19 MR. ALLEN: Okay. Your Honor, at this time I offer
20 Doctor Schwartz-Watts as an expert in the area of forensic
21 psychiatry.

22 SOLICITOR GOWDY: No objection whatsoever, Your Honor.

23 THE COURT: Without objection, this witness will be
24 qualified within that field.

25 You may proceed, Mr. Allen.

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1 MR. ALLEN: Thank you, Your Honor.

2 Q Doctor Schwartz-Watts, what methodology does a forensic
3 psychiatrist use when they take a case?

4 A Well, we're a little bit different than just your
5 general psychiatrist. For example, if a, if a patient came
6 into a general psychiatrist office, we might just perform an
7 interview. And if you had old, you know, if you had medical
8 records from your regular doctor, we may get you to sign a
9 medical release. But because forensic involves some kind of
10 legal issue, we need more information than one would
11 typically require if you went to a general psychiatrist.

12 And so, what we normally would routinely have, if
13 someone, in, in criminal instances, if someone's charged
14 with a crime, we would have the incident reports. We would
15 have some of the same evidence you-all most likely have
16 looked over, statements of various people. In this case,
17 the autopsy reports about the victims. I reviewed, in this
18 case, some, some videotapes of the, the CD ROM of him at
19 Li'L Cricket. We also will have records if there's any
20 prior mental health treatment. If they've been in prison
21 before, we would try to have the Department of Corrections
22 records.

23 So, basically as many records we can have about that
24 person because there may be reasons sometimes people aren't
25 always forthcoming with details when they're facing legal

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1 situations, and also sometimes there's other records on
2 people. Patients may not remember things about themselves.
3 So, it's helpful to get as much information as possible.

4 Q And did you do this in, in -- did you do that in this
5 case?

6 A Yes, there were voluminous records. I probably, I
7 would, guess about 10,000 pages of records.

8 Q Okay. And what kinds of documents did you review in
9 this case?

10 A Well, Mr. Torres had a history of some prior
11 psychiatric treatment. So, I had all of his inpatient
12 records. He had been at a number of hospitals. He was at
13 Harris Psychiatric Hospital. He was also at Spartanburg
14 Regional Hospital. He had been at the William S. Hall
15 Psychiatric Institute in Columbia. He had been at the
16 Medical University of South Carolina Psychiatric Hospital.
17 So, I had those records. He also had a history of
18 out-patient treatment. So, I had the Mental Health Center
19 Records from Spartanburg County.

20 He also had a history -- he was involved in an agency
21 called the Continuum of Care, and what the Continuum of Care
22 is, it's a wrap around service that basically coordinates
23 services for children until their ages 18 or through 21, and
24 the Continuum of Care also had a set of records on him.

25 I had his school records. I had all of the, the

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1 discovery provided I believe by the prosecution. It was the
2 arrest warrants, the statements. I saw the crime scene
3 pictures. I looked at the Li'L Cricket video. I saw the
4 video of Mr. Torres most recently after he was found guilty
5 and was in the detention center. I had the statements of
6 various witnesses, and then also, after I looked at records,
7 I also ordered some further test on him.

8 Q Okay. And did you interview Tony?

9 A Yes, I did. I, I saw him four different times. I saw
10 him August 25th. I saw him October 1st, October 8th,
11 and then very briefly this afternoon.

12 Q Okay. And did you ask for consultations with a
13 neurologist?

14 A Yes, I did.

15 Q Okay. And did you get records from, from that
16 consultation?

17 A Oh, I don't know if Doctor Self has performed a written
18 report yet. But I spoke with Doctor Self. I referred Mr.
19 Torres to a neurologist, a Doctor James Self, and, for, for
20 various reasons, and I received a verbal report from Doctor
21 Self. We also ordered an MRI scan, which is basically a
22 picture of his brain, and I reviewed those results with
23 Doctor Self in person.

24 Q Okay. And after reviewing all these records, and
25 consultation, and also with your interview, did you come up

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1 with a diagnosis for Tony?

2 A Yes, I was able to do that. I also spoke with the
3 social worker in this case, Doctor Loring, and also spoke
4 with various people I think that testified, Mrs. Hughey, her
5 daughter, Jessica Hughey. I spoke with Mr. Howard. I spoke
6 with some of the witnesses as well. But yes, I was able to
7 diagnose Mr. Torres.

8 Q Okay. And have you also -- well, let's talk a little
9 bit first before we get to the diagnosis. Let's talk a
10 little bit first about, if you don't mind, did you go
11 through a developmental history of Tony?

12 A Yes.

13 Q Okay. And what did you determine?

14 A Basically what, what psychiatrist will do, we'll, when
15 we're interviewing somebody, even, even in general
16 psychiatry, we'll go through various histories that people
17 have, and then we'll try to determine important things. And
18 what a developmental history is it's basically that part of
19 the interview where you determine whether someone had --
20 it's basically from the time of conception up until their
21 brain is matured. So, on various people that's going to
22 depend on their age. But usually through about age 18. We
23 don't necessarily cut it off there.

24 But what you're looking for is things that are abnormal
25 in development, things that should not happen in the typical

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1 childhood, and there were, there were a number of
2 significant factors in Mr. Torres developmental history.

3 Q Such as?

4 A Yes, I'll go through them. We -- what's very fortunate
5 in this case is I had many many records on Mr. Torres, and I
6 think what's most notable about him is, from a very early
7 age, he was in psychiatric treatment. So, compared to other
8 cases, we were able to have records from him from the time
9 that he was a child. And so, he had been under psychiatric
10 care. He had some developmental history done, which made my
11 job a little bit easier in this case.

12 But some of the things that were important, his mother
13 did have some complications with pregnancy. Nothing major.
14 But she -- there was, with his delivery, there was meconium
15 staining, and what that means is that's, that means that he,
16 the child, in utero, defecated. And so, some of the, the --
17 it's called meconium. He was -- he, he may of inhaled that.
18 So, he was exposed to that at birth. That's, that's not
19 significant other than it was a, a complicated delivery.

20 There was some questions about whether Mr. Torres'
21 mother drank when she was pregnant with him, and that's of
22 concern because children that are exposed to alcohol in
23 utero, they can become very hyperactive as young children,
24 and Mr. Torres certainly had that history. There's
25 conflicting reports. Mr. Torres was seen by Doctor Caston

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1 from very early on. He performed a developmental history,
2 and his report indicates that his mother did drink.

3 However, talking to his mother, she states she had one
4 glass of wine, and when she found out she was pregnant, she
5 no longer drank. And so, there was some conflicting history
6 there.

7 What is significant, I think most significant in Mr.
8 Torres' developmental history, and this is, this is
9 confirmed by the medical records, that by the age of 16
10 months, one year and four months, he was so hyperactive that
11 he was seen by doctors, and Mrs. Lamb reported, in one of
12 the medical records, that at the age of 16 months he rattled
13 the bars in the crib so hard that he broke the crib trying
14 to get out of the crib at a very young age.

15 I think the other things that are important is that he,
16 he was a, he had, he had a mental illness at a very young
17 age which made him a very difficult child to raise. More
18 importantly, there were things in the medical records, by
19 the time he was three, he was noted to be using very foul
20 language, and it's actually documented in his medical
21 records that he was saying things that most three years old
22 don't say, the F word, things like that that were
23 documented.

24 And I think the other thing that was significant is
25 that he had a lot of separations from his mother at a very

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1 early age. And that's because he was either placed in
2 hospitals. He was in treatment. He, he was placed in many
3 group homes as a child because he was difficult to manage.
4 And so, he had a lot of absences from his mother. And so,
5 when his mother would come to visit and would leave, he
6 would become, he was, he was difficult to control. He had a
7 lot of anxiety when she left. So, he had a lot of
8 separations from his mother and I think his early childhood
9 is characterized by mental illness at a very young age.

10 Q Okay. And did you also review any information
11 concerning his school history?

12 A Yes.

13 Q And what did you determine from that?

14 A Well, because Mr. Torres, he was in a lot of homes, and
15 you'll hear about them later. He was in a lot of group
16 homes. He was in York Place. He was at the Charles Lea
17 Center. He was in the Crane House. He was in various
18 therapeutic environments while he was growing up. So, he
19 had a lot of different school placements.

20 I think what's important about his school is he is, he
21 is an intelligent person. His testing shows that his
22 intelligent is average, and he was able to do fairly well in
23 school. The -- I think what's important is there is a
24 period of time, from 1991 through 1994, so that would of
25 been from ages 11 to 14, he did very well. He made -- he

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1 makes straight A's. He was on the honor roll very often,
2 and this is probably the best time that he ever functioned
3 if you look back at his few records.

4 He had -- he was in the School for the Deaf and the
5 Bland, the Spartanburg School for the Deaf and the Blind,
6 and he did very well. He had the same teacher. She was
7 very patient with him. He had a very good relationship with
8 her.

9 So, I think what's important is when he was in a good
10 environment he did quite well. Otherwise he made D's and
11 C's. He, he was in trouble at school. For example, the
12 first grade, he got conduct marks for flailing himself upon
13 the girls, throwing bread at a teacher and saying the F
14 word, cursing, and kicking a teacher, and this is in first
15 grade. He was in special ed by the time he was in second
16 grade.

17 And so, his, his school performance was significant in
18 that it was variable. There were times when he would act
19 up. But that once he stabilized, his grades, his intellect
20 certainly showed he's, he's capable of learning.

21 Q Did you also consider Tony's medical history?

22 A I'm sorry?

23 Q Did you also consider, consider his medical history in
24 arriving at---

25 A Absolutely.

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1 Q ---your diagnosis?

2 What type of medical history did you find significant?

3 A He, he had a number of things that were significant.

4 One of the things we do, when children come in, by the age
5 of two he had already had a brain wave study, which is, it's
6 called an EEG. And what that does is that tests for
7 seizures. And at the age of two he was seen because his
8 mother noted, you know, he was very hyperactive, rattling
9 the bars off of the crib, and was aggressive. By the age of
10 three, he was already using curse words and aggressive at
11 times.

12 His EEG was abnormal when he was two years old, and
13 what it showed, and I'll just read it to you and then I'll
14 explain it, it showed paroxysmal activity, which are, which
15 looked epileptic form, but was not repeated or seen during
16 sleep. So, basically what that means is they put electrodes
17 on your head, you look at strobe lights, and it measures
18 your brain waves, and he had a set of brain waves that
19 looked abnormal. However, there was -- it wasn't repeated.
20 So, it was hard -- no one diagnosed him with a seizure
21 disorder. But at that point they placed him on seizure
22 medicine called Tegretol.

23 So, very early on, by the age of two, we know that his
24 brain, the electrical impulses of his brain were not quite
25 normal. The other thing that was very significant is by the

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1 age of seven he had a test that we use -- we don't use this
2 any more in psychiatry, but it was called a Dexamethasone
3 Suppression Test.

4 And basically what that means, that's a -- you would
5 give -- Mr. Torres received an injection, and what that
6 injection did, his blood was measured. That he was injected
7 with some medicine, dexamethasone, and then at various
8 intervals blood was drawn. And basically what that does,
9 that shows -- your adrenal gland is a gland that lives on
10 top of your kidney, and what that gland does is it controls
11 your adrenaline. It makes a hormone called Cortisol, which
12 eventually is transferred into adrenaline. And back at the
13 age of seven we already knew that there was abnormalities in
14 his, in that test and what that showed, that's evidence for
15 a mood disorder.

16 As you can imagine in psychiatry, a lot of times when
17 we diagnose a mood disorder, you have to base that on
18 somebody's history. So very early on, in psychiatry, we try
19 to use these tests. Now we know enough about depression
20 we're able to diagnose that without that test. But even by
21 the age of seven, he failed a blood test that demonstrated
22 that he had the presence of a mood disorder. So, that was
23 very significant.

24 The only other thing that's really significant right
25 now is he was recently diagnosed with glaucoma while he was

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1 in the detention center and he was on medications for that,
2 and he's not right now. He's suppose to be on eye drops and
3 he's not taking those.

4 Q Okay. Also, in arriving at a diagnosis, did you also
5 consider his prior psychiatric history?

6 A Yes.

7 Q Okay. And what, if anything, did you find that's
8 significant there?

9 A Again, just that he has a very long psychiatric
10 history, and I'll go through some of the hospitalizations.
11 He's received a lot of different diagnoses over time, and
12 he's been on a lot of different psychiatric medications over
13 time. Some of the diagnosis he's had included behavior
14 disorder. Some of the doctors that saw him just thought
15 that he was misbehaving. He's also received a diagnosis of
16 mood disorders.

17 One, in specifically, bipolar disorder, which is called
18 manic depression. He was diagnosed with an impulse control
19 disorder, which is called Intermittent Explosive Disorder.
20 And I'll explain those later. He was also diagnosed with,
21 let's see, disruptive behaviors, attention deficit. So, he
22 had various diagnoses. He was on many different
23 medications.

24 The most significant, again, just going through the
25 records, the Spartanburg Mental Health Center records show

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1 that when he was 19 months old they started him on
2 medications. So, he was already on psychiatric medications
3 by the time he was 19 months old. He was noted, even by the
4 time of three, to use bad language whenever he was placed in
5 time out, and he was placed on some very strong medications
6 by the time he was four, Ritalin, which many people use for
7 Attention Deficit Disorder. But more importantly, he was
8 placed on a medication called Mellaral, which is similar to
9 Thorazine. That's a pretty strong medication for a four
10 year old to take. It calms you down. It makes you tired,
11 sleepy.

12 He was hospitalized at the Medical University of South
13 Carolina. What was significant there, he was seven years
14 old, he was found to have a normal IQ, and he was diagnosed.
15 This was the first time he received a diagnosis called
16 Intermittent Explosive Disorder.

17 And what that is -- that's a -- it's a, it's a
18 psychiatric disorder and it's much more than just a behavior
19 disorder. It has a neurological basis to it. But what,
20 what it means is that -- children will normally get mad.
21 I've got a 13 year old and he threw his share of temper
22 tantrums when he was a child. It's different than that.
23 Intermittent Explosive Disorder is a disorder where you're,
24 you're suppose to be angry. It might be a situation perhaps
25 you tell a child they can't have something, and you would

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1 expect that child to be angry. But the rage that they have
2 is far out of proportion to any provocation.

3 So, for example, it would be if you said you can't go
4 to the mall and he tears the door hinge, the doors from the
5 hinges, which his aunt said that that was a behavior that
6 Mr. Torres exhibited as a child that he wanted to go to the
7 mall and she said no and a few minutes later the door was
8 ripped from the hinges. So, it's, it's a, it has a
9 biological basis compared to just being bad behavior or
10 choices. So, that was the first time he received that
11 diagnosis.

12 He's had a number of inpatient psychiatric treatments.
13 I think what's important, by the age of seven, he was also
14 diagnosed with bipolar disorder, which is what I have
15 diagnosed him with. And what bipolar disorder is is that's
16 a mood disorder where you have highs and lows. You have
17 periods where you're very hyper, hyperactive, and during
18 those periods you use very poor judgment. You can become
19 aggressive, irritable. And that's very consistent with my
20 diagnosis today. But he's had that diagnosis since the age
21 of seven, and he's had some hospitalizations for that.

22 He's been given medications. He's been transferred
23 from psychiatric hospitals into group homes. He's had a lot
24 of different diagnoses. He's had treatment. I think what's
25 most significant, a lot of the psychiatric records are very

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1 similar. They carry a lot of the same diagnosis. The
2 doctors either thought he had the explosive disorder or the,
3 the bipolar disorder in, in addition to other things.

4 But I think what's most important is by the time he was
5 seventeen he was being followed by the Continuum of Care,
6 and what their job is is to coordinate services for him.
7 So, for example, if he's in a group home and has to move, he
8 has the same agency following him. So, if he goes from
9 different hospitals, someone knows where he was, what
10 treatment he was getting.

11 And the difficulty there was by the time he was 17, and
12 discharged from the Continuum of Care, they did not require
13 him to be on psychiatric medications. And even younger than
14 that he was allowed to refuse medications. And so, he's not
15 had any treatment since he's been 16 or 17 years old, and
16 he's, he's still on their medications to date.

17 Q Okay. Also, in arriving at your diagnosis, did you
18 consider his, his family history?

19 Is that part of what a forensic psychiatrist does?

20 A Absolutely.

21 Q And did you get -- where do you get this information,
22 family history?

23 A The family history is important and the reason being
24 some of the mental disorders, you know, we use to blame
25 parents. Well, that's just not true anymore, and as we

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1 know, as we're learning the biology of all the mental
2 disorders, we find that they, they run in families. There's
3 usually a genetic component. So, it's very important to
4 learn what other mental illnesses may be in the family.

5 To me, the most significant piece of family history
6 actually came from one of the Harris Psychiatric Hospital
7 records in 1988. He had a psychosocial evaluation and his
8 mother was interviewed. And Mr. Torres' grandmother, who it
9 would of been Lisa Lamb's mother, was actually hospitalized
10 at the South Carolina State Hospital, and had electro shock
11 therapies back in the, in the, in her youngers years, which
12 is indicative usually of a mood disorder. Usually people
13 that receive electro shock therapy have some kind of mood
14 disorders. So, we know that there's a strong family history
15 of mood disorders that require long term hospitalization.

16 Now, I've interviewed an aunt who says she has panic
17 disorders. I have not seen her records. She's told me some
18 of the medications she's been on, and then his cousin,
19 Jessica Hughey, reported to me that she had a history of a
20 mood disorder, and she's been prescribed various
21 anti-depressants. But again, that's just based on their
22 history to me. But we actually do have it documented in
23 other medical records that the maternal grandmother had ECT.

24 Q Do you also consider substance abuse?

25 A Yes.

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1 Q And what -- I mean did you do so in this case?

2 A Yes, Mr. Torres, and he's, he's not uncommon. Many
3 people with mental illness, mental illness use drugs. I
4 think what's different about Mr. Torres is the age of onset
5 of his mental illness was very young. I've, I've not seen
6 anybody else with a younger age of, of onset of mental
7 illness and being prescribed psychiatric meds. I've not
8 seen anyone that young. So, that's different.

9 The other thing I think that's different about Mr.
10 Torres, the amount of drugs he's used. But it's very
11 common. People with mental illness use, and he has an
12 extensive history of drug abuse.

13 So, it makes it very difficult, as a psychiatrist. As
14 you can imagine, if you go to your medical doctor and you
15 have belly pain, there could be five or six different causes
16 for that. It could have -- you could have appendicitis. If
17 it's a woman, you could have -- you could be ovulating. You
18 could have diverticulitis. So, it's very similar with a
19 psychiatrist.

20 If somebody presents with aggressive symptoms, we have
21 to look back at what all the causes, what, what can cause
22 aggression in people, and mental illness can do it.
23 Substances can do. I'm -- sometimes choices. Sometimes
24 people just choose to be aggressive. Sometimes choices do
25 that. So, it's very important to look at the substance

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1 abuse history and he has a number of substance abuse
2 disorders.

3 He abuses alcohol to the point where he blacks out and
4 he drinks more than others. He abused methamphetamine to
5 the point that he -- it's, it's ruined his life. He's
6 abused Benzodiazepines or Clonopin. That's similar to
7 Xanaxes or Valiums. He's abused those to the point that he
8 could take -- he's taken more by history, up to 14 a day.
9 I've not heard of someone taking quite that much. That's
10 quite a tolerance to those kinds of drugs. So, he's abused
11 drugs extensively, and on the night of the offense as well,
12 he was abusing drugs heavily.

13 Q Also, in your consideration, did you consider his, we
14 call it legal history?

15 I mean did you---

16 A Yes, one -- you have to look at---

17 Q Prior trouble with the law.

18 A Absolutely. He had, he had a pretty long extensive
19 court history. But they were mainly for -- I think at one
20 point he had convictions I believe for 24 counts of car
21 breaking, and he had served some time in the Department of
22 Corrections for that. He's had some prior charges before.

23 And he also -- I think what was significant, he didn't
24 do very well on probation. He violated. I believe he
25 failed a drug test and he, he was behind on some payments.

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1 But he also, under community supervision, did not fair very
2 well.

3 Q Okay. When you say community supervision, are you
4 referring to parole or---

5 A Correct. And he was violated for that.

6 Q Okay. Again, was that -- do you recall what that was
7 for?

8 Was it for---

9 A Yes, he was working while he was on house arrest. He
10 was. They placed him on house arrest as a condition of his
11 probation, and his probation officer came, came to check on
12 him and he, he had been working and wasn't suppose to.

13 Q Okay. And as part of your methodology, do you also
14 consider his history of, while in the Department of
15 Corrections or in a local jail?

16 A Yes, that's very important.

17 Q Why is that?

18 A Well, besides working at the Department of Corrections,
19 you need to look at the corrections records to see if
20 they've had psychiatric treatment, how do they do, can they
21 generally follow rules. And it's, it's very fair to say,
22 Mr. Torres' correctional history, he's been charged with
23 very minor things, sleeping, missing call because he was
24 sleeping, refusing to go to work. There's not been any
25 assaults that I could see. There's been no history of

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1 violence while he's been incarcerated.

2 Q I see.

3 Okay. Did you make a note of a -- well, since you
4 mentioned it, did you make a note concerning a, a fight?

5 A Yes, he was in a -- I'm sorry. He was in a fight it
6 looks like on April 8th. Actually I think it was
7 April 5th of 2008. But it was actually marked
8 April 5th, 2006, in the detention center records. So, I'm
9 not sure. I believe it would of been from this year. I
10 think it was just a typographical mistake, and it was over a
11 cigarette.

12 Q Okay. That was with?

13 A Another inmate.

14 Q Another inmate.

15 Okay. As part of your methodology, do you also
16 consider a relationship or his, history with relationships?

17 A Yes.

18 Q And why is that important?

19 A Well, for a number of reasons. You want to see -- I'm
20 looking again as his development. He's 27 years old. And
21 I'm looking at what kinds of relationships does he have in
22 his life and also because there was a sex crime involved in
23 these, in these charges. It's important to establish what
24 kind of relationships, and I think it's very significant,
25 Mr. Torres has not had any kind of long term relationship.

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1 None. He -- and it's not surprising given his history.

2 He had been removed from the home at a very early. He
3 had been exposed -- his stepfather, this is in the record,
4 the Continuum of Care records, was an alcoholic. There was
5 a lot of discord in the house. He didn't spend a lot of
6 time at home.

7 So, he is not very trusting of people and it's very
8 hard for him to develop relationships and he's not had a
9 long term relationship. Doesn't have any children. He had
10 a number of sex partners over the years. But he's not been
11 in love. He's not settled down.

12 He does maintain contact with his mother. Their
13 relationship's been tumultuous over the years. There's
14 times -- she certainly tried to be a caretaker for him, and
15 there's times he made it difficult because he was sick. But
16 there's also times that she was tired and needed a break.
17 The records, the records very clearly document there were
18 times she wouldn't come and pick him up. He would be in the
19 hospital when she was to pick him up for a visitation and
20 wouldn't show up. So, she would cancel a visit, which
21 caused a lot of difficulties.

22 But over the years, they seemed to -- they maintain
23 contact and he sees her as supportive even though it's been
24 intermittent.

25 Q Was there another primary contact or another attachment

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1 that he had?

2 A Yes, I think, I think the most important contact in Mr.
3 Torres' life was his great grandmother, Mrs. Rogers, and he
4 is very -- she died and he, he decompensated after her
5 death. But she was in the home with him and his mother and
6 he always saw her as the one -- she was a lot calmer with
7 him. Probably being older -- his mother was 20 when she had
8 him. So, the grandmother was a good bit older and probably
9 more patient than his mother, and he saw her as a very good
10 person who was able to calm him down, and I believe his
11 grand, his great grandmother is his closest attachment, and
12 she's been, she's been the most consistent over the years.

13 Q Okay. While conducting your examination, did you
14 conduct a mental status examination of Mr. Torres?

15 A Yes.

16 Q And what is a mental status examination?

17 A A mental status examination is our physical. So, when
18 you go through your internist, and he listens to your
19 heart -- in mental status, we're looking at the brain.
20 We're looking at how is your memory, are you able to pay
21 attention. We're assessing things like your present mood.
22 And so, it's our equivalent to a physical exam.

23 Q Why is this significant in your findings?

24 A There, there are a few things that are significant.
25 I've diagnosed Mr. Torres -- I'll talk about, about, with

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1 you about that later. But I diagnosed him with bipolar
2 disorder, and which is manic depression. And so, sometimes,
3 with that mental illness, you will see certain mental status
4 findings. He didn't have those.

5 So, there's -- at the times that I've interviewed him,
6 he is certainly not been manic. And so, I think it's
7 important that he wasn't showing signs at the time I've
8 interviewed him that I was concerned that he was acutely
9 suffering from this mental illness.

10 But I think what is important is he is very paranoid,
11 and I will give you examples. They're a number of tests
12 that I needed Mr. Torres to complete and he, he tried, but
13 he was not able to do them. And, for example, one of the
14 tests required him wearing a respiration belt, and he
15 started to take the test, and in the middle of the test
16 stopped and said that it reminded him of being back at the
17 mental hospital and he felt like he was being a guinea pig.

18 And there, there was another occasion where I tried to
19 repeat the EEG test for him to see if his brain still had
20 abnormal electrical activity, and he did not cooperate with
21 that test. He does not like medical tests.

22 He is very sensitive. He doesn't like people touching
23 him, especially without permission, but he gets -- a lot of
24 his anxiety centers I think when he was in the hospital. He
25 was often secluded. And what that means, when his behavior

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1 was out of control at the mental hospital, what we do is we
2 put the children in seclusion. You're put in a locked room
3 and you're given medication. And so, people come in, they
4 hold you down, and they give you a shot to calm you down.

5 And so -- but he is -- he's got some issues certainly
6 with male doctors. He's always been cooperative with me. I
7 haven't -- he's, in terms of my interviewing him. But on
8 the times that I've referred him to a male physician, and
9 they wanted to run some tests, he was quite paranoid.

10 Q And I believe you referred him for consultations with
11 Doctor Self and a Doctor Brawley, is that correct?

12 A That's correct.

13 Q And what were the results of those consultations?

14 A Doctor Brawley is a neuropsychological and what she
15 does is she tests for brain damage. Mr. Torres had a number
16 of histories of closed head injuries where he was knocked
17 unconscious, and I was concerned especially more so because
18 of all the drugs he's used. He's used a lot of LSD over the
19 years, which can cause brain damage. He's used Ecstasy,
20 which is one of the newer drugs kids use that's associated
21 with brain damage, and there was no evidence of brain
22 damage.

23 His IQ is still stable. He's of average intelligence.
24 And despite all the drugs he's used, there's no evidence
25 that he has brain damage at this time.

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1 He did have -- what I do need to tell you about, on his
2 MRI exam, he did have an abnormality. I don't, I don't even
3 know if Mr. Torres knows this. He has a small venous tumor
4 in his brain. But it is not clinically significant. Many
5 of us -- I talked to Doctor Self about that. It's called a
6 venous angioma, and it's in the back of his brain in the
7 area called the cerebellum. And if he were having symptoms
8 from that, he would be unable to walk or keep his balance.
9 And so, clinically, he didn't show any signs.

10 Probably -- I don't know the exact instances, but
11 probable ten people have an MRI of their brain, perhaps
12 maybe one out of ten would have that, and it's not
13 clinically significant. So, he did have some abnormal
14 findings. But I specifically went to Doctor Self with those
15 findings and there wasn't anything to correlate. And also I
16 checked with Doctor Brawley, and I had her go back over her
17 test results knowing that his MRI was abnormal, and there
18 was no evidence that he had impairment in his brain
19 functioning from that.

20 Q Okay. Were you able to diagnose Mr. Torres?

21 A Yes.

22 Q And what was your diagnosis?

23 A What psychiatrist do, we have, we have what's called a
24 multi axial system that we have to diagnose people with and
25 it's five different axes, and the reason we have to do

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1 that is so if I called a psychiatrist in California and say
2 Patient Mary has depression, the psychiatrist in California
3 understands exactly what I'm talking about. So, it's
4 similar if you go to your doctor's office and you see a code
5 on your bill, it's the coding system that psychiatrist use,
6 and ours is a little bit different from the, the internists,
7 for example.

8 But Axis 1, that's what we call major mental illnesses.
9 Those are the severe mental illnesses or conditions so bad
10 that we would expect you to have problems. So, say, for
11 example, if you came to my office and your spouse just died,
12 a psychiatrist would expect you to have problems adjusting
13 for a period of time. It's just such an extraordinary life
14 event. So, Axis 1 is for major mental illness or
15 extraordinary life events, and I diagnosed him with a number
16 of conditions on Axis 1.

17 Q Okay. And would you please tell us what diagnosis you
18 gave him on Axis 1?

19 A Sure. First and foremost I did diagnose him with
20 bipolar disorder, and there's different types of bipolar
21 disorder, and I diagnosed him with what's called bipolar
22 disorder type one, and what that means is that, in my
23 opinion, to a reasonable degree of medical certainty, he has
24 mood swings that are far in excess to normal mood swings
25 that people have.

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1 And I based that, number one, on a family history. We
2 have family history of mood disorders in him. I based that
3 on the early age of onset of his mental symptoms. By the
4 age of 19 months he's already being treated. I based that
5 on the past records where he's received that diagnosis of
6 bipolar disorder, and then I also based that on his own
7 history as well.

8 And, and what that means, mainly -- Mr. Torres is a
9 little bit different. His symptoms are more -- and it's not
10 uncommon. Some people that are bipolar, when they have
11 what's called a manic phase, which is the hyper phase,
12 they're happy. They're fun people to be around. They're
13 larger than life. But there's another subset that's become
14 very irritable and that's Mr. Torres' case.

15 Family members, friends will tell you and Mr. Torres
16 even admits that he can become incredibly irritable for
17 periods of time where the smallest thing sets him off. And
18 that's, I think, the behaviors that were diagnosed as
19 Intermittent Explosive Disorder in the, in that past.

20 Now, I've looked through his medical records, and
21 that's also proof of that in some of his records. For
22 example, I found one proof that said when he was younger
23 that he was happy over everything. The, the other symptom
24 that you have with manic, you can have irritable moods, is
25 you have a decreased need for sleep, and that's, has to be

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1 documented over time, and I found records where it said he
2 kept all the other children up all night. So, we know that
3 he even had that in his childhood history.

4 Before this crime, Mr. Torres tells me, and also
5 Mr. Howard, that he had not slept for four days. Before he
6 committed this crime, he had been awake for four days. Some
7 of that's from drugs. He's using a lot of methamphetamine.
8 But also some of that was from his own underlying mood
9 disorder.

10 In addition, during those periods of time he used very
11 poor judgment. You can be very impulsive, which he
12 certainly has that kind of history. Mr. Torres still
13 complains of symptoms to date and his main symptoms he will
14 tell you is that he has racing thoughts, that his thoughts
15 come very fast. And the way I described it is it's like
16 looking out of a locomotive train and seeing the scenery
17 going. His thoughts are very very fast at all times, and he
18 still complains of racing thoughts, which is a symptom seen
19 in that kind of disorder. So, that's the first diagnosis I
20 gave him.

21 I also diagnosed him with an anxiety disorder. It's
22 mild though in comparison to his mood disorder, and I base
23 that on two things. He does have some anxiety and he
24 becomes paranoid when he's around medical procedures or
25 people trying to touch him, and that probably comes from

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1 some of the treatment he had at the hospital.

2 Also he was exposed to some violence as a child. His
3 stepfather would drink and his mother and father would fight
4 one another. So, sometimes when kids have been exposed to
5 some abuse or violence, they witness it as children, they
6 even become anxious, and I also diagnosed him with that
7 because, based on his medical records as a child, he would
8 overreact when his mother would leave. It's called
9 separation anxiety. He would, he would tear apart rooms or
10 he would go in his room and become very depressed for days
11 on end when his mother would leave. So, he has an anxiety
12 disorder as well.

13 And then, by history, I diagnosed him with the
14 Intermittent Explosive Disorder. And by history, it just
15 means that other people have diagnosed him with that. And
16 he does have symptoms that's very hard to tell the
17 difference between the Intermittent Explosive Disorder and
18 bipolar disorder because some of the behaviors are similar.

19 But given his history and the fact that he's still
20 having symptoms and looking at overall, I think bipolar
21 disorder's fits better his behaviors and moods and symptoms
22 better.

23 And then also I diagnosed him with all the substance
24 abuse disorders, hallucinogen dependence, which means he
25 abuses LSD. Hasn't done that since the early 2000's. But

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1 he was at a point where he was taking 12 hits of acid a day,
2 which is a pretty large amount.

3 Alcohol dependence, the Clonopin dependence, and then
4 he also has abused alcohol, marijuana. So, he has a number
5 of substance abuse disorders as well.

6 Q Okay. Why is it that you think the bipolar is a better
7 fit or a better diagnosis than the, then the I think it was
8 Intermittent---

9 A Intermittent Explosive Disorder. I've never seen
10 any -- I've never diagnosed Intermittent Explosive Disorder.
11 Mr. Torres is the first one that I've seen that's got a
12 history of questionable numbers. Certainly there's features
13 there.

14 But bipolar disorder is much more common. Intermittent
15 Explosive Disorder is a very rare disorder. His symptoms,
16 over time, seem more consistent with bipolar disorder. His
17 complaints of racing thoughts in-between the fact that he
18 has a family history of mood disorders, the fact that, if
19 you look over history, the years that he was doing very
20 well, 1991 through 1994 when he was at school, he was on
21 Lithium, which is treatment for bipolar disorder.

22 So, if you look clinically at him and his history, that
23 the diagnosis of bipolar disorder or I think, first of all,
24 it's more common. It certainly would explain his present
25 symptoms that he continues to have. Even between episodes,

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1 he still has racing thoughts and that sort of thing.
2 Intermittent Explosive Disorder would be characterized by
3 periods of being totally normal, visions, having periods of
4 provocation, and, and overreacting and becoming dangerous,
5 and he has symptoms in-between.

6 So, it's, it's more common, number one. Number two,
7 we've got a family history. And number three, clinically
8 he's responded to the treatment for bipolar disorder. He
9 was on treatments for Intermittent Explosive Disorder and
10 there was no real change in his behavior.

11 Q So, if, if the, the treatments for bipolar seemed to
12 work, is that what you're saying?

13 A This -- certainly, to me, the best period of function
14 he ever had was 1991 to '94. He was making all A's in
15 school. He was in the Spartanburg School for the Deaf and
16 Blind. He was in the Pioneer Center, which he, he was, had
17 good continuity of care and was being treated well. He
18 seemed to do very well during that period of time.

19 Q Okay. I believe you've made a diagnosis concerning
20 Axis 2, is that right?

21 A Yes.

22 Q What is Axis 2?

23 A Axis 2 out of the, is multi axial system, that's for
24 personality disorders or people that have disorders in
25 intellectual functioning. Say, for example, if somebody was

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1 mentally retarded, we would diagnose that on Axis 2. But
2 it's also for personality disorders.

3 Q And did you find any in Mr. Torres?

4 A Yes.

5 Q And that was?

6 A Yes, he meets the diagnostic criteria for what's called
7 Antisocial Personality Disorder, and what that means is,
8 even aside from his bipolar disorder, there are periods of
9 time where he chooses not to obey the law. It's, it's, it's
10 one of those -- you have to look at the behaviors. You have
11 to look at what causes the behaviors.

12 Mr. Torres certainly has behaviors that are caused from
13 his mental illness. There's no question. When he becomes
14 enraged and he is irritable, once he's at that point, it's
15 very difficult to control him. But there's other periods of
16 time where he's chosen to break the law. For example, the
17 24 car breakings. He wasn't manic at that time. He
18 wasn't -- you know, he didn't hurt people at that time. So,
19 you know, there's been also periods in his life where he's
20 chosen to -- he's had a pattern of breaking the law. So, he
21 has that. You have to code that in addition to his mood
22 disorder.

23 Q Okay. At the -- what, what kind of treatment is
24 available for bipolar disorder?

25 A Well, there's a lot better treatments now than there

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1 was then. That's for sure. We're, we're -- we, we know a
2 lot about bipolar disorder. Back in the earlier days when
3 Mr. Torres was treated, for example, the medication Tegretol
4 the doctors had him on -- we've learned that -- I did the
5 same thing in the 80's. That's what we treated people with
6 bipolar with, and we now know that that's not a very
7 effective treatment for bipolar disorder. The mood
8 stabilizers like Lithium, Depicot, there's many treatments.
9 But there's also a new, a whole new class of medications
10 called atypical neuroleptics that we use that can clearly,
11 are much more calming and can control the bipolar disorder.
12 It's much more treatable.

13 The symptoms, the people still have symptoms. But
14 it's, it's -- there's a whole lot other of new medications
15 and a lot more choices of medications than what existed when
16 he was a teenager and a child.

17 Q Now, what about -- are you, are you familiar with the
18 term behavior modification?

19 A Sure.

20 Q Okay. And what is that?

21 A That's where you use it, use it all the time as a
22 parent. Teachers do too. That's where you reward behaviors
23 you want people to continue using, and you negatively
24 reinforce bad behaviors. So, you try to shape people's
25 behavior through reward or punishment.

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1 Q Is behavior modification a, a proper treatment or a
2 defective treatment for someone with bipolar disorder?

3 A Once their mood stabilizes it is. But while somebody's
4 in either acutely depressed or acutely manic, it's not gonna
5 be very helpful. They're, they're driven by a motor so to
6 speak. You know, if you're manic, it's hard to -- you can't
7 reason with somebody whose thoughts are bad, whose behavior
8 is out of control. But it's certainly a good treatment once
9 the symptoms have stabilized.

10 Q Okay. So -- and the symptoms must be stabilized with
11 medication?

12 A Absolutely. Some, sometimes people can -- they can be
13 manic for a period of time and the symptoms will eventually
14 go away. For example, you can have a depression, and some
15 depressions can last up to 12 months, but they get better on
16 their own, and sometimes people -- not his age usually.
17 Usually if you have a manic episode that, at his age, you
18 would require medication to be able to calm back down. It
19 could be a few weeks otherwise that you may have those
20 symptoms, the irritability. Sometimes on their own they
21 will stabilize over time. But usually you've gotten into
22 too much trouble by then and you're either arrested or
23 you're in a psychiatric hospital.

24 Q Could you tell, within a reasonable degree of medical
25 certainty, if Tony, on May 11th of 2007, was under the

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1 influence of a mental or emotional disturbance?

2 A Absolutely he was.

3 Q And why do you say that?

4 A Well, the bipolar disorder is, in my opinion, he's had
5 it since early childhood. His early diagnosis was seven
6 years old, and even going back earlier he, the, the, he was
7 diagnosed with Intermittent Explosive Disorder, Attention
8 Deficit. Attention Deficit Disorder, there is some
9 association with bipolar disorder in later years. So, he
10 certainly has been having symptoms since he was a child.
11 But this illness doesn't go away. It comes and goes.

12 The, the good thing about Mr. Torres is he has what's
13 called Inter-Episode Recovery, and what that means is he --
14 some people have either highs or lows all the time, and they
15 never have periods of normal mood in-between. Mr. Torres
16 does have normal mood in-between, which is a good sign for
17 him. So, he does have periods of normal functioning even
18 when he doesn't have the mood symptoms.

19 But, in my opinion, he clearly had symptoms of his
20 bipolar disorder on and around the time of the offense.
21 There's no question. He also was under the influence of
22 many drugs, which also made his mood disorder worse and made
23 his, him even impulsive than what he normally is. So, he
24 was clearly very sick when these crimes happened.

25 Q Now, are, are you suggesting that, that, that Tony is

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1 not competent?

2 A Not at all. He clearly, he clearly knew what he did
3 was wrong. If you ask him now, you can ask him, even when
4 he's manic, he knows it's wrong to murder. He knows it's
5 wrong to rape. There is no question that no matter how sick
6 he was at that point, he was not psychotic. He was not out
7 of touch with reality. He knew what he was doing was wrong.

8 Q Okay. Do you have an opinion, within a reasonable
9 degree of medical certainty, as to whether or not all, on
10 May 11th, if Tony Torres could appreciate the criminality
11 of his conduct or conform his conduct to whether, whether
12 his ability to conduct, conduct to the requirements of the
13 law was substantially impaired?

14 A Yes, in my opinion it was substantially impaired.

15 Q And why is that?

16 A I base that on a number of things. I look at the
17 statements of the victims and I tried to get an idea or some
18 witnesses to understand what his functioning was like before
19 then, and it starts with his Aunt Tammy Hughey, who he was
20 living with her at the time of the offenses, and the aunt
21 stated that his mood symptoms started the week before, with
22 the Saturday before this crime, that the daughter, Jessica,
23 her son, her child had left a toy out on the floor, and Mr.
24 Torres stepped on the toy and twisted his ankle and was in
25 pain, and she noted that was the onset that he began to get

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1 very irritable that week.

2 Mr. Torres told me that he had not been sleeping well
3 at all. That there were many people in his aunt's house and
4 he had to sleep on the couch. And he was working at Burger
5 King and he would try to sleep. And then while he was
6 sleeping, people would be in and out of the home watching
7 television. It was a, a small house and there, there's a
8 big TV in the room where he slept and a couch, and there's a
9 number of chairs. And so, it was -- he was not sleeping
10 very well. And he reported to me that for four days before
11 he had not slept.

12 And then there's various statements that I relied upon
13 and I'll go over those. He states -- there's a statement
14 from Ashley Harley, and she states that he called her --
15 let's see. A statement from Ashley Harley states that he
16 was intoxicated on 12:30 of the day of the crime, and cursed
17 at her and threatened to kill her in her sleep.

18 There is a statement of Jennifer Mon, Mondonedo that,
19 that said she and Tony took a lot of Clonopins on the
20 evening before the events, and that he cussed her out at
21 nine o'clock that night, and excuse me, she described him as
22 "a drunken asshole." She stated that "he gets violent when
23 he drinks."

24 The statement from the, the cousin, Jessica Hughey,
25 states that she, she saw he and Chuck Emery get in or knew

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1 about the fight or heard the fight on 1:30 that morning, and
2 she heard Mr. Torres threaten to kill Mr. Emery and his
3 family. States he was hitting cars and yelling.

4 The aunt said that she wouldn't let Mr. Torres in the
5 house that evening because he was so upset, and, and
6 irritable that she wasn't sure what he was capable of.

7 Holly Melton, who was the girlfriend to Mr. Emery,
8 states that, this is her quote, "Tony has been acting crazy
9 lately and gets upset over the littlest things. He takes it
10 to the extreme."

11 Michelle Burgess, who is the woman that saw him the
12 next morning when he was, ran over the fire hydrant at the
13 Li'L Cricket, said he was driving erratically, wrecked into
14 a fire hydrant, was in a panic state.

15 Mr. Vinson, who I think saw him also at the Li'L
16 Cricket, said he was anxious to try and get out of there.

17 Henry Richardson, which is very interesting, is the man
18 who took him to the hospital said that he slept all the way
19 to the hospital. So, here's someone that, you know,
20 obviously is exhausted. He's been up. He's been moody.
21 He's been irritable. And the, the crime itself was very
22 violent. Those are, in my 20 years of doing this work,
23 those are the most violent crime scene pictures I've seen.

24 Q Okay. So, you believed, at that time, that he was
25 suffering from what?

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By Mr. Allen

1 A I don't think full blown mania. But he certainly was
2 having symptoms of his bipolar disorder. He had very poor
3 judgment. I can't say that he was full blown manic at the
4 time because he was doing so many drugs that night. It's
5 too hard. I don't think anybody could say that for
6 certainly. He was on methamphetamine, which would speed you
7 up. He was taking Clonopins, which would slow you down. He
8 was drinking. So, he was on so many medications and at
9 doses so high I don't know if anybody can tell. But we
10 certainly know he had the underlying mood disorder. He was
11 irritable before this crime happened, and that he was doing
12 many many drugs that night, and he was in a fight with the
13 victim. He was in a fight with the victim's son. He had
14 been aggressive that night.

15 Q Okay. You indicated earlier that you work with the
16 Department of Corrections?

17 A Yes.

18 Q At, at times?

19 A Yes.

20 Q Can Tony or can Tony's bipolar and his other
21 psychiatric problems be treated in prison?

22 A Absolutely. We -- the prison -- I, I work at the
23 mental hospital. We have an 89 bed unit. It's probably not
24 89 beds right now. But we have a, a mental hospital within,
25 with the prison. We're the only prison in the United States

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By Mr. Allen

1 that does that. A lot of the other prisons send the
2 patients out to a regular mental hospital. But they
3 actually have a mental hospital within the Department of
4 Corrections.

5 They also have, in Columbia, a 250 bed unit where the,
6 the patients are in prison, but they have a nurse there to
7 give medications. So, there's a, a day treatment program.
8 But then some of the prisons also have out-patient mental
9 health centers. There's one in Pelzer. There's one in
10 Dorchester County, and there's one in Lee County where
11 there's various high level security prisons that treat the
12 mentally ill. They have nurses there and they give
13 medications, and they have psychiatrists at one clinic
14 similar to me.

15 They have -- the Department of Corrections has some
16 full-time psychiatrists, but mainly they have contract
17 psychiatrists from that region of the state. They go in and
18 provide psychiatric services. So, it's many people, many
19 inmates with bipolar disorders that are managed.

20 Q Okay. Thank you. If you would, please answer any
21 questions of the State.

22 THE COURT: Mr. Gowdy, your witness.

23 SOLICITOR GOWDY: May it please the Court?

24 THE COURT: Yes, sir.

25 CROSS-EXAMINATION

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 BY SOLICITOR GOWDY:

2 Q Good afternoon, Doctor Schwartz-Watts.

3 A Good afternoon.

4 Q Let me begin by thanking you for doing a report. I
5 thanked you outside, but I wanted to thank you in front of
6 the jury for doing the report.

7 A You're so welcome.

8 Q You agree that this defendant knew the difference
9 between right and wrong?

10 A Absolutely.

11 Q And in forensic legal terms, he was not criminally
12 irresponsible?

13 A That's exactly correct. Even though he has bipolar
14 disorder and was sick, there's never been a time that he's,
15 he's, his reality testing has been impaired. There's no
16 question he knew right from wrong in my opinion.

17 Q And he has the capacity to confirm his conduct?

18 A That's correct. And what that means is even though his
19 capacity was impaired that night, he still -- that, that
20 means he doesn't walk around with irresistible impulses to
21 rape and kill people, and that he, even though he was
22 lacking capacity that night, he could conform his conduct.
23 That's correct.

24 Q And in your opinion, he is able to appreciate the
25 wrongfulness of his conduct?

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 A Absolutely.

2 Q He knows the difference, I guess in simpler terms that
3 I can understand, he knows the difference between right and
4 wrong?

5 A That's correct.

6 Q He knows how to do right and sometimes he chooses to do
7 wrong?

8 A That's correct. There's some -- that's correct.

9 Q And I guess that is probably borne out in some of the
10 Continuum of Care records where I think he's quoted as
11 saying I know how to do good when I want to do good?

12 A That's correct. I think -- the, the only place I would
13 take issue is that, of that -- and you're exactly right.
14 All of those things involve choices. But I think, once he
15 gets to the point where he's out of control, he can't stop
16 at that point. But you're right, it involves a decision
17 beforehand of what course of conduct he's going to take.

18 Q You made note -- and I, and I want to talk about the
19 jail incident later.

20 But you, you -- I believe you made note that he's had
21 relatively few major disciplinaries in the Department of
22 Corrections?

23 A That's right. Compared to most of the inmates I treat,
24 his, his, his disciplinary record's pretty mild compared to
25 most that I see on a weekly basis.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 Q And, and that's also true for the, for the local
2 detention center, with the exception of a couple of
3 episodes, relatively benign records?

4 A That's correct.

5 Q But yet, he's not being treated with any psychotropic
6 substances right now?

7 A That's correct. But also keep in mind he's not using
8 methamphetamine. He's not getting Clonopin. He is getting
9 some rest compared to being on the street. He has his meals
10 provided. He -- his stress level -- believe it or not, his,
11 that's a crazy thing to say, but his stress level's lower in
12 the detention center. The officers are very nice to him.
13 They treat him very well overall. And so, his stress
14 level's lower. But you're correct. He's had his episodes.
15 But he -- there's no evidence that I've seen that he's been
16 manic while he's been in the jail.

17 Q And, and, and I guess that's my point, he, he still
18 suffers from mental disorders that you've diagnosed. He's
19 not on any psychotropic substances. But yet, he's not
20 killing or raping anyone.

21 A That's correct.

22 Q But he's also not having access to illicit drugs?

23 A That's correct. And also keep in mind that the kind of
24 bipolar -- he, he does have what's called inter-episode
25 recovery, and what that means, in-between the highs and the

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 lows, he does have periods of normal functioning, which is
2 very consistent if you look at his medical records and
3 psychiatric records. There's spells. There is one week,
4 for example, in the Continuum of Care records where it says
5 he's happy all the time, keeping all the kids up, the next
6 day he was aggressive and irritable, and the next day he's
7 depressed. And when he has his cycles, for about four or
8 five days, where he's very agitated and irritable. And then
9 he'll have periods for months in-between.

10 So, I think we've been lucky also that's he's, he's
11 been inter-episode recovery. I, for example, if this trial
12 were to go on for another few weeks, I would expect him to
13 begin having symptoms.

14 Q Okay. You made note of meconium staining during
15 pregnancy.

16 A Yes.

17 Q But there's, there's nothing about that that would lead
18 someone to, to, to do any of the things he's done?

19 A No, not at all. It was just, just, just an
20 abnormality. In fact, I'm, I'm just obsessive. But that
21 has nothing to do with it.

22 Q Fair enough. I want to move to your diagnosis. I'm
23 going to start with bipolar. And you correct me if I'm
24 wrong.

25 If someone is subject to mood swings, sometimes they're

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 manic and sometimes they're depressive?

2 A Correct.

3 Q And you diagnosed him as being bipolar with the most
4 recent episode being manic?

5 A Correct.

6 Q And I assume by that you meant the most recent, recent
7 episode being the, the incident on May the 11th or did you
8 mean the most recent episode being when you saw him?

9 A No, the most recent episode probably being the last
10 psychiatric hospitalization he had. The most recent
11 episode -- I probably should code it as most -- if I looked
12 at his behavior on the night of the crime, I would probably
13 call that hypo-manic. But the most recent documented
14 episode would of been manic many years ago, which was the
15 last time we had treatment records on him.

16 Q So, there are---

17 A I couldn't really say he was manic that night because
18 he was using so many drugs. I don't think any, anyone could
19 know. He certainly has -- we note -- what we do know is if
20 you look at his psychiatric records before he ever started
21 using drugs, you know, when he was seven and eight years old
22 when he was diagnosed with bipolar disorder, we know he had
23 that before drugs. But he did so many drugs on that day,
24 it, it's really difficult, it's difficult to know.

25 Q Yes, ma'am. The DSM is considered the gold standard of

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 your industry. I'm not gonna use the word Bible.

2 But it is, it is very very well received and used in
3 your profession?

4 A Sure.

5 Q I suspect you probably rely on it and others like
6 yourself that are experts in the field of psychiatry would
7 consider it to be a learning treatise?

8 A Yes, sir.

9 Q All right. With respect to bipolar disorders with the
10 most recent episode being manic, the DSM says, and I'm gonna
11 quote, "most individuals are regretful for their behavior."

12 A Yes.

13 Q Would you agree with me that regretful could also be a
14 synonym for remorseful?

15 A Sure.

16 Q Did you -- and I am not gonna show them to you. I'm
17 not gonna show you the crime scene photos. You described
18 them the same way I described them.

19 Did you see any evidence of remorse or regret in any of
20 the crime scene photos?

21 A I don't know if that's a term I can -- I don't know how
22 you would see remorse or regret. But no -- were the bodies
23 covered?

24 No.

25 Have I seen crimes -- I don't, I don't really -- that's

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 kind of a little bit outside of my specialty. But I would
2 guess what you're saying is were the, were the people
3 covered?

4 No. There was no evidence that their bodies were
5 covered or that they---

6 Q He, he left her in about the most vulnerable position
7 you could leave a woman in?

8 A Yes.

9 Q And he poured gasoline over both of their bodies?

10 A Yes.

11 Q And there was an intent to conceal the crime?

12 A Correct.

13 Q And you made special note of Henry Richardson, who's
14 the person that he rode with?

15 A Yes.

16 Q If he were still in a manic state on, on May the 11th
17 after he committed these crimes, would you not also expect
18 him to, to have something less than just sleeping in the car
19 with Mr. Richardson?

20 A Well, no, no. Actually that's kind of consistent. If
21 you look at him in the Li'L Cricket, he was still pretty
22 agitated. I, I looked at him in the video. You know, you
23 see him on the phone. He's got hyper behavior, and I think
24 what happened is all the drugs he took, they finally -- I
25 think, once he just sat down, I think he just passed out.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 So, it's hard to tell there cause he had used so many drugs
2 that night I'm, I'm just wondering if he finally crashed.
3 I'm not sure.

4 But you know, if someone's manic, sure, they can go
5 days and days. But even after days and days without
6 sleeping, they eventually crash. So, it's hard to say for
7 that morning. But he certainly wasn't anxious looking with
8 Mr. Richardson, and Mr. Richardson's statement was that he
9 slept---

10 Q He slept.

11 A ---almost the whole way to the hospital.

12 Q And after the crime scene with the gasoline and the
13 intent to burn, there was thinking that was lucid enough to
14 tell bystanders don't call 9-1-1. He told Michelle Burgess
15 and Eric Vinson don't call 9-1-1.

16 A Correct.

17 Q Which is---

18 A When he hit the fire hydrant.

19 Q Which is fairly clear thinking, I just committed a
20 crime, I don't want the police there?

21 A Certainly. And that's, that's evidence that he knew
22 right from wrong. That's correct. That's why there's no
23 evidence that he was so impaired that he didn't know what he
24 was doing. That's correct.

25 Q And, and he was cogent enough to make up a false

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 explanation to Mr. Richardson about why he needed to go back
2 to Spartanburg?

3 A Absolutely.

4 Q And he was cogent enough, when he got back to
5 Spartanburg, not to go to the home he was living in, but to
6 go to someone else's home?

7 A That's correct.

8 Q And of course, to make an effort to conceal the blood
9 that was on his cloths by putting it in a washing machine?

10 A That's correct.

11 Q I want to assume, and, and I'm gonna assume because
12 you're an expert, that you are correct, that he suffers from
13 bipolar disorder.

14 Are there any studies that show people who are bipolar
15 are more likely to do the things that he did than the
16 general population?

17 A There, there is a subset of people with bipolar that
18 are more aggressive and that can be dangerous. Bipolar
19 Disorder can be, when you're manic, the, the time that
20 people are most manic, most dangerous is when they're manic.
21 There actually are -- I can tell you what studies I do know.
22 That if you take inpatient hospital, people that just come
23 in the hospital, they, bipolar manic patients assault other
24 patients and doctors more than any other mental illness
25 within the first 24 to 48 hours admission.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 So, there is a subset, especially those that have been
2 hospitalized, that are acutely more dangerous. So, there
3 is -- and, and I think Mr. Torres falls in that subset.
4 He's had the early age of onset that I've ever seen. He's
5 the, the youngest diagnosis I've seen made in somebody at
6 that point. So, there's a subset.

7 But overall, if you take -- there's many people with
8 bipolar disorder that don't ever hurt anyone. They might,
9 when they're manic, they may go spend a lot of money. They
10 have a very high sex drive. They might -- they're the kind
11 that spend thousands of dollars and go hit every sale and
12 use very poor judgment. But there's a smaller subset that's
13 aggressive.

14 Q Would you, would you agree with me that, I think the
15 latest statistics I saw were somewhere between .4 and 1.5 of
16 the, of the population suffers from bipolar disorders?

17 A That, that sounds about right.

18 Q Of that, we'll just call it two million, two million
19 people I guess is one percent, we'll split the difference,
20 two million people in the United States that suffer from
21 bipolar, what percentage of that two million have committed
22 crimes that are similar to what he has done?

23 A Oh, it would be very very small. I think Mr. -- out of
24 all the death penalty cases I've done, I think Mr. Torres is
25 the only one I've diagnosed with bipolar disorder. So,

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 it's, it's very rare. It's rare.

2 Q So, there's really nothing inherent about that
3 diagnosis that causes someone to go do what he did?

4 A It can. Generally, no. But I think in his case, yes.

5 Q You think his bipolar disorder caused him to do what he
6 did to the Emery's?

7 A No, I think it impaired his capacity. It was one of
8 the other -- it was one of the factors. I think if you take
9 his nature, he's been aggressive. Sometimes by choice. You
10 take his mood disorder, which we know in him is associated
11 with severe irritability, and I'll give you an example.

12 When you have mood disorders, you become, can become
13 irritable. For example, you can have a parent, a mother
14 that never spans her child, and then she gets depressed and
15 gets irritable, and she spans her child. And so, you can
16 have irritability and aggression with mood disorders, and
17 his is more severe than the typical person with bipolar
18 disorder just because he's got family history and such an
19 early age of onset.

20 So, for him, he's probably a little bit different. But
21 overall, you're correct. There's, you know, if somebody has
22 a diagnosis of bipolar disorder, you would not expect them
23 to murder two people and rape someone. I mean I've seen,
24 I've seen a lot of sex crimes that are the result of bipolar
25 disorder and some murders. But not of this magnitude.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 Q Well, you raised two interesting points. He managed to
2 make it to age 27. He had it when he was three, and he
3 managed to make it to age 27 with a bipolar disorder, and he
4 never used a hammer on anyone else?

5 A That's correct.

6 Q He didn't rape anyone else?

7 A That's correct.

8 Q And it is impossible to strip out the methamphetamine
9 and see what the bipolar disorder alone would of done?

10 A That's correct. That's absolutely correct. I don't
11 think anybody -- and also the Clonopin and the alcohol, all,
12 all of those things. And then, and then the fact that he
13 was in an argument with somebody over -- you know, he was
14 also involved in some external stressors. That's correct.
15 I don't think anybody could do that. But it certainly
16 contributed and it was one of the conditions that impaired
17 his capacity that night.

18 Q All right. I want to move to anxiety disorder.

19 There's nothing about that diagnosis that leads,
20 causes, or forces someone to do any of the crimes that he's
21 committed?

22 A Not, not for him. Not on that night, no. There's,
23 there's -- you can have people with anxiety disorders that
24 will commit crimes, but it didn't relate to him on that
25 night.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 Q His crimes, the genre of his crimes range from personal
2 violence against a man?

3 A Correct.

4 Q Sexual violence against a woman?

5 A Correct.

6 Q Property violence by stealing?

7 A Correct.

8 Q Deceitfulness in his interactions with others, and
9 that's all within a two hour time period?

10 A Correct.

11 Q His criminal conduct in that two hour range period, for
12 the most part, ran the entire gamut of the criminal
13 spectrum?

14 A I think that's very fair to say.

15 Q All right. Intermittent Explosive Disorder --

16 A Yes.

17 Q -- I noticed that you diagnosed that by history?

18 A Correct.

19 Q But I also noticed, I think in your report, that you
20 don't really think he meets that diagnosis right now?

21 A He could. But I think bipolar disorder better accounts
22 for what's going on. If you look at the diagnostic criteria
23 for Intermittent Explosive Disorder he meets it. But one of
24 the things it says if it's better accounted for by a mood
25 disorder, which is much more common.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 Q You have---

2 A I've never diagnosed, I've never diagnosed that. He
3 does have some of the symptoms. He's had the abnormal EEG's
4 in the past, which you can see with that. But I think
5 bipolar disorder better clinically fits what his course of
6 illness has been.

7 Q He refused Doctor Brawley's attempts at a, for lack of
8 a, for want of a better word, brain scan or what did she
9 want to perform on him?

10 A No, Doctor Brawley -- he cooperated with Doctor Self,
11 the neurologist. Doctor Self wanted to run the EEG, which
12 is a brain wave test. He's had two that have been somewhat
13 abnormal and he refused that. That's correct.

14 Q All right. But Doctor Brawley found no evidence of
15 organic brain damage at all?

16 A That's correct.

17 Q All right.

18 A That's correct.

19 Q Before we leave Intermittent Explosive Disorder, you
20 correct me again if I'm wrong, it's a failure to resist
21 aggressive impulses and the aggressiveness is out of
22 proportion to the provocation?

23 A That's exactly right.

24 Q But there's nothing the Emery's did to provoke him.

25 A Not at all. Not that I know of. Mr., Mr. Torres, I

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 tried to -- he, he doesn't have a good memory for that
2 night, and he's not able to give me a lot of details. He
3 remembers being in the fight with Chuck Emery, but he
4 doesn't give a lot of details. He says he has no memory of
5 that. So, it's hard to get his account. But as far as I
6 know, I don't think he had any altercation with them.

7 Q Does he remember being in their house a couple of hours
8 before he killed them?

9 A He didn't tell me that.

10 Q Does he remember threatening to kill them a couple of
11 hours before he did?

12 A He didn't tell me that.

13 Q And interestingly enough, others had provoked him that
14 day?

15 A Many.

16 Q And he didn't do anything to any of them?

17 He didn't do anything to Chuck Emery?

18 A well, I believe they had---

19 Q Certainly didn't hit him with a hammer?

20 A No, he didn't hit him with a hammer. I think they had
21 an altercation. I think he also broke a glass bottle when
22 he was in an argument with one of his friends. There was
23 some escalating. He was getting more and more irritable and
24 aggravated. He called a number of people and cursed them
25 out. He threatened them. You could see his behavior

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 escalating throughout the day. But you're right, he
2 certainly didn't use, other than I guess the broken
3 bottle---

4 Q With Jonathan Howard---

5 A ---in the altercation.

6 Q With -- Jonathan Howard and he had an altercation?

7 A Correct.

8 Q Chris Morgan took him home from Burger King. He worked
9 that night.

10 A Correct.

11 Q Any of the people who theoretically could of provoked
12 him, he didn't do anything to them. He didn't commit crimes
13 against them. This was a couple that did not provoke him.

14 A As far as I know, there is no evidence at all. In
15 fact, I think, I think he had gotten along quite well with
16 them. There was no evidence that I knew of that he was
17 upset with them.

18 Q All right. Last bit before we leave Intermittent
19 Explosive Disorder, and, again, I'm gonna quote. You tell
20 me if I'm wrong. "A diagnosis of Intermittent Explosive
21 Disorder is made only after other mental disorders that
22 might account for episodes of aggressive behavior have been
23 ruled out."

24 A That's correct.

25 Q Is that fair?

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 A Yes, sir.

2 Q All right.

3 A That's, that's why I diagnosed him with bipolar. I
4 think that better fits his diagnosis than Intermittent.
5 That's why I put my -- by history, it just means other
6 people have diagnosed it. I'm not making that diagnosis
7 right now. But it means that it's been made enough that you
8 acknowledge it.

9 Q All right.

10 A Correct.

11 Q A diagnosis of Intermittent Explosive Disorder is made
12 only after other mental disorders that might account for
13 episodes of aggressive behavior have been ruled out, and in
14 the, the parenthesis right after that comment in the DSM,
15 the very next diagnosis, is something else you diagnosed him
16 with. An---

17 A Yes.

18 Q Antisocial personality disorder.

19 A Correct.

20 Q The next one's not bipolar?

21 A Correct.

22 Q It is Antisocial Personality Disorder.

23 A Correct.

24 Q And that is characterized by a pervasive pattern of
25 disrespect for others.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 A Yes.

2 Q A violation of the rights of others?

3 A Yes.

4 Q It starts at childhood?

5 A Yes.

6 Q And you found ample evidence to support that?

7 A Yes.

8 Q It's sometimes referred to, and this is not a
9 pejorative term, I think it is actually in the book,
10 sociopathic.

11 A It's -- it use to be in the book. They've changed that
12 now. But that's right. Lay people call it sociopathy.

13 Q It was in the DSM-4.

14 A Correct.

15 Q There may be a more recent DSM than four.

16 A That's correct. It's the TR.

17 Q Okay. But even clinicians refer to it as sociopathic?

18 A Yes.

19 Q And not in a pejorative word.

20 A Correct.

21 Q Okay. There's also an element of deceit and
22 manipulation?

23 A Yes.

24 Q People with this disorder, disorder frequently
25 disregard the wishes, rights, and feelings of others?

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

- 1 A Yes.
- 2 Q They repeatedly lie?
- 3 A Yes.
- 4 Q They con others?
- 5 A Yes.
- 6 Q And they malingering?
- 7 A Yes.
- 8 Q What is malingering?
- 9 A Malingering means feigning symptoms of mental illness,
10 trying to get away with something by faking.
- 11 Q They lack empathy and tend to be callous, cynical, and
12 contemptuous of other people?
- 13 A Yes.
- 14 Q And interestingly, antisocial personality disorder
15 includes a lack of remorse.
- 16 A It can, yes.
- 17 Q Whereas bipolar, the DSM says many show remorse, with
18 antisocial personality disorder, lack of remorse is actually
19 an element of that?
- 20 A Correct.
- 21 Q Which is why, presumably, you diagnosed him with
22 antisocial personality disorder?
- 23 I know you did both.
- 24 A Right.
- 25 Q But you did diagnose him with that?

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 A Absolutely. In the inter-episodes, even when he's not
2 under the mood disorder, he's had patterns of disobeying the
3 law. He's stolen. He's broken into things. He certainly
4 has not always told the truth. I think there's ample
5 evidence to make that diagnosis as well.

6 Q Attention Deficit Disorder, we'll go through these
7 hurriedly, that has nothing to do with committing crimes of
8 this magnitude?

9 A No.

10 Q And in terms of legal stressors, financial stressors,
11 interpersonal stressors, we all have those?

12 A Correct.

13 Q All right. He told you he had no memory of raping Ann
14 Emery?

15 A That's correct.

16 Q That it was like a dream?

17 A Yes.

18 Q He admitted to you that he was on methamphetamine?

19 A Yes.

20 Q And there is no way to strip out the methamphetamine
21 and see what the mental disorders would have done had they
22 not be, been exacerbated by methamphetamine?

23 A That's correct.

24 Q You said that he would not have access to drugs or
25 alcohol in prison.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 A Not those ones. Not methamphetamine. There's some,
2 there's some drugs in the Department of Corrections. Some
3 of them in the yard. People can get marijuana sometimes,
4 and they -- there's a lot of medication. In fact, Mr.
5 Torres is taking some of those. There's a medication called
6 Seroquel, which is one of the antipsychotic medications.
7 It's actually one of the treatments for bipolar disorder.
8 Seroquel is a medicine the inmates will -- it sells for \$5 a
9 pill on the yard because it helps you sleep well.

10 So, you can get -- you can certainly get some drugs.
11 But I don't -- I've not heard of anyone getting meth. They
12 better not be getting methamphetamine there. But I haven't
13 heard of anyone on the yard with that kind of drug.

14 Q But he's not currently being prescribed medicines that,
15 at California avenue or the D.O.C.?

16 A That's correct. Not that I'm aware of.

17 Q But yet, in your report, you made note that he himself
18 admits he's taking drugs?

19 A That's correct. Well---

20 Q So, he had to get them from some other source?

21 A Correct.

22 Q All right. I'm not gonna show you the pictures.

23 A Thank you.

24 Q I'm doing it for both of us.

25 I just want to ask you one more time, there is nothing

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 about what happened on May the 11th, 2007, that he did not
2 have the ability to not do?

3 A Correct. Legally, correct.

4 Q Thank you for your patience.

5 A You're welcome.

6 Q I'm almost through.

7 You said his prognosis in the future was good?

8 A Yes, with, with medication. And in the Department of
9 Corrections he's allowed to refuse medications to a point.
10 But if gets to a point that he's dangerous to himself or
11 others, actually in the Department of Corrections he can be
12 forced to take medications. I do that all the time. If
13 patients refuse---

14 Q They go before a judge and it's got to be order?

15 A No, in South Carolina, it's substituted judgment. What
16 we do in the Department of Corrections is he would be
17 committed to probate, but two doctors just have to say that
18 he's in need of medication and he can be forcibly medicated.

19 Q Have you seen the jail reports where he has spit out
20 the medicine that he was given?

21 A I would not be surprised.

22 Q You would agree with me that he is gonna be touched
23 almost every single day in the Department of Corrections
24 without his consent?

25 A Depending what he does, certainly he would be subject

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 to searches and, and being pat down---

2 Q Pat down.

3 A ---and things like that if he goes off campus. There's
4 days that you may or may not be touched. But certainly he
5 would be subject to the same rules that any other inmate
6 has.

7 Q Did you see the video from the jail Sunday?

8 A Yes.

9 Q Would you agree with me that that detention officer was
10 as polite as you can possibly be in his initial dealings
11 with this defendant?

12 A Sure.

13 Q Would you agree with me that Mr. Torres, on at least
14 different occasions, said do not touch me?

15 A Correct.

16 Q He had been patted down every other night for the
17 previous eight nights, and for some reason he just decided
18 Sunday night he wasn't gonna be patted down?

19 A Well, I believe he'd been found guilty that night. He
20 was probably a little more agitated -- that was a pretty
21 significant event. He was probably more agitated than he
22 would be on any other night.

23 Q He may of been.

24 A That's a pretty important night.

25 Q That's fair. He may of been.

Donna Schwartz-Watts - Cross-examination
By Solicitor Gowdy

1 But you will agree with me he failed to comply with the
2 commands of a structured environment that night?

3 A Absolutely. I think he tried some. I saw, you know,
4 he tried to take off his shoes and socks and showed him he
5 wasn't hiding anything. But when they touched him, he did
6 refuse to be patted down.

7 Q All right. Last question.

8 He's done well at times?

9 A Yes.

10 Q He's done horrific things at times?

11 A Absolutely.

12 Q And there's nothing about those horrific things that he
13 did not appreciate the wrongfulness of or have the capacity
14 not to do?

15 A That's correct.

16 Q Thank you, ma'am.

17 THE COURT: Redirect?

18 MR. ALLEN: No, Your Honor.

19 THE COURT: You wish for this witness to be excused?

20 MR. ALLEN: Please.

21 THE COURT: Any objection from the State?

22 SOLICITOR GOWDY: No, sir, Your Honor. I have no
23 objections if he wanted her to be excused.

24 THE COURT: All right. Ma'am, you may step down.

25 WITNESS: Thank you.

1 THE COURT: You're free to go. Thank you very much.
2 Ask the attorneys to approach briefly.

3 (Whereupon, a bench conference was held out of the
4 hearing of the jury at this time.)

5 THE COURT: All right. Ladies and gentlemen of the
6 jury, there's a matter I've got to take up with the
7 attorneys outside of your hearing. We've been going for an
8 hour and a half since lunch. It's a good time for you to
9 stretch your legs. So, we're gonna take your break right
10 now while we take care of those things.

11 And I'll give you the same instructions, instructions
12 I've given you for days now when you leave the courtroom.
13 Don't begin any discussions concerning the case. Don't
14 discuss the case among yourselves and don't allow anyone to
15 do that with you. And, of course, should anyone try to talk
16 to you about the case, please report that to me.

17 You may retire to the jury room.

18 I'd ask that everyone remain seated.

19 (Whereupon, the following takes place outside the
20 presence of the jury.)

21 THE COURT: All right. You indicated, during our bench
22 conference, that perhaps the next witness would involve the
23 charts that we discussed earlier.

24 Is that right, Mr. Allen?

25 MR. ALLEN: Yes, Your Honor.

1 THE COURT: Let's go ahead and take whatever proffer
2 you wish to offer on those, that, particularly the chart
3 that's been objected to.

4 So, do you want to call that particular witness at this
5 time?

6 MR. ALLEN: Yes, Your Honor.

7 Marti Loring.

8 THE COURT: Ma'am, come forward to the witness stand to
9 my right to be sworn please.

10 WITNESS: Yes, sir.

11 MARTI LORING, being first duly
12 sworn, testified as follows:

13 THE COURT: All right, ma'am. Please have a seat in
14 the witness stand.

15 WITNESS: Thank you, Your Honor.

16 THE COURT: And once you're seated I'd ask that you
17 state your name for the record.

18 WITNESS: Yes, sir.

19 Doctor Marti Loring.

20 THE COURT: Mr. Allen, your witness.

21 MR. ALLEN: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. ALLEN:

24 Q Doctor Loring, I'm gonna ask you a few questions
25 concerning the charts and things that you brought, but I

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By Mr. Allen

1 first want to ask you can you give us your educational
2 background please?

3 A Certainly.

4 I went to Vassar College in Poughkeepsie, New York for
5 my undergraduate degree where I majored in psychology. Then
6 I went on to Brynmore College Graduate School, Social work,
7 and Social Research. Got my social work degree. And then I
8 was out in the field for a while and went to Emory
9 University in Atlanta where I got my Doctorate in Sociology
10 where I majored in social psychology.

11 Q Okay. And also how have you been employed?

12 A I'm director of the Center for Mental Health and Human
13 Development in Atlanta, Georgia at this time.

14 Q How long have you held that position?

15 A Since 1979.

16 Q Okay. And can you tell me a little bit about what the
17 center does?

18 A Yes, sir.

19 Of course, we do evaluations. Sometimes we're asked to
20 share information in Court. We do research where we look at
21 areas of trauma, abuse, leadership, and explore ways to help
22 people, what's going on in those areas, what causes people
23 to be traumatized, how trauma affects people both when
24 they're a child and as they grow older. We do training
25 across the country in areas of, all areas really related to

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1 trauma and abuse. And we do some media education to help
2 people understand about, about trauma and abuse.

3 Q Okay. And as a part of this, have you served the
4 police in courts in the area of trauma and abuse?

5 A I beg your pardon, sir?

6 Q Have you served the police in courts in the area of
7 trauma and abuse?

8 A Yes, sir, I have.

9 Q Okay. Have you been, have you been qualified to
10 testify in other Courts?

11 A Yes, sir, I have.

12 Q In what areas of expertise?

13 A Yes, sir, battered person syndrome, development,
14 trauma, abuse, and forensic interviewing, and social
15 historian.

16 Q And as part of your areas, do you also perform
17 psychosocial assessments?

18 A Yes, sir, I do.

19 Q And do you also create charts or do you create gen,
20 genograms specifically?

21 A Yes, sir, I do create genograms.

22 Q And what kind of -- I mean tell us, in general, what a
23 genogram is and how it's used.

24 A A genogram is like a family tree. It's meant for
25 people who are being a social historian, like I sometimes

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By Mr. Allen

1 am, to show not only who the relatives of the individual
2 whom I'm evaluating, but what important information can be
3 shown about these relatives. So, for example, if there's
4 certain kinds of problems or illnesses or issues that are
5 found not just in the one person whom I've evaluated, but in
6 the whole family, other people within the family, we find
7 it's important to show that because a lot of times a person
8 will learn from what he or she sees, and will pick up on
9 certain kinds of behavior problems that are seen in other
10 members of the family.

11 Sometimes other members of the family kind of inflict
12 or impose the behavior problems on the person who, who we're
13 evaluating. So, it's important to show that.

14 And thirdly, often there are types of problems that
15 occur within whole families. An example would be you find
16 alcoholism or mood disorders often in a number of people
17 within that family. And still another purpose for the
18 genogram is you can show relationships between the person
19 you're evaluating and other members of the family can show
20 if there's been physical abuse, for example, or abandonment
21 so that when you look at the genogram, you see, using the
22 colors, and the symbols, what are the, what are the problems
23 in the, in the family, what are the tendencies, what kind of
24 relationships did the person you're evaluating have with
25 different members of the family, and, and they with him or

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1 her. It's like a big snapshot to show the history of an
2 individual's life.

3 Q And is this a tool that's used by people in your area?

4 A Yes, sir, most people -- excuse me. Most people who
5 are doing social histories will create and share a genogram
6 in order to be thorough.

7 Q Okay. And again, we're talking your area concerning
8 sociology, psychosocial assessments as a life historian in
9 death penalty cases, is that right?

10 A Well, yes, sir, that is correct.

11 Q Okay. And what is the methodology that's used for
12 creating a genogram?

13 A Well, there are a number of methods. One is to
14 interview numerous family members and get information from
15 them, often individually, to see if there's any discrepancy
16 and sometimes together to see how they interact. Then it's
17 helpful to review records to, to learn from many others,
18 through the years, what they have observed, diagnosed, and
19 found about the individual. You incorporate that into the
20 genogram as well.

21 It's sometimes useful to check with other professionals
22 like a family physician or a mental health provider to make
23 sure that the information that you're presenting you have
24 more than one person usually sharing that kind of
25 information with you about different aspects of the person's

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1 life. And it's sometimes useful to find out what other
2 individuals who have interviewed your client have found as
3 well at different points in his or her life or performed
4 tests, that kind of thing.

5 Q And did you follow that methodology in this case?

6 A Yes, sir.

7 Q And did you create a genogram?

8 A Yes, sir.

9 Q And do you have it with you?

10 A Yes, sir.

11 Q Okay. If I may---

12 A Please.

13 Q ---retrieve it.

14 And this has been marked as Defense Exhibit 2 for
15 identification. I'm trying to show it to the Court and to
16 the, the opposing side at the same time.

17 How did you go about creating this?

18 A I reviewed a great deal of records, interviewed some
19 individuals who had met with Tony Torres during earlier
20 parts of his life, interviewed family members, and put this
21 together to try to reflect the family relationships and
22 dynamics and individuals, struggles within the family,
23 individual, people in the family and their behavior
24 problems.

25 Q And is this a, a chart of your opinions or summaries of

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By Mr. Allen

1 your interviews and review of records and other information
2 that you've gathered?

3 A Yes, sir, that is what it is.

4 Q Okay. And does this reflect your opinion of the, the,
5 of Tony Torres' genogram?

6 A Yes, sir, it does.

7 Q And you are trying -- can you show the Court what it is
8 that you're trying to reflect on this genogram?

9 If you need to stand up or something, I, to show the
10 Court or---

11 A I'm, I'm wondering if you'd like me to go through the
12 whole thing?

13 Q If you would please.

14 A Yes, sir.

15 Then I shall stand up in order to be able to point it
16 out to the---

17 Q If you need, if you need to or if you'd like to.

18 A I'd be glad to. Thank you so much.

19 Thank you.

20 Q Make sure that the solicitor can see as well.

21 SOLICITOR GOWDY: It's more important that the judge --
22 if the judge doesn't mind me moving to that there---

23 THE COURT: No, you can come right there. That will be
24 fine.

25 WITNESS: May I get closer?

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By Mr. Allen

1 THE COURT: That's fine. I can read it.

2 WITNESS: Thank you, Your Honor.

3 THE COURT: In fact, there's an easel you can put it
4 on.

5 WITNESS: Thank you so much.

6 Your Honor, here we have Tony Torres, and primarily
7 you'll see squares. I'm talking about men. That's a
8 square. And circles, I'm talking about the women.
9 Sometimes there's a larger square that can even be around
10 the women. But that's to, to indicate some symbol which
11 I'll describe for, to you.

12 where you see yellow, it's alcoholism or alcohol
13 problems.

14 Pink is panic disorder.

15 Green, mentally ill. In this family primarily is
16 depression.

17 A blue is bipolar disorder.

18 Red, violence.

19 And those colors mean to indicate those things. And a
20 little plus indicates drug addiction, struggle with drugs.

21 So, you have Tony Torres who has yellow indicating
22 alcohol problems with a border of blue indicating bipolar
23 disorder. The plus indicates the struggle with drugs.

24 And Your Honor, we have the red indicating some violent
25 acts on his part. And where you see the, the side, that's

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1 white, that indicates a criminal history, judge.

2 Now, going up, you see his biological father, Andy
3 Torres, and his biological mother, Lisa Lamb. So, we have
4 these two, Lisa and Andy, and then coming down you have
5 their son, Tony.

6 THE COURT: What's the significance of the purple
7 zigzag line?

8 WITNESS: Your Honor, this indicates physical abuse by
9 the father, Andy, toward his son, Tony.

10 THE COURT: I didn't see that on your legend. That's
11 the reason I was asking you that.

12 WITNESS: Right.

13 THE COURT: Okay. Go ahead.

14 WITNESS: And the other thing you don't see, Your
15 Honor, is the dotted line separated as such indicates
16 abandonment.

17 THE COURT: Okay.

18 WITNESS: Different types of it.

19 THE COURT: Okay.

20 WITNESS: Shall I continue?

21 THE COURT: I think I've got the gist of it.

22 WITNESS: Thank you, Your Honor.

23 Q And you've interviewed a number of people in connection
24 with this case, is that correct?

25 A Yes, sir.

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- 1 Q Have you interviewed, for example, Andy Torres?
- 2 A Yes, sir.
- 3 Q Okay. And of course, Lisa Lamb?
- 4 A Yes, sir.
- 5 Q Tony Torres?
- 6 A Yes, sir.
- 7 Q And any others connected on here?
- 8 A The brother, F.B., Aunt Donna, Aunt Tammy, Aunt Paula,
- 9 and Aunt Pam, Grandma Glenda, Cousin Amanda, Cousin Jessica,
- 10 and a number of what we call collateral witnesses, people
- 11 who aren't related to the family, but had some contact with
- 12 Tony through the years.
- 13 Q Okay. Of course, you indicated that you've reviewed
- 14 records in connection with Tony's case, is that right?
- 15 A Many records.
- 16 Q Would that include records of Continuum of Care?
- 17 A Yes, sir.
- 18 Q Also mental records, would that---
- 19 A Yes, sir, mental health.
- 20 Q Mental health records, hospitalization records?
- 21 A Yes, sir.
- 22 Q The legal history, history records like the Court
- 23 records and that kind of thing like convictions?
- 24 A Yes, sir.
- 25 Q Okay. Records from the Department of Corrections?

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By Mr. Allen

1 A Yes, sir.

2 Q And the jail?

3 A Yes, sir.

4 Q Okay. And before you make a conclusion, do you, how do
5 you go about verifying a fact upon which you base a
6 conclusion?

7 A Well, I try to verify it with more than one individual,
8 if possible. And when I can talk with a family doctor, as I
9 did with these two young ladies, they gave me permission,
10 then I do that.

11 There's a mistake. This should be Continuum of Care.
12 I apologize.

13 Q Okay. Is this the -- now, the, the, the method that
14 you used in these interviews that you conducted, is that
15 the -- how does that compare with the general methodology
16 accepted in, in your expert, area of expertise in creating a
17 genogram?

18 A That's the way you're suppose to do it.

19 Q I mean is that done by other people in your field?

20 A Yes, sir, it is.

21 Q And you, and you use that same methodology?

22 A Yes, sir, I do.

23 MR. ALLEN: Okay. That would be my showing, Your
24 Honor.

25 THE COURT: All right. Ma'am, you can have a seat back

Marti Loring - Direct examination
By Mr. Allen

1 in the witness stand.

2 WITNESS: Thank you, judge.

3 THE COURT: You want to move that around where she can
4 see it. I've, I've seen it close enough. I know what -- I
5 think I have a good idea of what it says.

6 You may cross-examine on this point.

7 SOLICITOR GOWDY: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY SOLICITOR GOWDY:

10 Q Good afternoon, ma'am.

11 A Hello, sir.

12 Q What evidence do you have that Jessica and Amanda are
13 bipolar?

14 A Yes, sir.

15 The first thing I did was to speak with family members.
16 Particularly their mothers. Jessica---

17 Q Let me, let me ask you a little better question.

18 A Yes, sir.

19 Q All right. What evidence do you have that reaches a, a
20 degree of medical certainty that they are bipolar?

21 A Well, I spoke with their doctor, Doctor McAlhaney.

22 Q All right.

23 A And so---

24 Q And they've both been diagnosed as being bipolar?

25 A Jessica has been diagnosed as bipolar and he felt that

Marti Loring - Cross-examination
By Solicitor Gowdy

1 Amanda was too, but had big anxiety issues. So, he would
2 see them as possibly both being true, but anxiety being the
3 primary diagnosis from Amanda with bipolar issues as well.
4 We're allowed to give more than one diagnosis or make one
5 stronger than the other.

6 Q Well, let me ask -- I guess I shouldn't of started with
7 this.

8 what exactly are you expressing your opinion on?

9 If you're an expert, what is the opinion?

10 A My opinion is that Tony Torres grew up in a family
11 where there were significant problems among other members of
12 his family that affected him greatly. So, that is the
13 opinion. And this is trying to break that opinion down to
14 show you well, what other members of the, of the family had
15 difficulties and how indeed did those difficulties affect
16 young Tony growing up.

17 Q Well, he was not in the home most of the time you would
18 agree, right?

19 I mean he was, he was either in Charleston or he was in
20 Pioneer, Pioneer Ridge or he was in the Hall Institute.

21 Agreed?

22 A Yes, sir, you're absolutely right, at a certain point.
23 At about four years old is when he first started going into
24 hospitals and going into these homes. So, the period up to
25 four years old comes very important in understanding his

Marti Loring - Cross-examination
By Solicitor Gowdy

1 history. In addition to that, when he was in these places
2 that you accurately mentioned, there were issues about him
3 coming home on weekends and holidays. So, he still did have
4 the tying the bond to home and the great desire to come
5 home.

6 Q Well, we'll save that for a second.

7 What does any of that have to do with those two being
8 bipolar, one of whom is not been diagnosed as being bipolar?

9 I mean they weren't alive when he was three years old.

10 A Well, one is diagnosed as thought to have bipolar, but
11 greater anxieties issues, and the other as having bipolar.
12 Yes, sir, you're quite right. And I'm sorry if I didn't
13 explain it well.

14 But within a family, you have certain kinds of problems
15 which are thought by people in the mental health profession
16 to have, some of them have a chemical basis. So, for
17 example, with bipolar, we really wouldn't expect to have one
18 lone person in a large family with a, bipolar disorders. We
19 would expect to be able to look and see other individuals
20 within the family with bipolar and also, as Doctor McAlhaney
21 phrased it, mood disorders cause we often see mood disorders
22 as resting on the chemicals within our body too---

23 THE COURT: Mr. Solicitor, my -- excuse me, ma'am.

24 WITNESS: Certainly.

25 THE COURT: My understanding of the inquiry at this

1 time is -- I'm, I'm looking at Rule 703 and it's the -- it
2 says there that, of course, an expert has the right to base
3 their opinion or inferences on matters which have been made
4 known to the expert before the witness, before this hearing,
5 excuse me, and that those things may not be admissible in
6 evidence, some of the things that they base their opinion
7 on. The question is, is the information of a type that's
8 reasonably relied upon by experts in that particular field
9 in formulating the opinion.

10 So, I guess the question that I'm focusing on is
11 whether or not that particular methodology, methodology is
12 the one that is reasonably relied upon by people within her
13 field. And I -- you seem to be going more toward the weight
14 of the testimony than to whether or not the methodology was
15 correct. So---

16 SOLICITOR GOWDY: well, and I apologize for doing that,
17 Your Honor. I, I guess my first question, and I should of
18 started with what is, what is her opinion because until I
19 know what her opinion is, I don't know whether or not---

20 THE COURT: well, you've asked that question, and I'm,
21 I, I was interested in that answer. But I don't know if we
22 need to get into the, to the weight of that information as
23 opposed to whether or not she is used a proper methodology
24 by people within the field that she's, claims to be an
25 expert in.

1 SOLICITOR GOWDY: Would the Court still allow me to
2 make a 403 argument?

3 THE COURT: Yes, sir. Go ahead. You can.

4 SOLICITOR GOWDY: Well, from a 403 standpoint, we've
5 heard now from there different doctors that he's bipolar.
6 And to, to have a fourth come in is cumulative and, and
7 frankly doesn't need to be proven by a fact that Jessica,
8 Amanda, who on this chart, aren't even related directly to
9 him. I, from a relevant standpoint, I don't know why people
10 he lived with being anxious has anything to do with him.

11 THE COURT: I'll hear from you.

12 Now, he, he -- now the focus is on Rule 403 and that
13 objection is to needless presentation of cumulative
14 evidence, and I suppose that's where we are. That's what
15 that rule talks about.

16 MR. ALLEN: Well, Your Honor, this is secondly in part
17 to demonstrate Tony's life. Also some of the relationships.
18 I also recall the testimony of Doctor Schwartz-Watts and I
19 believe she said that bipolar is, may run in the families or
20 may find it's genetic to that. That's number two.

21 The -- Jessica is related to Mr. Torres. She is the
22 daughter of the sister of his mother. So, this would tend
23 to support Doctor Schwartz-Watts' opinion or her diagnosis
24 and also tends to again show my, my client's life and his
25 family history. And I believe that, under, counsel may

1 state we have the right to put up his life history and
2 that's what we're attempting to do, and I believe that the
3 genogram can be a---

4 THE COURT: All right. And Mr. Solicitor, I'll hear
5 you in response.

6 SOLICITOR GOWDY: Your Honor, only that unless there's
7 been some foundation laid that he had a relationship with
8 them, that, you know, if -- the fact that somebody's a
9 family member, if they were never around them, if they never
10 abused them, and absent some genetic testimony that there's
11 a linkage, I don't see the relevance of a great uncle of
12 being an alcoholic. If that alcoholism didn't result in any
13 harm being done to him, and there's no genetic link, then I
14 don't know the relevance of it.

15 THE COURT: All right. I think I understand the
16 arguments. We're in a break right now. We'll take about a
17 ten minute break. I'll announce my ruling upon my return.

18 Court's in recess for about ten minutes.

19 Everyone remain seated while the defendant retires.

20 (Whereupon, a short recess was taken at this time.)

21 THE COURT: All right. I have reviewed the proposed
22 chart in context with Rule 403 and 705 and I'm gonna allow
23 it to be used by this witness in her testimony. I do note
24 that the diagnosis of bipolar has been already made and
25 placed in the record. However, there was testimony by that

1 witness, Mrs. Schwartz-Watts, that the, that condition is
2 somewhat hereditary. She expects to find it in other
3 members of the family. And the indication on the chart
4 would be that perhaps they're others.

5 Certainly you can cross-examine on the weight and
6 comment on the weight all you like, Mr. Solicitor. That's
7 your prerogative and right. But as far as it being unduly
8 cumulative or not following the proper procedure within the
9 field, I am going to allow it.

10 Anything further before we bring the jury in?

11 MR. ALLEN: Your Honor, if it please the Court.

12 Maybe we should go through---

13 THE COURT: You want to look at the photographs?

14 I know that was an issue. We didn't address that
15 earlier. But---

16 MR. ALLEN: Yes, sir.

17 THE COURT: ---I, I said I'd consider those objections
18 contemporaneously with the introduction of those things.

19 Solicitor, you want to -- I think he may want to
20 discuss that with you. I'll give you a moment to do so.

21 (Pause.)

22 SOLICITOR GOWDY: Your Honor, can Mr. Allen and I
23 approach just for a second?

24 THE COURT: Yes, sir. Please do.

25 (Whereupon, a bench conference was held at this time.)

1 THE COURT: All right. We've had an opportunity to
2 review the photos at the bench.

3 Based on our discussions, I believe you've agreed to
4 withdraw several of the photographs.

5 Can you identify them for me?

6 MR. ALLEN: I have -- Your Honor, they have been
7 previously marked as Defense Exhibit 7, 9, 10, and 15.

8 THE COURT: Okay. Those have been withdrawn and the
9 others I have indicated that I, I don't see a problem with
10 those.

11 Although, have they been offered into evidence at this
12 point in time?

13 MR. ALLEN: They have not been offered into evidence at
14 this time. I would like to -- I mean---

15 THE COURT: Let's, let's do it through her testimony.
16 I had indicated though, at this point in time, I have no
17 problem. Doesn't preclude you from raising any objection
18 that you'd like to put on the record.

19 SOLICITOR GOWDY: Yes, sir.

20 THE COURT: Okay. Now, anything else that we need to
21 go over before we bring the jury in from the State's point
22 of view?

23 SOLICITOR GOWDY: No, sir, Your Honor.

24 THE COURT: From the defendant's point of view?

25 MR. ALLEN: No, Your Honor.

1 THE COURT: Mr. Humphries, bring the jury in.

2 Ma'am, if I can get you to step down. You'll need to
3 be sworn in the presence of the jury. So, if you would step
4 down briefly.

5 WITNESS: Certainly.

6 THE COURT: You can leave your material there.

7 WITNESS: Thank you, Your Honor.

8 THE COURT: You can just have a seat. Just have a seat
9 right back there and then we'll call you when the jury is in
10 the courtroom.

11 WITNESS: Thank you, Your Honor.

12 THE COURT: Mr. -- all right. Mr. Humphries, you may
13 bring the jury in.

14 (Whereupon, the following takes place within the
15 presence of the jury.)

16 THE COURT: All right. The jury has returned to the
17 courtroom.

18 The defense may call its next witness.

19 MR. ALLEN: We call Doctor Marti Loring please.

20 THE COURT: Ma'am, come forward to the witness stand to
21 be sworn.

22 DOCTOR MARTI LORING, being first
23 duly sworn, testified as follows:

24 THE COURT: Ma'am, once you're seated in the witness
25 stand, please state your name for the record.

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By Mr. Allen

1 WITNESS: Yes, sir.

2 Doctor Marti Loring.

3 THE COURT: Mr. Allen, it's your witness.

4 DIRECT EXAMINATION

5 BY MR. ALLEN:

6 Q Doctor Loring, and, and for the record, can you spell
7 your first name -- how do you spell your last name?

8 A M-A-R-T-I.

9 Q Okay. And can you please tell me where you work?

10 A Yes, sir, I work at the Center for Mental Health and
11 Human Development in Atlanta, Georgia.

12 Q And what position do you hold there?

13 A I'm the director of the center.

14 Q And what does that center do?

15 A We're, we're a center where some individuals work with
16 us a, part-time, some full-time, and others in the community
17 come to join us when we have a large project. We, for one
18 thing, respond to community crises like the courthouse
19 shooting in Atlanta a couple of years ago. We go out to
20 help those involved like the deputies with trauma issues.

21 Second thing that I do, and we do at the center, is we
22 do research into areas of trauma and abuse.

23 Thirdly, we do a training and education, education
24 across the country in those same areas, trauma, abuse,
25 social history kinds of trainings, and like that.

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1 And lastly, we do media education. Sometimes I or
2 others will appear on television to try to help people
3 understand what is, what is abuse and trauma, all of that,
4 and how it can affect people at different times of their
5 lives.

6 Q Okay. And have you been qualified in the Courts of
7 South Carolina as an expert?

8 A Yes, sir, I have.

9 Q Okay. And other states?

10 A Yes, sir, several other states.

11 Q What is your education and background please like where
12 you went to school and your principal areas of study?

13 A Yes, sir, I went to undergraduate college up in
14 Poughkeepsie, New York at Vassar College where I majored in
15 psychology. Then I went to just outside of Philadelphia,
16 Brynmore Graduate School of Social Work and Social Research,
17 where I studied sociology, social work, and abuse, and the
18 like. I got a Master's Degree.

19 I was out in the field for a while in agencies working,
20 and then I, I went back after several years to Emory
21 University in Atlanta, Georgia where I got my Ph.D. in
22 Sociology with a Major in Social Psychology. So, I went on
23 to become a clinical sociologist.

24 Q What is a clinical sociologist?

25 A A clinical sociologist is someone who studies not just

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By Mr. Allen

1 the individual, but the, the individual in relation to his
2 or her family. What are the kind of things going on in the
3 family that could affect that individual, what does the
4 individual do that can affect the family.

5 And then also, even broader than the family, what are
6 the culture issues that are going on, what are the different
7 institutions. You know, hospitals, schools, how, how do
8 they affect the individual as well, that kind of thing, for
9 clinical sociologist.

10 Q Have you also conducted studies in life history or in
11 life history to particular individuals?

12 A Yes, sir, I have.

13 Q And have you also made psychosocial assessments?

14 A Yes, sir.

15 Q Can you tell me what that is?

16 A A psychosocial, a psychosocial evaluation is an
17 evaluation of the individual in relationship to the social
18 things going on around him or her like the family and the
19 like. A life history is studying all the things that
20 affected a person during their lives, studying all the
21 documents that are obtained about all the experiences that
22 that person has in their family and school and hospital,
23 whatever. And then interviewing a lot of people too for
24 social history. People who were in the family, who observed
25 the individual, and what we call collateral witnesses. And

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1 that would be people who are not in the family who may of
2 helped the individual at different times in, in the life or
3 observed them. We interview them as well to do a life
4 history.

5 Q Okay. Have you also written books or articles?

6 A Yes, sir.

7 Q And can you tell us in general about your writing?

8 A Well, I've written two books on emotional abuse, which
9 is one area of specialty that I've studied and done research
10 on, and then several articles having to do with how trauma
11 can affect the person growing up, how it can stick with a
12 child long into their adult lives, their experiences with
13 trauma, how it affects them, how abuse affects people,
14 articles about leadership, and articles about hot lines for
15 people who are depressed to call up and get help, articles
16 about people who are battered like battered women. Those
17 are some of the topics that I've covered in the articles
18 I've written and that I've had the pleasure of working with
19 others on, on writing as well.

20 Q Okay. Have you served the various law enforcement
21 agencies and the Courts in areas of say trauma and abuse
22 that you've mentioned?

23 A Yes, sir, we have. I mentioned earlier that we were
24 able to help during the courthouse shootings. The fire
25 department in Atlanta asked us to help. We helped during

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1 the Olympic bombings as well with some of the officials and
2 the family members who had dealt with the, the bombings.
3 We've helped the Court or we've helped train sometimes in
4 for both defenders and prosecutors or solicitors and
5 consulted in various cases.

6 Q What professional organizations do you belong to?

7 A A number of professional organizations including the
8 Academy of Traumatic Stress, the National Association of
9 Social workers and Sociologist, and the, the local
10 organization of social workers. Also the American, the
11 Psychological Association of the Women's Division.

12 MR. ALLEN: Your Honor, at this time I offer Doctor
13 Loring as an expert in the area of clinical sociology,
14 family history, and psychosocial assessment evaluations.

15 THE COURT: Objection?

16 SOLICITOR CRICK: No, sir.

17 THE COURT: Without objection, she'll be received as
18 such.

19 You may proceed.

20 MR. ALLEN: Thank you, Your Honor.

21 Q Doctor Loring, were you asked to conduct a study on the
22 history of Tony Torres?

23 A Yes, sir, I was.

24 Q And can you tell us how do you prepare a social history
25 on an individual such as Tony Torres?

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1 In general, how do you do that?

2 A Well, in general, I reviewed documents about that
3 particular person, and if there's some reason about a
4 relative as well. I interview family members. I also, as I
5 mentioned earlier, interview the collateral witnesses,
6 individuals who aren't in the family, and I certainly spend
7 time interviewing the, the person himself or herself, the
8 individual whom I'm preparing the history about.

9 I think that pretty much covers it. The documents, the
10 individual himself or herself, family members, collateral
11 witnesses.

12 I look at pictures too. I try to get pictures from the
13 family and then I talk with them about what the pictures,
14 they think the pictures portray, and I get an idea of how
15 old was the person at these different times. And as I put
16 together a time line of what was going on during different
17 periods of the individual's life, I look to see whether
18 they're pictures that help understand, help demonstrate, and
19 get a feel for how the person looked and was at that time.

20 Q Okay. And did you do that in this case?

21 A Yes, sir, I did.

22 Q Okay. You looked, you looked at a variety of documents
23 and interviewed a number of people?

24 A Yes, sir, I did.

25 Q Okay. And what -- in, in discussing the, the social

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1 history of Tony Torres, you were taking it from what point
2 in his life to or did you end at a particular point or do
3 you take it up all the way to today or what do you do?

4 A I take it to, from before they were born, maybe while
5 their mom was pregnant with them, for example, up until a
6 period of time prior to some incident that has occurred,
7 sometimes a tragedy, in which another professional takes up
8 the study at that point rather than myself.

9 Q And in this case, you were asked to study him from the
10 beginning to, up to May 11th of 2007?

11 A Basically, yes, sir. Although there was another
12 professional who took up the time immediately preceding just
13 before May 11th.

14 Q Okay. So, not quite to May 11th then.

15 Is that what you're saying?

16 A That is correct, sir.

17 Q Okay. Thank you.

18 A You're welcome.

19 Q And did you prepare anything today as far as a, charts?

20 A Yes, sir, I did.

21 Q What, and what did you prepare?

22 A I prepared a, three charts which, which was our
23 genogram, a family tree, a time line, and a chart that
24 illustrates something that's discussed in the time line, and
25 then I also prepared several pictures, had them enlarged to

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1 be easier for me to show.

2 Q Okay. Now, before I get to that part, I mean what
3 types of reports or documents did you review in this case?

4 A I reviewed a, police records, Continuum of Care
5 records, which was the organization that help guide the
6 different kinds of treatment which Tony Torres had, hospital
7 records of his treatment, and I'm not gonna list them. I'll
8 list them out if you wish.

9 Q No, I mean in general.

10 A In general, yes, sir.

11 Parole records, SCDC records, school educational
12 records. Excuse me. I don't want to leave anything out.

13 (Pause.)

14 A Records from the various homes that he was in, group
15 homes, and I think I may of mentioned mental health records,
16 psychiatric records from hospitals and treatment facilities,
17 out-patient treatment facilities. And I reviewed records of
18 his grandmother's hospitalization. And those are the
19 primary records that I reviewed.

20 Q Okay. And did you, did you interview a number of
21 people in connection with this case?

22 A Yes, sir, I did.

23 Q And those people include, you don't have to list
24 everybody necessarily, but the primary people?

25 A I reviewed his cousin, Jaharra Torres, his father's

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1 mother, Andy Torres, his mom, Lisa, aunts, uncles, his
2 grandmother, Glenda, and his cousins, Jessica and Amanda, in
3 terms of family members. And then I interviewed some
4 collateral witnesses. That is non-related people who I felt
5 could help me. And that, that included Nakita Harrison, one
6 of his former case managers, Jonathan Howard, a friend of
7 his, John Shackelford, who is the former case manager.
8 Those are primarily the people who I interviewed.

9 Q Okay. Now -- and I believe one of the charts you said
10 that you created for this case was a genogram?

11 A Yes, sir.

12 Q What is a genogram?

13 A A genogram is like a big family tree. It's meant to
14 show important individual family members in the person's
15 life, and then it's, it's meant to show the kinds of
16 problems that those people had because sometimes we find
17 that the people we interview share similar problems as other
18 members of their family or affected by problems of members
19 of their family. And yes, sir, that's a part of what a
20 genogram does. It shows sometimes the relationships between
21 people in the families, for example, when there's abuse.
22 There's a line that shows that.

23 Q Okay. And what is the methodology if -- I mean I don't
24 want you to go through everything you've reviewed.

25 But what is, in general, is the methodology for

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1 creating the genogram?

2 A To make a genogram, in general, you review all the
3 documents that you can have to show the history you know,
4 and when there's a family member whose documents you should
5 review, you try to do that. If not, perhaps talk with
6 someone who is involved with them at the time. For a
7 genogram, you interview family members, collateral
8 witnesses, and the individual himself or herself to try to
9 come up with an accurate kind of photo, a snapshot of their
10 lives, the problems with people in their lives, and the
11 relationships they had with those people.

12 Q Do you, do you rely on any one source for any amount of
13 information that's located on the genogram?

14 A No, sir, you try to have more than one source.

15 Q And why does the methodology require more than one
16 source?

17 A Well, whenever possible, if you can hear from family
18 members and like a doctor as a collateral witness and see
19 records, just all that you can bring to bare help with the,
20 the information that you're trying to put together on the
21 chart.

22 Q Okay. Now, so, you followed that methodology in this
23 case?

24 A Yes, sir.

25 Q Okay. And I am gonna first show you, show you

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1 Defendant's Exhibit 2 -- thank you.

2 Defendant's Exhibit 2, this is the -- is this the
3 genogram that you prepared in connection with this case?

4 A Yes, sir.

5 Q Using the methodology that you've previously outlined?

6 A Yes, sir.

7 MR. ALLEN: At this time, Your Honor, we offer into
8 evidence Defense Exhibit 2.

9 THE COURT: Subject to previous objections?

10 SOLICITOR CRICK: Yes, sir.

11 THE COURT: It will be admitted then.

12 MR. ALLEN: Thank you.

13 (Whereupon, Defendant's Exhibit No. 2 was received into
14 evidence at this time.)

15 MR. ALLEN: And permission to publish to the jury?

16 THE COURT: You may do so.

17 Q Doctor Loring, if -- could you step down here and I
18 want to try to set up an easel.

19 (Witness comes down from the stand.)

20 Q If you would, please explain this genogram, if you
21 would.

22 WITNESS: Please excuse my back, Your Honor.

23 THE COURT: That's fine. Go right ahead.

24 Q If you would, explain this genogram please.

25 A I'm wondering if you, you-all can see this properly.

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1 (Jurors nod affirmatively.)

2 A Okay. Where there's a small box, it's meant to be a, a
3 man, and where there's a circle, it's meant to be a woman.
4 Sometimes you'll see that kind of a box over the circle, and
5 that's meant to show you what I'm gonna explain, something
6 about that person.

7 So, you have these symbols and these lines are meant to
8 show the relationship between people, which I'll show you
9 also. And then these lines are meant to show you a problem
10 in the relationship, which I'll explain to you.

11 Now, in this key, and I'll certainly go back to it, but
12 it explains that wherever you see yellow, you see an
13 alcoholic problem. So, for example, there you see an
14 alcoholic problem.

15 where you see pink outlined like that, you'll see a
16 panic disorder.

17 where you see green, you'll see mental illness.
18 Primarily depression in this family.

19 Blue, there would be a blue outline or right here, that
20 would be bipolar disorder.

21 Red indicates violence.

22 And that little plus like that, that indicates a drug
23 problem or drug addiction.

24 And where you see the little bit of square left white,
25 that means there's also a history of, a criminal history.

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1 So, if -- and I apologize. That should be Continuum of
2 Care right here. Excuse me.

3 So, we'll start off, this is Tony Torres and you, you
4 see immediately the yellow indicating the alcoholic problem.
5 You see the plus indicating a drug problem. See the red
6 indicating a history of violence. 1980, his birthdate. You
7 see the white there indicating a criminal history. And you
8 see the blue outlined indicating bipolar disorder.

9 Now, Tony's dad, biological dad, is Andy, and his
10 biological mom is Lisa. So, you have Lisa and Andy, and
11 then they're together, and then down here comes Tony.

12 Andy, his biological father, you see the yellow
13 indicating the alcohol problem, and this box around him
14 really isn't meant to indicate anything. It just hacked --
15 the program put it there to indicate, to hold the yellow.
16 So, then you have the red indicating violence, and you have
17 the plus indicating drug struggles, drug issues.

18 Some of the violence was toward Tony. So, that's where
19 that squiggly line is, physical abuse. We'll talk more
20 about that on the time line.

21 And then for Andy, there's also physical abuse toward
22 Lisa, Tony's mom, both prior to his birth -- primarily prior
23 to his birth. But some afterwards.

24 Now, this dotted red line with the separation indicates
25 abandonment. So, after the separation between the two of

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1 them, Andy and Lisa, for all purposes, Andy abandoned Tony.
2 There were, you know, several visits and that was the end of
3 it.

4 Also, abandoning Tony, since we're on the subject of
5 abandonment, if we go up like this, we have his grandfather,
6 Frank. That would be Lisa's father. So, Grandpa Frank just
7 didn't care for Tony because of Tony's Hispanic origin with
8 Andy. So, he abandoned him for all intensive purposes,
9 Grandpa Frank, which is Lisa's dad.

10 And I know we have the line of abandonment going up to
11 his mom, Lisa, who was overwhelmed with the person she later
12 married, which is Eddie. She later married Eddie after she
13 separated from Andy. Eddie was an alcoholic.

14 So, Lisa was trying to cope with an alcoholic husband,
15 and she was trying to cope with a mentally ill mother,
16 Grandma Glenda, was hospitalized on, with a mental illness,
17 had electroshock treatments for some of the depression. So,
18 because Lisa was struggling with her mentally ill
19 grandmother, and with an alcoholic husband, and a full-time
20 job, and her own struggles with Tony, it got to the point
21 where she just didn't have him home and didn't participate
22 in the family therapy sessions she was asked to as one would
23 of hoped.

24 And then Lisa's brother, who is F.B., was very close to
25 Tony up until Tony was about five, and then he developed a

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1 family of his own and got, had a job out of town that he
2 went to, and he just didn't have much more to do with Tony
3 at that point. So, you can see that Tony experienced
4 abandonment with his mom, his dad, his particularly close
5 Uncle F.B., and his Grandpa Frank.

6 I didn't get a lot of history on his father's Andy side
7 of the family because of the rejection of Andy toward Tony
8 and Andy really didn't want to participate in this. I did
9 catch him long enough to have, have a brief talk. But I, I
10 asked for, but was not granted the opportunity to get as
11 much history as I would of liked to have or I am aware, from
12 family reports, in that Andy agreed that his brother, Tito,
13 was, you see the green, the mental illness, primarily
14 depression here, he was depressed and he hung himself, and
15 it was successful. He died.

16 Now -- so, I tried to include what I knew of them. But
17 I'm sorry. I couldn't get more.

18 Now, going, going over this, we have, we have
19 Grandfather Frank and we have Grandma Glenda. And again, as
20 I said, Grandma Glenda did receive psychiatric treatment for
21 her mental illness. It was thought to be schizophrenic and
22 others thought it as depression. And her -- Glenda's
23 brother, grandma, Glenda's brother, which will be like
24 Tony's great uncle I think, was said by family members,
25 several family members, to have been diagnosed with bipolar

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1 disorder as well. And you can see you -- you begin to see
2 the different blue boxes. We do often find that bipolar
3 runs in families as it is inherited is the thought.

4 Now, we have Lisa, Tony's mom, Lisa, her sisters, and
5 we have in pink, which is struggling with panic disorders,
6 Tony's Aunt Donna, Aunt Tammy, and Aunt Paula. And then we
7 have Aunt Pam outlined in green because of her depression.
8 And coming down this way, we have Aunt Pam's daughter,
9 Amanda, and Aunt Tammy's daughter, Jessica, and Doctor
10 McAlhaney indicated both have very, when I talked with them,
11 very high anxiety, and then there's thought to be bipolar,
12 but anxiety was so large that's a primary diagnosis,
13 according to the doctor, Jessica's primary diagnosis is
14 bipolar.

15 Again, this is to be Continuum of Care. It should say
16 Continuum of Care. And this is the agency that connected
17 with Tony when he was a couple of years old and stayed with
18 him really through around 17 years old. So, I put that on
19 the family chart because I talked to three people who were
20 involved in that organization who were case managers and
21 worked with Tony and it was, it was a very big influence in
22 his life.

23 And going right down, that box is psychiatric treatment
24 and Community of Care would help arrange the psychiatric
25 treatment. And the psychiatric diagnoses were suppose to

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1 get back to the Continuum of Care workers so that the
2 Continuum of Care case managers could properly treat and
3 help Tony.

4 Unfortunately, the two things that happened, as you can
5 see by the question mark on the chart, is, the first thing,
6 the psychiatric diagnoses kept changing. You'd go to one
7 place and you have one diagnosis. You'll see more of that
8 on the time line. He'd go to another place and have another
9 diagnosis. And they kept changing, which made a difference,
10 and you'll see in a few moments how that would of made a
11 difference.

12 And the other thing that was quite unfortunate is at
13 least two of the three community care workers, that is the
14 people who were at the group homes, two of the three weren't
15 aware of the psychiatric diagnosis at the time that they
16 were helping Tony, which would of made it quite difficult
17 for them to sort of adjust what they were doing to the
18 person they were helping because you're really suppose to
19 help people differently according to what's wrong with them,
20 and you'll see that in a few moments.

21 So, that's what we call a genogram, which is sort of a
22 mental health family tree if you will. And, and where you
23 see an X, like over here, the person has passed away. And,
24 and there you have it.

25 Thank you.

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1 (Witness returns to the stand.)

2 Q Did you also create a, a time line in connection with
3 this case?

4 A Yes, sir, I did.

5 Q Okay. And I'm showing you Defense Exhibit 3, and can
6 you tell me what this is?

7 A That is the time line of, for the life of Tony Torres.

8 Q Okay. And what methodology do you use in creating a, a
9 time line?

10 A I review extensive records. There's a large, a large
11 number of records in this case. I also interview family
12 members and collateral resources in order to put together an
13 accurate time line.

14 Q Is this similar to the methodology that's used in
15 creating a genogram?

16 A Yes, sir, it is.

17 Q And again, do you use it, like I say, this one source
18 for any particular entry or---

19 A Well, sir -- no, sir, not -- usually at, in this case,
20 I had more than one source for the entries. I'm not certain
21 if there was one entry that could of had just one source,
22 one -- but for the most part, there were many records and
23 many people to interview in this case. For, for the most
24 part, I had more than one source.

25 Q Is this methodology typically used in creating time

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1 lines in this area of doing psychosocial assessments, family
2 and life histories?

3 A Yes, sir.

4 Q Okay. And that's the, and that's the methodology you
5 followed in creating Defense Exhibit 3, the time line in
6 this case?

7 A Yes, sir.

8 MR. ALLEN: Okay. And we offer this into evidence as
9 Defense Exhibit 3.

10 THE COURT: Without objection?

11 SOLICITOR CRICK: Yes, sir.

12 THE COURT: All right. It will be admitted.

13 (Whereupon, Defendant's Exhibit No. 3 was received into
14 evidence at this time.)

15 MR. ALLEN: And permission to publish to the jury?

16 THE COURT: You may do so.

17 Q Okay. Doctor Loring, if you would, step over here. If
18 I set this up there for you.

19 Can you---

20 A Sir, may I bring this as well?

21 Q Okay. Well, let's get this into evidence first then.

22 A Thank you.

23 Q I'm gonna show you Defense Exhibit 4.

24 Can you tell me what this is?

25 A Yes, sir, that is a listing of the various living

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1 situations in the life of Tony Torres, group homes,
2 psychiatric hospitals.

3 Q And you created this listing from what?

4 A From the documents and from the interviews and
5 collateral witnesses.

6 MR. ALLEN: Okay. We offer Defense Exhibit 4 into
7 evidence at this time.

8 THE COURT: Any objection?

9 SOLICITOR CRICK: No, sir.

10 THE COURT: Without objection, it's admitted.

11 (Whereupon, Defendant's Exhibit No. 4 was received into
12 evidence at this time.)

13 MR. ALLEN: Permission to publish to the jury?

14 THE COURT: You may do so.

15 Q Doctor Loring, if you would come down and---

16 A Make I take these with me?

17 Q Okay. We're going to have to -- before you, before you
18 show these photos to the jury, they're gonna have to be
19 admitted into evidence. So, I want to ask you to explain
20 the time line and the placements. And if you get to a point
21 where you want to use the picture, then let me know and pick
22 up the picture, without showing it to the jury, and we'll
23 get it into evidence, we'll offer it into evidence at that
24 time.

25 A I see.

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1 Q Okay.

2 A I understand.

3 Q Okay. If we can just -- okay.

4 A Oh, what has happened is because I don't have these --
5 let me think.

6 Your Honor, I, I need to be able to perhaps put these
7 down to be able to see which pictures are here in order to
8 indicate when I might need to---

9 THE COURT: Is there a surface inside the witness
10 stand?

11 MR. ALLEN: There is not. But we can make one with the
12 chair.

13 THE COURT: All right. That will be fine.

14 MR. ALLEN: We can put the chair up like that.

15 WITNESS: Thank you, Your Honor.

16 Thank you, sir.

17 Q Okay.

18 A Thank you.

19 Q Now, this is the time line that I created to help
20 summarize the important things in the life of Tony Torres.
21 Certainly it isn't every single thing. But hopefully it's
22 the important things. And as I said, I got it from records
23 and from family and from collateral witnesses.

24 I have a picture for number one, sir.

25 Q Okay. I'll just stand right over here then.

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1 And is this the picture, this is Defense Exhibit 5, is
2 this the picture?

3 A If I, if I can look at the yellow -- yes, sir.

4 Q Okay. And this picture depicts what part of Tony?

5 A Shortly after birth.

6 MR. ALLEN: Okay. We offer Defense Exhibit 5 into
7 evidence at this time.

8 THE COURT: Any objection?

9 SOLICITOR CRICK: No, sir.

10 THE COURT: Without objection, it will be admitted.

11 (Whereupon, Defendant's Exhibit No. 5 was received into
12 evidence at this time.)

13 A No, sir.

14 MR. ALLEN: Okay. And may we publish to the jury?

15 THE COURT: You may.

16 A This is a picture of -- Tony was born [REDACTED]/80 after his
17 father beat his stomach and he beat Lisa around the stomach
18 and back while pregnant. Unfortunately we find sometimes
19 with batters and pregnant women. And Lisa had experienced
20 abuse from her father, abuse from her husband, her partner,
21 Andy, and saw this as a child who was gonna be her companion
22 for life. That's how she talked about Tony. She was very
23 excited about having him.

24 Q Okay.

25 A Thank you.

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1 The second indicates Tony about eight months old and I
2 have a picture for this. Actually, the next two pictures,
3 if you'd be so kind.

4 Q Showing you Defense Exhibits 6 and 8.

5 A Yes, sir.

6 Q And these pictures, is that which you refer?

7 A Yes, sir.

8 Q And Defense Exhibit 6 shows him at what stage?

9 A Very young. About eight months old.

10 Q And---

11 A No, I beg your pardon. Very young, very young. It was
12 prior to eight months. He was an infant. After birth.

13 Q And Defendant's Exhibit 8.

14 A Similarly.

15 MR. ALLEN: Okay. Offer these---

16 WITNESS: Okay.

17 MR. ALLEN: Offer these into evidence at this time.

18 THE COURT: Any objection?

19 SOLICITOR CRICK: No, sir.

20 THE COURT: They'll be admitted.

21 (Whereupon, State's Exhibit Nos. 6 and 8 were received
22 into evidence at this time.)

23 THE COURT: You may publish.

24 A Thank you.

25 Here we have a picture in both -- he's a very young

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1 infant like here just beyond is he really -- and you see a
2 picture of him being held with his mother, by his mother and
3 father. And this attachment to his father and then the
4 rejection by his father will be a theme in his life that
5 will later be mentioned in various psychiatric records of
6 him talking longingly about his father and wishing that his
7 father cared about him in ways that made Tony feel like his
8 father would reach out to him or reach back to him.

9 Thank you.

10 Number 2 is '81, about eight months old, and I do have
11 a picture of that, for that as well.

12 No, sir.

13 Q okay. If you---

14 A Could you hand them to me in order?

15 Q okay. If you can do that without showing it to the
16 jury.

17 A Certainly.

18 You know what I'm going to do?

19 I'm going to continue onwards.

20 Q okay.

21 A okay.

22 Q Thank you.

23 A Certainly.

24 And I'm, I'm going to ask -- there, there needs to be
25 some way that I can be accurate and hold them like this if

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1 that's all right so I can---

2 THE COURT: Ma'am, as long as they don't -- they're,
3 they're not in evidence and they can't be shown to the jury
4 until they are.

5 WITNESS: Thank you, Your Honor.

6 THE COURT: Now, you can -- I can't, I can't control
7 how you present them.

8 WITNESS: Thank you, Your Honor.

9 THE COURT: Thank you, ma'am.

10 WITNESS: Thank you, Your Honor.

11 THE COURT: Yes, ma'am.

12 A Thank you so much.

13 Q Okay. All right.

14 A Thank you.

15 Q Please continue.

16 A Certainly.

17 Already in 1981, when he was about eight months old,
18 there began to be observations that he seemed a little too
19 nervous, a little too -- some people thought it as
20 aggressive. He would hold on to his crib, the kind of crib
21 that you lie in, and that you have the sides that are square
22 with the little slats, little wooden slats. He would be
23 shaking his crib so hard that some of the slats, the little
24 wooden pieces that ran up and down, would fall out of the
25 crib.

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1 He began to be noticed rocking. Couldn't go to sleep
2 unless he was rocked. He began to be noticed hitting his
3 head against the crib or the wall.

4 In 1981, he was about a year old. We, you know, he
5 still was again the apple of his mom's eye. She loved him
6 very much and spent all the time she could with him.

7 And number four, again, all this in 1981, he's about 15
8 months old. And just so you know what's happening, I'm not
9 using all the pictures. So, I'm just trying to beware of
10 the pictures I'm using, and I think in this instance we'll
11 just keep right on going, and rather than use a picture I'll
12 talk to you about the fact that he had a little duck that he
13 always held.

14 His mother and father separated, and that whole process
15 was very violent and very very dangerous. At one point,
16 father, Andy, held little Tony, who's about 15 months old,
17 out of a window and dangled him. The police were called
18 because, of course, there's a fear that he'd been dropped
19 from the window. This was like on the second floor I
20 believe. And then another thing that happened during that
21 same incident is, as a 15 month old, Andy was squeezed by
22 the father when some people noted that he couldn't breathe,
23 he couldn't catch his breath because of the violence with
24 which he was squeezed after he was dangled out of the
25 window.

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1 The police were called and talked to, to Andy and were
2 able to talk him into turning Tony over to Lisa who then
3 left immediately and came back at some point for her
4 clothes. And that was the separation.

5 Now, during this period of time, 14 to 15 months old,
6 and just prior to that, Andy, the father, would put Tony on
7 the floor and Andy would, according to grandma, bring up his
8 foot and crash it down to the side, right to the side of
9 Tony's head like pretending he was gonna stomp him, and then
10 he'd bring his foot up and bring it down real hard on the
11 other side of Tony's head. And there were occasions,
12 Grandma Glenda said, where he actually brought it down on to
13 Tony's face. She said there weren't two many and she tried
14 to take Tony away right away when that happened.

15 We go on to number five and we have 1982 when he's
16 about 18 months old, and the family describes the
17 indescribable. They come up with words like fits or spells
18 to try to describe what they're saying in terms of outbursts
19 that Tony will have. Sometimes it's when he doesn't have
20 his way. Sometimes it doesn't seem to have to do with
21 having his way or not. Sometimes he's sitting off prior to
22 this, and during the 15 month period, he's sitting off on
23 the couch rocking and crying for no known reason. At least,
24 none that the mother, Lisa, could, could come up with.
25 Again, he's banging his head and rocking himself to sleep

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1 prior to and at this time, and he's getting out of doors
2 that are locked and going out into the road.

3 So now I'm gonna catch a couple of pictures here.

4 Q Okay. Now -- okay. Show, showing you exhibit, Defense
5 Exhibits 11 and 12, what do they -- generally, do you know
6 what these are?

7 A Yes, sir.

8 Q And what part of the time line does that refer to at
9 this point?

10 A The two that are the front refer to 1982. This is
11 going to be later. So, I'm going to wait on it.

12 Q Okay.

13 A Thank you.

14 These are 1982, about 18 months old, sir.

15 Q What do they depict?

16 A They depict the length---

17 Q In general.

18 A Oh.

19 Q In general.

20 A Doors with locks on them.

21 MR. ALLEN: Okay. We offer these into evidence as
22 Defense Exhibits 11 and 12.

23 THE COURT: Any objection?

24 SOLICITOR CRICK: No, sir.

25 THE COURT: Without objection, they're admitted and may

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1 be publish.

2 MR. ALLEN: Thank you.

3 (Whereupon, Defendant's Exhibits Nos. 11 and 12 were
4 received into evidence at this time.)

5 Q You may show them to the jury.

6 A Thank you. Thank you so much.

7 So, when Tony -- in 1981, when Tony was 18, 18 months
8 old having his outbursts or spells, the family was very
9 concerned that he'd run out the door, and they had to put
10 locks at the very top of the doors. I thought it was
11 interesting in order to keep him safe so he wouldn't run out
12 into the road, into the street because part of him having
13 these outbursts is he didn't seem able to control himself.
14 He seemed to flail about with this arms and legs and his
15 hands and run about as well.

16 So, they put these locks at the very top of the doors
17 to make certain he stayed inside and be safe. Thank you.

18 Have -- I have a picture for this.

19 1984, four years old, sitting on the, a bench.

20 Q And I'm showing you Defense Exhibit 13, and is that the
21 one that correlates with the one sitting on the bench?

22 A Yes, sir.

23 Q And this is correlating to what part of the time line?

24 A It's 1984, number six.

25 Q Which is what?

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1 A His first hospitalization.

2 MR. ALLEN: Okay. We offer this into evidence as
3 Defense -- this is Defense Exhibit 13. We offer into
4 evidence as Defense Exhibit 13.

5 THE COURT: Any objection?

6 SOLICITOR CRICK: No, sir.

7 THE COURT: Without objection, it's admitted and it may
8 be published.

9 MR. ALLEN: Thank you, Your Honor.

10 WITNESS: Thank you, sir.

11 (Whereupon, State's Exhibit No. 13 was received into
12 evidence at this time.)

13 Q When Tony was four years old in 1984, the outbursts
14 were such that his mom wanted to find out, you know, what is
15 going on here. She also had difficulties coping with him,
16 and had a lot of worries thinking that they should of gone
17 away by now if they were normally, you know, childhood kind
18 of outbursts.

19 So, she took him for help. Went to SMUC at Charleston
20 where they admitted him. And this is the picture of Tony
21 taken at the hospital sitting on a bench and a little kind
22 of mattress was put under his feet that didn't quite reach
23 the floor. And he's gonna be admitted there for the first
24 of many psychiatric hospital admissions in his life, and
25 then the first of many admissions into group homes with the

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1 help of the Continuum of Care.

2 And I think, you know, the reason that I picked this is
3 because, you know, to show his size and age during his first
4 admission to the psychiatric hospital.

5 It was also around this age, just, my understanding is
6 just prior to his hospitalization, when he helped pick out a
7 birthday present for his father, Andy. At that time he was
8 still getting a visit once in a while to get to go see his
9 father, and he picked out a shirt which was apparently a
10 very very colorful pretty shirt, and took it on the visit
11 and it was, it was reported to me that his stepmother, the
12 woman who his dad, Andy, was with at that time, took the
13 shirt and burned it in Tony's presence.

14 So, he came home crying that the gift to his dad, the
15 birthday gift had been burned. Indications were that she
16 didn't care for him, didn't really want him with his dad.

17 Going on to number seven, we have Tony at five years
18 old when he graduates from kindergarten, and there's a
19 picture of that as well.

20 Q Showing you Defense Exhibit 14.

21 Is that the picture depicted of the kindergarten?

22 A Yes, sir.

23 MR. ALLEN: Okay. Offer this into evidence as Defense
24 Exhibit 14.

25 THE COURT: Any objection?

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By Mr. Allen

1 SOLICITOR CRICK: No, sir.

2 THE COURT: Without objection, it will be admitted as
3 marked.

4 (Whereupon, Defendant's Exhibit No. 14 was received
5 into evidence at this time.)

6 THE COURT: It may be published.

7 A And I'll just make sure that no one -- thank you.

8 Am I allowed to show this one?

9 Q Yes, you may.

10 A Then we have Tony who graduates from kindergarten, and
11 by this time starting about age four, he's either in the
12 psychiatric hospital getting treatment or in a group home as
13 was suggested earlier. There are occasional visits home
14 like weekends because the group homes that he is in, like in
15 this case, you know, getting his graduating from
16 kindergarten, earns him a certain number of points. And
17 when he gets these points, then he is rising to different
18 levels. It's, it's a behavioral management system used for
19 kids that have different kind of behavior disorders.

20 The idea is you reward them, give them points, they
21 rise up a level, they get to go home at a certain level, and
22 then that motivates them to keep doing well. So, it's a
23 reward system. And so, he earned his graduation from
24 kindergarten and earned a trip home.

25 The only problem was, for Tony, that this point system

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1 didn't work so good a lot of time with him. Sometimes he
2 was able to control his behavior and sometimes he was not.
3 So, he'd get all excited, he'd done well, he earned the
4 points at the group home, he would go home, and then he
5 reports trying very hard, getting these headaches, having
6 these outbursts, sometimes hitting someone, sometimes just
7 flailing about, and that there were times when his mother
8 just said, you know, that's enough, I can't handle this. I,
9 you know, I have a mama I'm taking care of. I grew up
10 taking care of all my siblings because she was mentally ill
11 then with due respect to her. I have an alcoholic husband.
12 I have a full-time job. I can not cope with your behavior
13 this way.

14 So, he would, by his report, by the report of case
15 managers, make an effort not to behave that way and yet have
16 an outburst at home after which his mother would sometimes
17 return him early because she couldn't tolerate that, which
18 was a source of great frustration for him because it got to
19 be where his mother really didn't always want him home.

20 And this is when his Uncle F.B. is now leaving the
21 closeness with him, abandoning him for the job and a new
22 family, and then Tony is living in a group home. And as an
23 adult, he looks back upon this to this day, shakes his head,
24 and doesn't really understand why he couldn't get a grip and
25 control himself all the time. Not just some of the time.

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1 Because some of this behavior caused him to lose being at
2 home with his mom. And there were times when his father
3 would bring him back from a visit too for the same reason
4 cause he had been banging his head against a wall.

5 The cousin reports that when he was with his father
6 during these early years, during one of his rare visits,
7 that Tony beat his head against a brick wall to the extent
8 that he was bleeding and his father then brought him back
9 home.

10 It was during these early years, starting with three
11 going onto five and beyond, that his father would blow
12 marijuana into his face and give him beer to drink as well.

13 Number eight is 1986. Here Tony's six years old. Of
14 course, in a group home. And then he talks about, to the
15 case managers in the psychiatric records and later to me,
16 the, the grieving he felt for being with his dad, for not
17 being with his mom. How rejected he felt and he began to
18 turn to food and gained a great deal of weight.

19 In 1988 was a very different year in the life of Tony
20 Torres. In 1988 -- can you see this okay?

21 (Jurors nod affirmatively.)

22 A In 1988, Doctor Caston diagnosed Tony Torres as being
23 bipolar. Before this time the doctors thought maybe he had
24 an explosive, Intermittent Explosive Disorder or a conduct
25 disorder trying to account for these outbursts. Some

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1 doctors said I think he has a neurological problem. Some
2 said I think he has a seizure disorder. They give him
3 medication to try to help with a seizure disorder.

4 And all of the disorders that he had up to this point
5 had the assumption you can control your behavior. Conduct
6 disorder, Intermittent Explosive Disorder, you know, you
7 give the kids rewards. You, you take away privileges. They
8 talked to mother, Lisa, take away privileges if he doesn't
9 do things right. And that's what the standard was at that
10 time.

11 But what no one knew before 1988 was if indeed he was
12 bipolar, then what he was being expected to do he could do
13 some of the time. But some of the time people who are
14 bipolar, especially kids, but adults as well, there's no way
15 they can control it. It's, it's known to be a chemical
16 issue. That's why they give them high dosages of Lithium.

17 So, Doctor Caston did a blood test, and decided that
18 indeed Tony was bipolar, gave him high dosages of Lithium as
19 well as Mellaril and for that year, not to say he was
20 entirely well, but being certainly changed.

21 And I have an envelope that I would like to---

22 Q Okay.

23 SOLICITOR CRICK: And Your Honor, if I could, just
24 while we're pausing here, I'm trying to be patient. I think
25 what we've got going on right now is a narrative, and I

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1 would ask that at least she be asked some questions.

2 THE COURT: I'll sustain the objection.

3 Q Okay. Doctor Loring, we won't go into the envelope.

4 If you would please, can you tell us what else the time
5 line depicts in a summary fashion?

6 A Yes, sir, I'll do that.

7 Summarizing, in, in 1988, he began to have
8 accomplishments, ribbons for sports events, excellent report
9 cards, and the like. He began, in '88, to function much
10 better. In -- should I go ahead?

11 Q Yes.

12 Now, is that -- are you finished with that particular
13 portion of the time line?

14 A With 1988. Yes, sir, I'm ready to go on to number ten.

15 Q Please, if you would, tell us about the next portion of
16 the time line.

17 A Yes, sir, that would be number ten, which is 1989 to
18 1990, when the police are called because, at that point, the
19 diagnosis changed again away from bipolar to a different
20 diagnosis so the medicine would change and Tony has another
21 outburst or crisis as to some of the group home people call
22 it and took a brick to his mom's car, number one.

23 Number two, saw pictures of his mother with bruises on
24 her legs and arms. Asked if a boyfriend did that to her.
25 Was told by his mother no, you did, and was astonished that

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1 he would have grabbed or pushed his mother to create bruises
2 on her, and there was a growing recognition then, by mental
3 health people and the family, that he didn't remember his
4 behavior during these outburst afterward. He had to be told
5 what he had done.

6 Q Okay. Can you -- are you finished with that portion of
7 the time line?

8 A Yes, sir.

9 Q Can you go -- can you tell us what's the significance
10 about the next portion of the---

11 A Yes, sir.

12 Q ---time line?

13 A Yes, sir. That would be number 11, 1991 to 1994, in
14 which the mother kept canceling her home visits. That is
15 Tony's coming home. He was 12, 13, 14 and he'd call home.
16 She, at one point, said what she was cooking for
17 Thanksgiving dinner, but then didn't allow him to come home.
18 She was depressed herself, very anxious herself, and was not
19 able to come to family therapy to speak of canceling out.

20 Q So, can you tell us what is significant about the next
21 entry on the time line?

22 A Number 12, the diagnosis just kept on coming in terms
23 of it being different, they're, they're being different
24 during his 14, 15, 16, 17, and he's again living in
25 different places continually, in and out of psychiatric

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1 hospitals, very depressed, and that's when the trouble is
2 coming.

3 Q Okay. And the next entry on the guide, time line, can
4 you tell us what's significant about that?

5 A I will except this chart will come in right here if I
6 may?

7 Q And you want to -- okay. This is been -- you're
8 talking about Defense Exhibit 4. You can publish to the
9 jury at this time.

10 A Thank you. Thank you so much. I have to say thank
11 you. Appreciate it.

12 This -- I put this together and I listed out the
13 different psychiatric hospitals and group homes that he
14 lived in from age four through age seventeen because it
15 seemed like so many that I needed to see it myself. It's,
16 it's the Medical University in Charleston at four and seven,
17 Charles Lea Center at six years old, the inpatient
18 Spartanburg Regional Psychiatric Hospital at seven years
19 old, York Place, a group home, at eight and, and nine,
20 Spartanburg Regional Hospital at eight, Patrick Harris
21 Hospital at 11, Pioneer, Pioneer Ridge where we lived at 11,
22 Hall Institute where he's treated at 11, Carolina Children's
23 Home where he lived at 12, Spartanburg Boys Home where he
24 lived at 13, Pine Ridge where he lived as well about 13,
25 Boys Home of the South where he lived at about 14, Michael's

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1 Run, about 17, and two others around that time, Lancaster
2 Children's Home and John Crane House.

3 So, I finished with 12.

4 Q What is the significance of the next entry of the, of
5 the diagram?

6 He was released from the, photograph when he's released
7 from the Lancaster Home.

8 A Yes, sir.

9 Q Okay. And what is significant about that entry of the
10 time line?

11 A He was released from the Lancaster Home at 17. The,
12 the case manager did not know that he was or had ever been
13 diagnosed as bipolar. Had she known that, he might of been
14 able to have stayed longer.

15 And when I say homeless, he went from family member to
16 family member. He was depressed. There were no follow-up
17 visits. Continuum of Care doesn't have funds to do
18 follow-up visits. He became more and more depressed, and
19 began doing self-medicating, which is what we call it when
20 people take drugs when they're not in a psychiatric
21 hospitals in order to try to deal with their depression or
22 other kinds of anxiety or problems that they have.

23 I finished with 13.

24 Q And what is significant about the next entry which
25 you've titled prison probation, work release?

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By Mr. Allen

1 A During these years, 2002 through 2006, there is a
2 combination of him having experiences in prison, on
3 probation, and being on work release. He's still
4 self-medicating.

5 Q And what about the significance of the things, the last
6 entry, the depression and self-medication?

7 A Yes, sir, number 15, December '06 to May '07, he
8 continued to become more depressed and continued basically
9 to self-medicate.

10 Q Okay. Thank you.

11 A My pleasure.

12 Q Let me take these charts down.

13 In creating the life history and your study of, of his
14 life, did, were there any themes that were developed or did
15 you come to any conclusion as to any themes that were
16 prevalent in his life?

17 A Yes, sir.

18 Q And what were those?

19 A That Tony Torres suffered from low self-esteem, from
20 mistakes that he made in his own behavior, and often later
21 didn't remember---

22 SOLICITOR CRICK: Your Honor, I'm gonna object at this
23 time. These are conclusions and they're speculative. I
24 don't know how she would know that.

25 THE COURT: Mr. Allen.

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By Mr. Allen

1 MR. ALLEN: Your Honor, she's been qualified as an
2 expert in the life history and development of themes. And
3 as I understand it, I mean I can ask more questions about
4 the life.

5 THE COURT: Well, is she stating her opinion at this
6 point in time?

7 MR. ALLEN: She's -- yes, Your Honor.

8 SOLICITOR CRICK: It was my understanding, Your Honor,
9 she's not an expert in themes. She can report a history
10 that she reads from documents and gets from other family
11 members. But I didn't hear anything about being able to
12 diagnose themes or describe how he was feeling at the time.
13 I don't recall that.

14 MR. ALLEN: Okay.

15 THE COURT: I'm going to sustain the objection at this
16 time. You're gonna have to lay, lay a, a better foundation.

17 MR. ALLEN: One second please, Your Honor.

18 THE COURT: Yes, sir.

19 (Pause.)

20 Q Thank you, Doctor Loring. If you'd answer any
21 questions of the State.

22 THE COURT: Mrs. Crick, are you gonna do the
23 cross-examination?

24 SOLICITOR CRICK: Yes, sir.

25 THE COURT: You may proceed.

Marti Loring - Cross-examination
By Solicitor Crick

1 SOLICITOR CRICK: Thank you, Your Honor.

2 I'm gonna try to be as brief as I can.

3 THE COURT: That's all right.

4 CROSS-EXAMINATION

5 BY SOLICITOR CRICK:

6 Q You were hired by the defendant and compensated by the
7 defense in this case, is that accurate?

8 A The center with which I work was, yes, ma'am.

9 Q But you're the director and founder of the center?

10 A That is correct too.

11 Q So, you're being, being paid to do this?

12 A No, I'm not being paid directly, no, ma'am.

13 Q To your center?

14 A Yes, ma'am.

15 Q You are technically -- you're not a psychiatrist, are
16 you?

17 A That is correct.

18 Q You're a social worker?

19 A I'm, I'm here as a clinical sociologist.

20 Q So, you're a licensed social worker as well?

21 A Yes, ma'am, but that's not the capacity in which I come
22 here today. I come here today as a clinical sociologist.

23 Q Are you licensed in South Carolina?

24 A As a clinical sociologist, we don't have licenses. We
25 just have degrees.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q How about as a social worker?

2 A I'm not licensed, but I'm not here today as a clinical
3 social worker, ma'am.

4 Q You have worked with defense attorneys before in this
5 capacity to come up with your presentations, is that
6 correct?

7 A I'm so sorry.

8 would you repeat that?

9 Q You have worked with defense teams, with defense
10 attorneys in the past to come up with presentations like
11 this on social assessments, is that correct?

12 A I usually don't work with attorneys to come up with the
13 presentation. But I certainly have done social histories
14 before in South Carolina and elsewhere in that regard, yes,
15 ma'am.

16 Q And you present them for the defense in trials like
17 this one, is that correct?

18 A I do present them in, in trials like this, yes, ma'am.
19 I never consider myself doing it for the defense or for the
20 prosecution because sometimes if they don't like what I'm
21 going to say they ask me just not to come and talk.

22 Q Oh, okay. So, they kind of approve it first?

23 A No, ma'am, they -- if I'm telling the truth of what I
24 have found, if they don't like it, then they can just send
25 me away.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q Okay.

2 A So, they can't approve it and they can't -- I don't do
3 it for them so to speak.

4 Q You were told about the crime in this case and the
5 events that happened on May 11th?

6 A In -- perhaps in brief fashion. That wasn't my area to
7 study. So, I did not go into any depth in that.

8 Q But you looked at reports I think you said from the---

9 A No, ma'am, I looked at police reports leading up to
10 that time.

11 Q Okay. But not surrounding this time.

12 So, no one told you about the threats by the defendant
13 to kill the Emery's?

14 A No, ma'am, that was not my area.

15 Q Did they tell you about the sexual assault?

16 A I did not study that. That was not my area either.

17 Q When did you actually join the defense team or speak
18 with someone from the defense team about coming to court?

19 A Approximately three months ago. And you're right, I
20 honestly don't consider myself part of a team. But yes,
21 ma'am, approximately three months ago.

22 Q And you have met with the defendant in this case?

23 A Yes, ma'am, I have.

24 Q Do you know how many times?

25 A Yes, ma'am, two times for a, a couple of hours each.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q So, if you added that time up, about how many hours
2 total would you say you talked to the defendant?

3 A Approximately nine hours.

4 Q Two times, several hours each, right?

5 A That is exactly correct, ma'am.

6 Q And when you do your interviews or your, collect your
7 information, who gave you the list of people to talk to?

8 How did you get that information?

9 A I make this up myself. Sometimes I talk to the
10 investigator to get other ideas or the mitigation
11 investigator. But when I talk with the, with a client, the
12 person I'm evaluating, I ask them questions and I generate
13 from that, make up a list of all the people who have been
14 important in their lives that I ask the mitigation
15 investigator are there any other people you know of who've
16 been important. And then I ask to be given all the records
17 that have been obtained from the point that I'm suppose to
18 begin my study up to the point where I'm suppose to end it.
19 And when I talk to family members or see names in the
20 records, I may add that to my list as well. So, I generate
21 my own list.

22 Q And maybe my question wasn't very clear.

23 The mitigation investigator, is that someone who works
24 for you?

25 A Oh, no, ma'am, that's, that is part of the, the defense

Marti Loring - Cross-examination
By Solicitor Crick

1 group.

2 Q Oh, okay.

3 A I ask them for suggestions of anyone I might of missed
4 so I'm thorough.

5 Q So, you do get the names from someone working with the
6 defense, the, the mitigation investigator?

7 A I may get a couple from them, but certainly not the
8 majority.

9 Q You talk to the defendant in almost -- well, a lot of
10 his relatives, is that correct?

11 A Yes, ma'am.

12 Q And you talk to them after the defendant had been
13 noticed for the death penalty, correct?

14 A I believe this is correct, yes, ma'am.

15 Q It was three months ago?

16 A Yes, ma'am.

17 Q So, let me ask you, did you talk to Chuck Emery?

18 A No, ma'am.

19 Q Did you talk to Chris Morgan?

20 A No, ma'am, I did not talk to the family of the Emery's.

21 Q Did you talk -- well, he's not a family member.

22 Did you talk to Holly Melton?

23 A No, ma'am.

24 Q Did you talk to Michelle Burgess?

25 A No, ma'am.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q Eric Vinson?

2 A No, ma'am.

3 Q Henry Richardson?

4 A No, sir.

5 Q Did you talk to any of the defendant's coworkers at
6 Burger King?

7 A Yes, ma'am.

8 Q Well, who did you talk to there?

9 A To Jamie Swink, Swink.

10 Q Okay. Did you talk to his parole officer?

11 A No, ma'am, I read the parole records. But I didn't
12 speak with them.

13 Q Didn't speak with a probation officer?

14 A No, ma'am, I read that, both reports as well.

15 Q How about prior cellmates from when he had incarcerated
16 previously, did you talk to them?

17 A No, ma'am.

18 Q How about his, the Department of Corrections officers
19 that guarded him when he was in prison, did you talk to
20 them?

21 A No, ma'am, I read their reports. I did not speak with
22 them directly.

23 Q Did you talk to crime scene investigators in this case?

24 A No, ma'am, I wasn't suppose to go that far into the
25 time line.

Marti Loring - Cross-examination
By Solicitor Crick

1 We're talking about the tragedy, the crime scene?

2 Q We're talking about the murders of the Emery's, yes,
3 ma'am.

4 A I---

5 Q That's why you're here.

6 You didn't talk to anybody relating to that?

7 A I'm well aware that that's why, why we're here. I'm so
8 sorry. And no, ma'am, that was not my area that I was
9 suppose to cover. So, I did not.

10 Q So, you weren't suppose to cover anything that related
11 to this exact crime?

12 A I was -- in answer to your question, I'm trying to
13 decide whether to say yes, ma'am or no, ma'am. I guess I'll
14 say I don't know, ma'am.

15 Q Okay.

16 A Because my job was to do the social history in this
17 case. That's what I was asked if I would do, and that I
18 agreed to do. Other professionals, my understanding was,
19 were going to cover that. As much as I might of wanted to,
20 that's not something that I was asked to do nor did I do it.

21 Q So, when you try to determine your social history and
22 what was going on back here, you obviously weren't there
23 yourself, so you relied on notes and what people tell you,
24 correct?

25 A Part of what I do is exactly that, ma'am. And then I

Marti Loring - Cross-examination
By Solicitor Crick

1 also, when you say notes, yes, ma'am, I rely on the
2 extensive, in this case, extensive hospital and out-patient
3 psychiatric records as well as the collateral interview,
4 interviews with individuals who weren't family members.

5 Q Probably the same things Doctor Schwartz-Watts would of
6 relied upon?

7 A I don't know the answer to that. I'm so sorry.

8 Q That's okay.

9 Did you prepare a report?

10 A No, ma'am.

11 Q You weren't asked by the defense to prepare a report in
12 this case about the social history?

13 A I was not asked to do that, which is the usual case.
14 I'm not usually asked, when I do social histories, to
15 prepare a report.

16 Q But you could prepare one if you had been asked?

17 A If it had been insisted on, I certainly would of done
18 it. But I have to say to you in all honesty I was glad I
19 wasn't since I was so busy.

20 Q Okay.

21 A But it's often thought not to be necessary because all
22 these charts are used to help, you know, explain things.

23 Q You said yourself assessment starts prior to birth and
24 I think you mentioned the defendant's mother being struck
25 while the defendant was still in utero.

Marti Loring - Cross-examination
By Solicitor Crick

1 Is that the violence that you were depicting on the
2 chart?

3 Is that what you were talking about from the
4 defendant's father to him?

5 A That is part of it, ma'am. And just to be clear, I
6 really didn't do an assessment in terms of an evaluation or
7 diagnosis of Tony Torres cause I don't do that in South
8 Carolina.

9 Q Right.

10 A But yes, ma'am, in part, it was the hitting of mom,
11 Lisa, while pregnant with him. But then they're other acts
12 of violence toward Lisa. A lot of it emotional. And other
13 acts of violence by father, Tony, toward Tony that I didn't
14 discuss -- once he just punched him in the nose and knocked
15 him to the concrete, for example.

16 Q See, this is the first time we're hearing about this.
17 You got all that from your notes?

18 A I got that from talking with Tony, and from talking
19 with the, case managers at the group homes, yes, ma'am.

20 Q Okay. And you did look at his school records and
21 remember him being successful in school?

22 A That, the golden year, when he was diagnosed with
23 bipolar, it was a, a splendid report card, excuse me, a
24 splendid report card, all kinds of ribbons and all. But
25 then, with a couple of years, that was lost, that diagnosis.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q Did you actually talk to his teachers from that time?

2 A No, I tried to find her and I couldn't. So, I just had
3 the report card with all the comments that she had written
4 on it.

5 Q Did you talk to the psychologist who performed IQ
6 testing on him?

7 A No, ma'am, I did see the reports of the psychologists
8 and psychiatrist.

9 Q Did you do any psychological testing yourself?

10 A On, no, ma'am. I'm not suppose to do diagnoses in this
11 kind of situation. Just get the social history.

12 Q You said you tried to have more than one source for
13 your information, but in a lot, some cases that was not
14 possible?

15 A I was---

16 Q But you couldn't tell us precisely which situations?
17 Is that accurate?

18 A No, ma'am, I really thought that I had more than one
19 source in all of them. But I wanted to be honest and I just
20 couldn't remember each single one. So, I wanted to just
21 add, you know, maybe there was one where I didn't have more
22 than one source. For most of them though, I would say that
23 I had more than one source whether it was in the family or
24 among the case managers or from the records I reviewed.
25 There's certainly a lot of information in this case.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q So, if you talked to the defendant and his mom, you
2 would consider that double source?

3 A I would consider it double sourced, and I would look
4 for other sources as well.

5 Q Okay. I'm gonna take a look at your chart for one
6 second, and I don't know the best way to do this. I
7 probably can just stand back here honestly.

8 Taking a look at this chart, and I see that you've
9 indicated where there have been some mental illness, can you
10 identify which one of these individuals, other than the
11 defendant, actually killed somebody and I'll step closer if
12 you need me to?

13 A Thank you.

14 I'm not aware of any of them having done that with the
15 exception of the brother, Tito.

16 Q Well, that was himself though.

17 A Yes, ma'am.

18 Q Talking about which one of these actually, because of
19 their mental illness, struck out and actually killed someone
20 else. That's what I'm asking you.

21 A I see. Thank you.

22 Q Uh-huh. (Affirmative).

23 A I'm not aware of any of them having done that.

24 Q Okay. So, based on your collection of evidence and
25 your history, your opinion is what exactly, your expert

Marti Loring - Cross-examination
By Solicitor Crick

1 opinion?

2 A My opinion is that having done a family history on
3 Mr. Tony Torres, that I think that he was not properly and
4 consistently diagnosed with the proper diagnosis thereby
5 leading to his not being medicated properly nor getting the
6 proper kind of therapy and treatment making even worse an
7 already difficult situation.

8 Q I mean let me pause here for a second.

9 A But---

10 Q You're talking about his medications and diagnosis, but
11 you've already told this jury you're not a psychiatrist,
12 right?

13 A I'm sorry. I thought you wanted my expert opinion on
14 his history.

15 Q Well, I want your expert -- I guess that's what I'm
16 asking.

17 What is your expert opinion as it relates to this case?

18 A That he turned to food as an, alcohol and drugs as a
19 substitute for the love that he was never able to, to get
20 from his father and had great difficulty getting from his
21 mother, no criticism of her because she was so overwhelmed,
22 that he became a depressed person who left a program perhaps
23 before he should have and perhaps without the tools that he
24 needed to to have done what we would of hoped he would of
25 done in society, that because of his depression and bipolar

Marti Loring - Cross-examination
By Solicitor Crick

1 disorder, he turned to self-medication to the extent that,
2 as you suggested earlier, here we are today.

3 My expert opinion is that his self-medication, his drug
4 addiction, and his alcohol addiction greatly impaired his,
5 greatly, greatly impaired him as a person and that all of
6 his history kind of leads to that in some very sad and awful
7 way.

8 Q So, he's an addict?

9 That's your opinion?

10 A I don't make diagnoses in South Carolina and that kind
11 of smacks of a diagnosis. So, I'm talking more of
12 descriptively and I, I---

13 Q That's---

14 A ---I appreciate what you're asking. I really do. So,
15 I'm trying to be descriptive.

16 Q Well -- and that's fine.

17 A Thank you.

18 Q We'll take it for what you said.

19 A Okay.

20 Q But you're not telling the jury there's anything in his
21 background that made him bludgeon and rape the Emery's, are
22 you?

23 A Since that was not, not my job to do that, I can't even
24 begin to answer that question with the kind of accuracy and
25 honesty I've tried to bring to this courtroom today.

Marti Loring - Cross-examination
By Solicitor Crick

1 Q Let me ask you a more general question.

2 You're not suggesting that the, everyone's who
3 experiences abandonment in some form is going to go out and
4 kill someone, are you?

5 A Well, ma'am, I would -- I caught myself in time. I'm
6 not -- I almost answered. I'm not suppose to get into that
7 area. So, I'm just going to say to you that all of the
8 things that happened to him, so much more than the
9 abandonment, all of the things that shaped him, along with
10 whether it was neurological or seizures, I don't know, all
11 the things they said in the records that made him who he was
12 that was what was my job to bring to you today, and I, I
13 hope I've helped with the understanding of him. I truly do.

14 Q So, essentially abandonment, low self-esteem, lack of
15 love, you can't say that that makes somebody kill somebody?

16 A Since I can't talk about the tragic killing, I hope all
17 the things, in addition to what you said I thought to
18 describe them, I hope they will all be factored together in
19 your understanding.

20 Q Okay.

21 A Thank you.

22 SOLICITOR CRICK: I have nothing further, Your Honor.

23 THE COURT: Redirect?

24 MR. ALLEN: No, Your Honor.

25 THE COURT: Were you asking for this witness to be

Marti Loring - Cross-examination
By Solicitor Crick

1 excused?

2 MR. ALLEN: Please, Your Honor.

3 THE COURT: Any objection?

4 SOLICITOR CRICK: No, sir.

5 THE COURT: Ma'am, you may step down. You're free to
6 go.

7 WITNESS: Thank you, judge.

8 THE COURT: Ask the attorneys to approach.

9 (Whereupon, a bench conference was held out of the
10 hearing of the jury at this time.)

11 THE COURT: The defense may call its next witness.

12 MR. ALLEN: We call James Aiken to the stand.

13 THE COURT: Come forward, sir, to the witness stand to
14 be sworn.

15 WITNESS: Yes, Your Honor.

16 Right here, sir?

17 THE COURT: Right up here to this young lady.

18 WITNESS: Very good, sir.

19 JAMES AIKEN, being first duly
20 sworn, testified as follows:

21 THE COURT: Sir, once you're seated, I'd ask that you
22 state your name for the record please.

23 WITNESS: Very well, Your Honor.

24 My name is James Evans Aiken. A-I-K-E-N.

25 THE COURT: Thank you, sir.

James Aiken - Direct examination
By Mr. Allen

1 Your witness, Mr. Allen.

2 MR. ALLEN: Thank you.

3 SOLICITOR BARNETTE: Your Honor, if it would help,
4 we'll stipulate to his, to his qualifications in his
5 field---

6 THE COURT: In what field is he being offered?

7 MR. ALLEN: He's being offered in the field of prison
8 adaptability, Your Honor.

9 THE COURT: All right. And without objection, he'll be
10 qualified as an expert within that field.

11 Is that right, Mr. Barnette?

12 SOLICITOR BARNETTE: Yes, sir. Yes, sir, we'll do that
13 to help speed it up.

14 WITNESS: Thank you, sir.

15 THE COURT: Thank you. That gets that out of the way.

16 WITNESS: Thank you, Your Honor.

17 THE COURT: Now your witness, Mr. Allen.

18 MR. ALLEN: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. ALLEN:

21 Q Mr. Aiken, I won't go over all of your qualifications.
22 But I do want to briefly, for you to briefly tell us a
23 little bit about your education, your training, and some of
24 your experience in this area of prison adaptability.

25 A Yes, sir, I'll be very very brief. I started in

James Aiken - Direct examination
By Mr. Allen

1 corrections in the State of South Carolina in 1971 in the
2 capacity of substance abuse counselor in a medium security
3 prison. From there I was promoted to the rank of
4 administrative assistant to the warden at that same prison.

5 Back in those days, when you were administrative
6 assistant to the warden, you got to do everything to include
7 break up fights, contraband control, disciplinarian,
8 classification of inmate population as well as other
9 security related duties. And when you finish that, you got
10 an opportunity to write letters for the warden.

11 From there I was promoted to the rank of deputy warden
12 of that same facility. I was in charge of all security, all
13 aspects of the use of force against inmate population to
14 control behaviors, as well as all problematic activities to
15 include also administrative support.

16 From there I was promoted to the rank of deputy warden
17 at the Central Correctional Institutions, the state
18 penitentiary commonly called, at that particular time,
19 C.C.I. It comprised approximately 1,800 to 2,000 of the
20 most dangerous predator inmate population within the South
21 Carolina Criminal Justice System. Inmates that were housed
22 even in the county level were not, that could not be managed
23 came to this prison.

24 We had gang members. We had individuals that involved
25 themselves with systematic as well as random violence

James Aiken - Direct examination
By Mr. Allen

1 against other inmates. We had inmates that were sentenced
2 as well as unsentenced, psychiatrically impaired population
3 as well as those inmates that were in other prisons that
4 could not be adequately managed were sent to the Central
5 Correctional Institution.

6 From there I was promoted to the rank of warden at the
7 women's prison. At the women's prison, of course,
8 classification all through my career as well as the control
9 and management of inmate population. From there I was
10 promoted back to the Central Correctional Institution that I
11 just explained to you to the rank of warden of that prison.
12 I was the chief executive officer being that I interpreted
13 policy, implemented policy, evaluated performance, security
14 posture, riot control, gang control, as well as other
15 critical events that may be taking place within inmate
16 population, the use of force, the appropriate evaluation of
17 the security posture of prisons.

18 I took that time to start my niche, so to speak, of
19 going into prisons and, and looking at ways to better
20 improve the efficiency and security posture of prisons.
21 And, of course, at that particular time I was responsible to
22 carry out executions. As warden of the state penitentiary
23 in South Carolina, I executed two inmates personally.

24 I was ranked, promoted to the rank of deputy regional
25 administrator over 16 prisons in South Carolina to include

James Aiken - Direct examination
By Mr. Allen

1 work release centers all the way through to super maximum
2 security prisons. From there I was appointed to the rank of
3 commissioner of corrections for the Indiana Department of
4 Corrections. I was a member of the Governor's staff. I was
5 in charge of all aspects of security posture to include the
6 things that we've talked about today, and relations to the
7 use of force on an inmate.

8 For example, or, you know, when I was there, I had a
9 situation where I had to order an inmate killed by a sniper,
10 and he was killed by the sniper. And all aspects of the
11 criminal justice system as it pertains to prisons and jails,
12 et cetera.

13 From there, I saw the need to look at a international
14 prospective because I saw the emergence of terrorism. I saw
15 the emergence of drug cartels and those kind of things. So,
16 I accepted a position, a promotion to the rank of Director
17 of Corrections for the United States Virgin Islands. This
18 is a territory. Not a state. This, in my estimation, was a
19 way that a number of terrorists groups as well as gang,
20 international gangs, drugs cartels, and those kind of people
21 coming in through the Virgin Islands, in through Puerto
22 Rico, in through there, through Miami and on into New York
23 and other areas. And I wanted to look at the prison system
24 and see how it was running. It was run very disastrous, and
25 that was again my niche to turn that around. But---

James Aiken - Direct examination
By Mr. Allen

1 Q Mr.---

2 A I'm sorry.

3 Q ---Aiken, let me interrupt a second here.

4 How are you now employed?

5 what do you now do?

6 A I'm president of James C. Aiken & Associates, Inc.

7 Q And you are -- what do you do?

8 A Well, I provide expert assistance and technical
9 assistance to governments, and I've done that to just about
10 all states and jurisdictions of their employees thereof.
11 Canada, Costa Rica, Costa Rica, as well as the Dutch
12 Kingdom, I also serve on a congressional and presidential
13 commission.

14 Q Okay. And do you also conduct classes to---

15 A Yes, I've done that. I've taught wardens how to be
16 wardens back through the U.S. Justice Department like back
17 in the 80's and 90's, early 2000's, teaching wardens how to
18 be wardens, teaching existing wardens how to be better
19 wardens as well as teaching wardens how to be wardens of
20 super max.

21 For example, that, that particular class was taught at
22 ADX in Florence Colorado, the most secure prison in the
23 world. Every known, well known terrorist criminal is
24 probably housed there at Terra Hope One.

25 Q Let me ask you, have you, during your experience, have

James Aiken - Direct examination
By Mr. Allen

1 you conducted classifications of prisoners, sentences
2 prisoners?

3 A I've classified thousands and thousands of inmates.
4 I've developed and assisted to develop classifications
5 systems as well as to validate existing classifications
6 systems not only in my jurisdiction, but also throughout the
7 United States.

8 Q Okay. Now, have you reviewed records in connection
9 with this case?

10 A Yes, sir.

11 Q And what, in general, have you reviewed?

12 A I've reviewed the institutional record of Mr. Torres
13 while he was incarcerated on the county level as well as his
14 previous criminal record to include sentencing within the
15 State Department of Corrections.

16 Q And what, if anything, have you found or determined
17 concerning Tony Torres adaptability to prison?

18 A Well, I found very simply this. He can adapt to
19 prison, and he will adapt to prison. And what I mean by
20 that is that he and he, as he gets older, will become less
21 involved---

22 SOLICITOR BARNETTE: Your Honor, I'm gonna object at
23 this point unless he has a basis or finding or whatever
24 going into his, his prior experience about age or whatever.
25 He can just to the -- specific to the defendant himself.

James Aiken - Direct examination
By Mr. Allen

1 MR. ALLEN: Okay. I'll try to keep him to the
2 specifics to---

3 THE COURT: I would sustain, sustain the objection, and
4 ask you ask another question.

5 MR. ALLEN: Okay.

6 WITNESS: Very well, sir.

7 Q But what -- essentially, in your review of the records,
8 is there anything -- I mean well, when you review records,
9 how do you look at them when you evaluate a case like Mr.
10 Torres?

11 A I'm looking at Mr. Torres specifically. I looked at
12 his behavior, behavior pattern while he was in custody and
13 incarcerated within confinement facilities as well as to
14 have an evaluation and look at the degree and type of
15 criminal behavior that he's been involved in.

16 Q Do you look at it as -- in what role, role do you cast
17 yourself in looking at it?

18 A The role that I cast myself is one of a prison warden,
19 for an individual that's got to maintain this individual for
20 a period of time as set forth by the Court. So, I do it
21 totally from a institutional prison security prospective.

22 Q Is it -- is there anything in his records that give you
23 any concern about his adaptability to prison?

24 A No, sir, not from a prison warden's prospective.

25 Q Why is that?

James Aiken - Direct examination
By Mr. Allen

1 A Because we can manage those behaviors.

2 Q Okay. Did you also review a videotape in connection
3 with this case?

4 A Yes, sir.

5 Q And that was a videotape of Mr. Torres, which has been
6 previously identified to the Court as taken this past Sunday
7 evening?

8 A That's correct, sir.

9 Q And what, if any, conclusions did you draw from that
10 videotape as they relate to Tony Torres adaptability to
11 prison?

12 A It personified the use of force that, in my
13 professional opinion, was appropriate, well within the
14 policies or standards, correctional practices of sound
15 correctional practices dealing with inmate population, and
16 my interpretation of it is very simple. He did not follow
17 instructions. Nor -- I did not say he took a hostage nor
18 did he try to escape or anything. He refused to do what he
19 was told to do. He did not follow instructions.

20 Staff responded appropriately by presence. They
21 responded appropriately by gesturing to him and trying him,
22 to, to comply. This is not an unreasonable command that an
23 inmate should receive. We search people like we cut light
24 switches off and on in our home. That goes on all the time,
25 and, and Mr. Torres refused to do it, and an appropriate

James Aiken - Direct examination
By Mr. Allen

1 amount of force was used, and he became complainant.

2 And I've seen thousands and thousands of transactions,
3 what I call security transactions of the use of force and
4 there's continuum all the way through to lethal force being
5 used, if necessary.

6 Q Is there anything in that video that you observed that
7 would cause you to or give you any concern about Mr. Torres
8 prison adaptability in the opinion you previously stated?

9 A No, sir, as I stated before, and with my background, as
10 well as teaching other people how to, to deal with these
11 situations, these things occur all the time in confinement
12 facilities throughout the United States on a regular basis
13 unfortunately.

14 Q Okay. And your -- and is it, is he still adaptable
15 even though you've seen that?

16 A Yes, sir, most definitely. He's adaptability. As he
17 grows older, he will become more complainant.

18 SOLICITOR BARNETTE: Your Honor, objection again.

19 THE COURT: Again---

20 Q We can't get into that.

21 WITNESS: I'm sorry, Your Honor.

22 Q We can't get into that.

23 THE COURT: I'll sustain the objection. Another
24 question please.

25 MR. ALLEN: One second please, Your Honor.

James Aiken - Direct examination
By Mr. Allen

1 (Pause.)

2 Q Thank you, Mr. Aiken. If you'd answer any questions
3 from the State.

4 THE COURT: Mr. Barnette.

5 SOLICITOR BARNETTE: May it please the Court, Your
6 Honor?

7 CROSS-EXAMINATION

8 BY SOLICITOR BARNETTE:

9 Q Good evening, Mr. Aiken. I'm going to try to make it
10 as short as I can.

11 A Very well, sir.

12 Q Like you said, you viewed the videotape and that was
13 appropriate use of force in that situation?

14 A Yes, sir.

15 Q And---

16 A Textbook.

17 Q And Officer Martinez probably was more gracious than a
18 lot of guards would of been in talking to him?

19 A Beg your pardon?

20 I didn't, I didn't get the first part.

21 Q Officer Martinez was very patient with him and
22 everything?

23 A Very -- well, you say patient. I say very
24 professional.

25 Q Yes, sir. I appreciate that.

James Aiken - Cross-examination
By Solicitor Barnette

1 Obviously they haven't -- any time they transport
2 prisoners or anything like that, they have to pat them down
3 and so forth?

4 A That's correct, sir.

5 Q And they look for contraband?

6 Like this, for example, that paperclip, that can be
7 contraband, couldn't it?

8 A Very much so.

9 Q And obviously they're looking for things like this that
10 can be used in prisons for something?

11 A That's correct, sir.

12 Q You've got to look at the Department of Corrections
13 records when he was in the Department of Corrections.

14 A Yes, sir.

15 Q The two -- I believe he was in from, for a brief time,
16 in 2001, and he was in from 2003 to 2006?

17 A I think so. I think he got out in 2007. I'm not sure.

18 Q Okay. Or somewhere around. I think it was
19 December 20th of 2006 or something like that?

20 A That's correct, sir.

21 Q In looking at his records, he didn't have any problems
22 in the D.O.C. from there?

23 A No, no major problems per se.

24 Q So, he really didn't have any problems or anything that
25 would cause -- I mean he didn't cause anybody any problems

James Aiken - Cross-examination
By Solicitor Barnette

1 per se, is that right?

2 A That's correct.

3 Q However, when they're in the Department -- when he's in
4 the Department of Corrections for that crimes he was in, he,
5 they're eligible for good time, is that right, and so
6 forth---

7 A That's correct, sir.

8 Q ---and so forth?

9 And obviously they're told that when they go in the
10 Department of Corrections?

11 A Yes, sir.

12 Q So, he knows if he acts up or causes problems that he's
13 gonna lose those work records, credits?

14 A Yes, sir.

15 Q However, starting Sunday night, he knows he's gonna be
16 in prison for the time of that conviction till whatever
17 happens. He acts up the first night like that, refuses the
18 commands, stands up to the officer, didn't he?

19 He did in that video?

20 He would not follow commands?

21 He wouldn't let anybody touch him?

22 A Without force, yes, sir.

23 Q And obviously he's gonna be touched when he's
24 transported to other cells, other prisons, throughout, check
25 for officers periodically to do pat down check for searches?

James Aiken - Cross-examination
By Solicitor Barnette

1 A Basically on a continual basis, sir.

2 Q Yes, sir. So, on this first night -- I mean the first
3 night he's convicted, he obviously did not comply with that
4 officer's commands?

5 A He did not comply with the officer's lawful commands.

6 Q Yes, sir.

7 Therefore, he caused some problems that night?

8 A Problems from the standpoint of a prison, that, that's
9 a trans, that's a normal security transaction.

10 Should he have complied?

11 Yes, sir.

12 Did he comply?

13 No, sir.

14 Did he finally comply?

15 Yes, sir.

16 Q Let me ask you this question, sir.

17 Did you review the crime that this individual did back
18 on May 11th, 2007?

19 A I reviewed the official information as provided in the
20 record. But I, I didn't do a, a crime scene investigation
21 or anything of that nature, no, sir.

22 Q Okay. I understand.

23 Excuse me for one second, Your Honor.

24 THE COURT: Yes, sir.

25 (Pause.)

James Aiken - Cross-examination
By Solicitor Barnette

1 Q Thank you, sir, for answering my questions.

2 A Thank you very much, sir.

3 THE COURT: Anything on redirect?

4 MR. ALLEN: No, Your Honor.

5 THE COURT: Do you wish to have this witness excused?

6 MR. ALLEN: Please, Your Honor.

7 THE COURT: Sir, you may step down. You're free to go.

8 WITNESS: Thank you, Your Honor. Have a good day, sir.

9 THE COURT: Yes, sir, you too.

10 Mr. Allen, at this point in time I'm gonna allow the
11 jury to retire to the jury room.

12 Ladies and gentlemen of the jury, I will caution you,
13 again, as I do always, not to begin any discussions until,
14 concerning this case, even among yourselves, until I've
15 advised you to begin your deliberations. If you'll retire
16 to the jury room.

17 Everyone remain seated while the jury retires.

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Mr. Allen, at the bench you indicated that
21 that was the last witness for the defense in the penalty
22 phase, is that correct?

23 MR. ALLEN: That is correct, Your Honor.

24 THE COURT: All right. Now, I would -- I did inquire
25 of your client at the beginning of this process as to

1 whether or not he wished to testify in this matter, and at
2 that time he indicated he did not wish to testify.

3 Have you consulted with your client since that time?

4 MR. ALLEN: If I may?

5 THE COURT: I'll give you a moment to do so.

6 (Pause.)

7 MR. ALLEN: Yes, sir, Your Honor, we have.

8 THE COURT: Does he wish to testify?

9 MR. ALLEN: He does not.

10 THE COURT: Mr. Torres, you're under oath still.

11 DEFENDANT: Yes, sir.

12 THE COURT: From my previous conversation, do you
13 understand that?

14 DEFENDANT: Yes, Your Honor.

15 THE COURT: Mr. Torres, do you still understand that
16 you do have the right to testify in this phase of the trial?

17 DEFENDANT: Yes, Your Honor.

18 THE COURT: And is it still your decision not to
19 testify in this phase of the trial?

20 DEFENDANT: Right.

21 THE COURT: Okay. And you're making that, that waiver
22 or your right to testify knowingly and intelligently, is
23 that correct?

24 DEFENDANT: Yes, Your Honor.

25 THE COURT: Have you had enough time to discuss it with

1 your attorneys?

2 DEFENDANT: Yes, Your Honor.

3 THE COURT: And do you wish any additional time to
4 discuss that matter with them?

5 DEFENDANT: No, sir, I don't.

6 THE COURT: All right. Thank you, sir. You can be
7 seated.

8 All right. Does the State intend to offer any
9 additional evidence?

10 SOLICITOR GOWDY: No, sir, Your Honor.

11 THE COURT: All right. At this time I'm gonna call the
12 jury back and excuse them for the evening. We'll begin
13 again at nine o'clock in the morning. They're some matters
14 I do want to go over with you before we rest this afternoon,
15 this afternoon.

16 Mr. Humphries, bring the jury in.

17 Mr. Allen, I will give you an opportunity to rest in
18 front of the jury. So, you'll be aware of where we are.
19 So, I ask you if you have additional witnesses. You're
20 fine.

21 (Whereupon, the following takes place within the
22 presence of the jury.)

23 THE COURT: All right. The record will reflect that
24 the jury has returned to the courtroom.

25 Mr. Allen, does the defense wish to call any additional

1 witnesses?

2 MR. ALLEN: No, Your Honor. We rest at this time.

3 THE COURT: All right. Does the State wish to call any
4 witnesses in reply or rebuttal?

5 SOLICITOR GOWDY: No, sir, Your Honor.

6 THE COURT: All right. Ladies and gentlemen of the
7 jury, that concludes the evidence to be presented in this
8 phase of the trial, and I note that it is six o'clock in the
9 evening. We will, in the morning, take closing arguments
10 and then I will charge you concerning the law, and the case
11 then will be placed in your hands for your deliberations.

12 So, we're gonna break for the evening. I'll give you
13 the same instructions that I've given you on every occasion
14 when we have rested for the evening, not to discuss the case
15 among yourselves. You've not heard all of the information
16 necessary to begin your deliberations.

17 So, don't allow anyone to discuss the case with you.
18 Don't attempt to gather any information outside of this
19 courtroom concerning this case, and, of course, should
20 anybody violate those orders or should anyone try to contact
21 you about the case, please let me know and I will take the
22 appropriate action.

23 We will begin again at nine o'clock in the morning.
24 And at this point in time you're free to go.

25 I'll ask everyone remain seated while the jury retires

1 for the evening.

2 Thank you very much.

3 (Whereupon, the following takes place outside the
4 presence of the jury.)

5 THE COURT: All right. At this point in time I'm going
6 to make a finding concerning the aggravating and mitigating
7 circumstances that I have found have evidentiary support in
8 the record before we go forward with the charge.

9 As far as aggravating circumstances, number one, that
10 the murder was committed while in the commission of the
11 following crimes or acts, criminal sexual conduct in the
12 first degree, burglary in the first degree, robbery while
13 armed with a deadly weapon or armed robbery, larceny with
14 the use of a deadly weapon, or arson in the first degree.
15 Also that the offender committed the murder for himself or
16 another for the purpose of receiving money or things of
17 monetary value. And that two or more persons were murdered
18 by the defendant by one act or pursuant to one scheme or
19 course of conduct.

20 Does the solicitor have any additional aggravating
21 circumstances?

22 SOLICITOR GOWDY: No, sir, Your Honor, and I -- we did
23 not ask for arson because we did not know whether or not the
24 arson had to be accomplished to ask for that aggravator. If
25 it were---

1 THE COURT: Does the defense wish to be heard on that
2 particular aggravator?

3 MR. ALLEN: Yes. Yes, Your Honor.

4 THE COURT: Yes, sir.

5 MR. ALLEN: We were, we were not put on notice. That
6 was not included in the written notice of the statutory
7 aggravating factors that the State wished to rely on. And
8 because they did not put us on written notice that's
9 required by the statute, we ask that---

10 THE COURT: All right. Then I will, I will take that
11 one out of the aggravators to be charged.

12 THE COURT: Anything else from the State?

13 SOLICITOR GOWDY: No, sir, Your Honor.

14 THE COURT: As to mitigating circumstances, number one,
15 that the defendant has no significant history of prior
16 criminal conviction involving the use of violence against
17 another person.

18 Number two, the murder was committed while the
19 defendant was under the influence of mental or emotional
20 disturbance.

21 Number three, the defendant, excuse me, the capacity of
22 the defendant to appreciate the criminality of his conduct
23 or conform his conduct to the requirements of law was
24 substantially impaired.

25 And the last one, the age or mentality of the defendant

1 at the time of the crime.

2 Any other statutory mitigators that the defendant
3 believes was supported by evidence?

4 MR. ALLEN: No, Your Honor. Not, not that was
5 supported by evidence. Of course, we made request of -- I
6 think it was number three. But based on the rulings of the
7 Court, that -- excuse me. Not number three.

8 THE COURT: The one that says the defendant was an
9 accomplice in a murder committed by another person and his
10 participation was relatively minor?

11 MR. ALLEN: Right. But based on the Court's ruling and
12 our abiding by this Court's ruling, I will acknowledge---

13 THE COURT: Well, I understand your previous exceptions
14 and then you except to my leaving that one off the list and
15 the rulings will remain the same.

16 MR. ALLEN: Thank you.

17 THE COURT: All right. Any other mitigators that the
18 defense wishes to have charged?

19 MR. ALLEN: No additional statutory mitigating
20 circumstances.

21 THE COURT: All right. Then let's talk about
22 non-statutory.

23 Yes, sir.

24 MR. ALLEN: If I may consult---

25 THE COURT: Sure.

1 (Pause.)

2 MR. ALLEN: Your Honor, if it please the Court.

3 We request prison adaptability. We'd request that
4 under, I think it would be Henry versus Lenault case, the
5 evidence of the background and the character of a
6 disadvantaged background, and I believe that would be all.

7 THE COURT: All right. Any objections to those
8 requests from the State?

9 SOLICITOR GOWDY: No, sir.

10 THE COURT: All right. Now, one other thing I want to
11 cover before we, we rest this evening.

12 Mr. Torres, again, I'll remind you that you remain
13 under oath. You have the right to participate in the
14 closing argument in this case. I informed you of that right
15 when we began this phase, phase of the trial.

16 Do you recall, recall my informing you of that?

17 DEFENDANT: Yes, Your Honor.

18 THE COURT: Have you had an opportunity to discuss that
19 matter with your attorneys?

20 DEFENDANT: Yes, Your Honor.

21 THE COURT: Do you need any additional time to discuss
22 this matter with your attorneys?

23 DEFENDANT: No, Your Honor.

24 THE COURT: Do you wish to participate in the closing
25 arguments in this case?

1 DEFENDANT: Yes, Your Honor.

2 THE COURT: All right, sir. And in doing so, I will
3 instruct you that you are confined to argue matters that are
4 in the record.

5 Do you understand that?

6 Have you discussed that with your attorneys?

7 DEFENDANT: Yes, sir.

8 THE COURT: You're not allowed to use this opportunity
9 as an opportunity to testify concerning matters that not,
10 are not already in the records. I'll ask you to discuss
11 that matter with your counsel. I'm not going to give you
12 legal advice. I will caution you, however, the Court will
13 limit you in that regard.

14 Do you understand that, sir?

15 DEFENDANT: Yes, Your Honor.

16 THE COURT: All right. Anything further before we rest
17 for the evening from the State?

18 SOLICITOR GOWDY: No, sir, Your Honor.

19 THE COURT: Anything further from the defense?

20 MR. ALLEN: No, Your Honor.

21 THE COURT: I'll ask that everyone remain seated while
22 the defendant retires.

23 Court's in recess until nine o'clock in the morning.

24 Thank you very much.

25

1 (whereupon, Court was in recess for the evening.)

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1 Thursday, October 23rd, 2008

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3 THE COURT: All right. Is the State ready?

4 SOLICITOR GOWDY: Yes, sir, Your Honor.

5 THE COURT: Defense ready?

6 MR. ALLEN: Yes, sir, Your Honor.

7 THE COURT: Bring the jury in.

8 (Whereupon, the following takes place within the
9 presence of the jury.)

10 THE COURT: All right. The record will reflect that
11 the jury has returned to the courtroom. I trust everyone
12 had a good evening, you're ready to continue with the case
13 this morning.

14 When we ended yesterday all of the evidence in this
15 matter had been presented. I told you when we started that,
16 at that time, we would have closing statements or arguments
17 concerning this matter. And as we have in the past, the
18 state will be going first followed by the defense.

19 At this time, the State may present its closing
20 statement or argument.

21 Mr. Gowdy.

22 SOLICITOR GOWDY: May it please the Court, Your Honor.

23 THE COURT: Yes, sir.

24 SOLICITOR GOWDY: Good morning, Mr. Foreman, ladies and
25 gentlemen of the jury.

1 This will be the last time anyone from the State of
2 South Carolina stands before you in this trial, and I would
3 be remiss if I did not, again, by acknowledging and thanking
4 you for your service. And I know I speak for Mr. Allen and
5 his colleagues as well as the prosecutors when we thank you
6 for the, the nights away from your family and your friends
7 and your loved ones in a hotel room and in a courtroom. If
8 any jury service is difficult, service on a murder case is,
9 especially a capital murder case, is even more difficult.
10 And we all acknowledge and thank you for your service.

11 I suppose it was a little more than a week ago when
12 this courtroom looked different. The wall was gone and it
13 looked like one big courtroom, and you began the process of
14 being qualified to serve in this case. And each one of you
15 sat either in this witness stand or the one in the other
16 courtroom, and you told the Court and you told both sides
17 that you could be fair, that you could listen to both sides,
18 and that if you thought life was the right sentence, you
19 could give life. And if you thought death was the right
20 sentence, you could give death. Each one of you sat where
21 so many witnesses have sat, and you said, depending on the
22 facts and the circumstances, if I think the appropriate
23 sentence is death, I can do that. If I think the
24 appropriate sentence is life, I can do that.

25 And ladies and gentlemen, I acknowledge to you that

1 standing in judgment of another human being is not easy. I
2 acknowledge to you that passing judgment on matters
3 involving life and death is not easy. But every one of you
4 said you could do it. Every one of you said that you would
5 vote for the sentence that you thought was appropriate, and
6 now we have come to the point in this trial where it is time
7 to decide what is appropriate for these crimes, for this
8 case, and for this defendant.

9 All murder cases are not eligible for the death
10 penalty. To be eligible for the death penalty, it has to be
11 aggravated and the State has alleged six aggravating
12 circumstances. The murder of more than one person, the fact
13 that the murder occurred during the commission of a, of a
14 criminal sexual conduct, the fact that the murder occurred
15 during the commission of a burglary, the fact that the
16 murder occurred during the commission of an armed robbery,
17 the fact that the murder occurred during the commission of a
18 larceny with a deadly weapon, and the fact that this murder
19 was accomplished by the means of taking something of
20 monetary or pecuniary value. That's six aggravating
21 circumstances that the State is alleged.

22 And ladies and gentlemen, I respectfully submit to you
23 that your verdicts Sunday afternoon were sufficient to find
24 all six aggravating circumstances, and the State has alleged
25 six. One is sufficient. The State has alleged six, and I

1 respectfully submit to you that there is sufficient
2 evidence, beyond a reasonable doubt, on each and every one
3 of those six aggravating circumstances.

4 So then we move to determine what the appropriate
5 punishment is. And ladies and gentlemen, you can consider
6 three things. You can consider whatever you want, and I
7 would to submit to you that there are three things that
8 would be most instructive and informative as you go about
9 this deliberative process.

10 Number one are the circumstances of this crime.

11 Number two, the character of this defendant.

12 And number three, is the impact Ann and Ray Emery's
13 deaths had on their family, on their friends, on their loved
14 ones.

15 Start with the circumstances of this crime.

16 Ladies and gentlemen, Doctor Donna Schwartz-Watts said
17 several things that I took notes of. She said -- that I
18 agreed with her on.

19 One of the things that she said is that in her 20 years
20 as a forensic psychiatrist these are the most violent crime
21 scenes photos she has ever seen. You heard the description
22 during the guilt phase, and you saw the pictures in this
23 phase. I don't have the words to describe to you the
24 carnage that took place inside that bedroom.

25 Ladies and gentlemen, Tony Torres got mad, got upset,

1 threatened the Emery family, and then under the cover of
2 darkness, walks into a storage building, and he gets a
3 hammer. I'm gonna stop on the word hammer because one of
4 the things you can consider, as you consider the
5 circumstances of this crime, is the weapon that was used.

6 This was not a distant gunshot with a .22 caliber rifle
7 where you don't have to see the face of the person you're
8 killing. This is not poisoning over the course of time
9 where you don't see it. This isn't putting a, a letter in a
10 mailbox where you're not around to see the consequences of
11 what you are doing. This is the most intimate personal way
12 you can kill another human being. With a hammer.

13 And he walks into the Emery home in the cover of
14 darkness and he walks into a bedroom where a man is laying
15 on his stomach with a sleep machine attached. And he hits
16 Ray Emery in the back of the head. Blood begins to pour,
17 and the, the bones begin to fracture, and he does it again
18 and again and again.

19 And then he turns to Ann. He doesn't hit Ann Emery in
20 the back of the face. He hits her in the front of the face.
21 Her eye is gone. The bridge from her mouth is not where the
22 bridge is suppose to be. Her face is essentially gone. She
23 has to have a black veil just to be buried.

24 You want a picture of depravity, ladies and gentlemen?
25 Look at the faces of the two people that he killed.

1 But not only did he not stop there. Because after he
2 hit Ann Emery with the hammer in the front of the face, he
3 raped her. He raped her. And then with two bodies in a
4 bedroom and blood everywhere, he steps over and around
5 bodies to rob them.

6 You want a conscious disregard for human life?

7 Is that what you want?

8 You want, you want a conscious disregard for human
9 life?

10 Imagine stepping over a body of a woman that you've
11 just beaten her face off and raped to take her jewelry.

12 You want depravity?

13 You want a conscious disregard for human life?

14 And after he kills them, and after he rapes her, and
15 after he starts stealing the moments and the memories of
16 their marriage and their life, he walks and gets a can of
17 gasoline. He has to leave and go to another building, and
18 he walks back in with a can of gasoline and he pours it
19 throughout the den and the bedroom. He even pours it on two
20 human bodies.

21 You want brutality?

22 Do you want depravity?

23 Do you want a conscious disregard for the lives of
24 other people?

25 But he doesn't strike a match because to strike a match

1 would endanger his own life. For any of us who have ever
2 thrown a match into gasoline, it's immediate. It would of
3 endangered his own life, but it also would of brought
4 attention that what he had just done.

5 So, he doesn't strike a match. He turns on the stove
6 and the oven so he can slowly burn and he gets in a van and
7 he drives down to Union, he wrecks, and he lies, and he says
8 don't call the police. And then he buys a soft drink and
9 takes a nap.

10 You want depravity?

11 Buys a soft drink and he takes a nap.

12 Ladies and gentlemen, his conduct in that two hours
13 crossed every category of the criminal experience. There's
14 violence. There's sexual violence. There's robbery.
15 There's deceit. There's manipulation. There's theft.
16 There's destruction of evidence. Everything you can imagine
17 in a two hour time period.

18 Ladies and gentlemen, you are entitled to consider the
19 circumstances of this crime. During the guilt phase, about
20 the only thing you knew about Ann Emery and Ray was what
21 Doctor Wren had told you. All you saw were crime scene
22 photos, their bodies. You heard descriptions from a
23 forensic pathologist, and you saw numbers and alleles on a
24 DNA chart.

25 And that's just the way our justice system works. In

1 the guilt phase, that's all you get to hear about Ann and
2 Ray Emery. Numbers on an allele chart. Height and weight
3 by a forensic pathologist.

4 But this phase is different. You got to hear about
5 them as a wonderful, loving, decent, and kind couple that
6 lived together, that loved together, and that died together.

7 I guess it was Crystal that told you that they just
8 wanted to be together always. When one would leave the
9 house, they always invite the other. They ate their meals
10 together. They loved each other. Phyllis White said it
11 just days before Ann and Ray Emery were killed that Ann told
12 her I love Ray so much I wish I had married him sooner.

13 What a greater compliment could a wife give a husband
14 than to say I love you so much I wish I had met and married
15 you sooner?

16 They lived together. They loved together. They died
17 together.

18 Randy Gault is a Spartanburg County sheriff's deputy.
19 He didn't come as a sheriff's deputy. He came as a grandson
20 and he told you the story of how Ann and Ray Emery would
21 take his grandma to the fish camp. And that may not seem
22 like a big deal. But I can tell you, for a young couple or
23 any couple that's first starting to date, first starting to
24 get to know each other, most folks don't want a grandparent
25 around. But they took her.

1 It wasn't his grandmother. It was somebody else's
2 grandmother. But they took her.

3 They lived together, they loved together, and then they
4 died together.

5 You may remember Doctor Wren talking about that reflex,
6 that instinct in each one of us that wants to protect
7 ourselves because I was asking him how could Ray Emery have
8 defensive wounds on his arms if he was attacked from behind,
9 and, and Doctor Wren said that there's this reflex, this
10 instinct in us that wants to survive. And I can't help to
11 think of what Doctor Wren said when I see the picture of
12 Ray, Ray reaching towards his wife.

13 She's in the floor, he's in the bed, and his arms are
14 reaching towards his wife because that's what husbands are
15 suppose to do. We are suppose to protect our wives, and he
16 couldn't and he didn't. It's not his fault. He got, he got
17 caught from behind. He had a sleeping machine on. But the
18 instinct was still there.

19 And can you imagine any greater agony than a wife
20 having to watch her husband beaten to death?

21 One of those two people had to watch the other beaten
22 to death with a hammer.

23 This loving wonderful couple that did so much for so
24 many other people that never once provoked this defendant
25 and this is what they get?

1 As wonderful of a couple as they were, they were also
2 individuals. Ann was active in her church. She loved her
3 baby girl Crystal. She was a good friend. She was a lady.
4 If I heard one, if I heard it once, I heard it several
5 times, talk about her, her demeanor, the way she comported
6 herself. Her decorum. She was so lady like she never
7 talked about other people. And to have a woman that
8 treasures her dignity and her lady likeness to have to put
9 those pictures on a screen for you to see, and then to have
10 a woman that treasures her dignity and lady likeness to have
11 to wear a black veil for her funeral, it's too much and it's
12 not right.

13 Then you got Ray Emery and every community needs a Ray
14 Emery. He's gonna fix this person's windows. He's even
15 gonna work on these folks cars. And oh, by the way, even if
16 I don't know you and you lock your keys out of your car, if
17 you come ask me, I'm gonna help you get inside.

18 He's active in his church. A kind man with a kind word
19 for everyone including a man from the neighborhood who comes
20 and knocks and says I need a ride to get some food. And,
21 oh, the bitter irony of the same hand that knocked a week
22 earlier and asked for a ride to get some food being the same
23 hand that holds the hammer that beats him and kills your
24 wife. The cruel bitter irony of Tony Torres asking for a
25 ride, and then about a week later killing him.

1 You are entitled to consider the circumstances of this
2 crime. You are entitled to consider the impact the deaths
3 of Ann and Ray Emery had on the lives of other people. You
4 are entitled to consider the character of the defendant.

5 But ladies and gentlemen, we, we live in a culture so
6 full of death. It is in the movies. It is in videos. It
7 is in video games that our children want to play. It's in
8 songs. We live in a culture of death and we forget
9 sometimes the finality of death.

10 We can come back from robbery. If somebody robs us, we
11 can come back. We, we can come back from some physical
12 injuries. We can come back from sexual abuse.

13 We can't come back from death. Whatever Ann and Ray
14 Emery said to one another that night before they went to
15 bed, it's the last thing they will ever say to each other,
16 and Crystal, with her hand on the door knob, do I knock and
17 go back in and tell them I love them on May the 10th,
18 2007. No, I'll see them tomorrow. I don't want to disrupt
19 them. I've already pulled the door closed. I don't want to
20 knock and go back in. I'll do it tomorrow except tomorrow
21 doesn't come. Ann and Ray Emery did not deserve to die and
22 they assuredly did not deserve to die like that.

23 So then we move to the character of Andres Antonio
24 Torres, who had a long and successful criminal history.
25 Almost 40 convictions before we even get to this trial.

1 He's not even 30 years old yet. Forty convictions ranging
2 from public drunk to forgery from grand larceny to burglary,
3 and a long and successful criminal career before he hits the
4 age of 30.

5 They gave him a shot at probation. It didn't work.
6 They gave him a shot at parole. It didn't work. They tried
7 to get him mental health counseling. Didn't go. Tried to
8 get him substance abuse counseling. Didn't go. You are
9 entitled to consider the character of Tony Torres.

10 But, ladies and gentlemen, you have got to consider
11 this crime when you consider the character of this
12 defendant. You can not separate the character of this
13 defendant from what he did.

14 And Sunday night, the night your verdicts are rendered,
15 the night that he begins to serve whichever of the two
16 sentences you impose on him, you saw on videotape his
17 character. It was a very simple request. That guard was
18 polite. He wasn't just professional. He was polite. Tried
19 to talk him into complying. You got to get patted down.
20 It's the rule. And you saw Torres reaction and this is the
21 night, the middle of this trial.

22 You are entitled to consider the circumstances of this
23 crime. You are entitled to consider the impact of Ann and
24 Ray Emery's deaths had on this community, and you are
25 entitled to consider the character of Andres Antonio Torres.

1 Ladies and gentlemen, mental illness is real. It is
2 real and everyday in this community there are families and
3 people and children struggling and making progress and
4 having setbacks and having more setbacks and making
5 progress. It is real. I will never stand before you or any
6 other jury and minimize mental illness ever. But nor will I
7 denigrate by allowing it to be used to explain away what he
8 did.

9 You heard Doctor Schwartz-Watts.

10 How many people in this country have bipolar disorder?

11 How many?

12 And then how many of them do that?

13 She doesn't believe he still has Intermittent Explosive
14 or Aggressive Disorder. We finally came around to the
15 diagnosis that we agreed on, which is antisocial personality
16 disorder. Sociopathic.

17 But even having said that, ladies and gentlemen, Doctor
18 Schwartz-Watts was 100 percent crystal clear. I asked her
19 three times.

20 Does he know right from wrong?

21 Can he conform his conduct?

22 I am -- we're not talking about somebody that hears
23 voices. We're not talking about somebody who is psychotic.
24 We're not talking somebody who thinks they're Jesus or
25 Mohammed or Buddha. We're talking about somebody who knows

1 the difference between right and wrong, who has the ability
2 to choose between right and wrong, who can conform his
3 conduct when he wants to, and he chose to do wrong. And
4 those are not my words. Those are her words.

5 Ladies and gentlemen, you can walk a mile in any
6 direction of this courthouse, and you can find children that
7 are poor, cold, and hungry, and they come from single parent
8 homes, and they may feel abandonment. You can go to any of
9 the elementary schools that are within two times of this
10 courthouse and find children that suffer from all of those
11 things and they will not do what he did.

12 As the father of two children that were once five years
13 old, let me tell you I felt the same way you felt when I saw
14 the five year old on a waiting bench at a psychiatric
15 hospital in Charleston. That's why they showed you the
16 picture. That's why they put it up there. So we'd feel
17 that way. And it worked. I felt that way. Y'all felt that
18 way.

19 Ladies and gentlemen, five year old Tony Torres is not
20 on trial in this case. This is not about rattling your
21 crib. This is not about cussing in school. This is about
22 the most brutal violent crime scene that Donna
23 Schwartz-Watts has seen in her 20 years as a forensic
24 psychiatrist and she's not even our witness.

25 Ladies and gentlemen, he knows the difference between

1 right and wrong. He can do good when he wants to do good.
2 I want you to think and look for just a minute at the
3 aftermath of the barbarism that took place on May the
4 11th. Doctor Schwartz-Watts was candid enough to agree
5 that his actions were incredibly clear and cogent. Crazy
6 people don't know to clean-up the crime scene. Insane
7 people don't know that I've got to get rid of the evidence
8 or leave the area. Look at what he did. He has the
9 foresight to put gasoline down and not strike the match
10 because he knows that it will draw attention.

11 So, he sets the ovens and the stoves to come on, and
12 then he doesn't stay in Spartanburg. He goes to Union where
13 he wrecks. And they saw they're gonna call 9-1-1, but
14 9-1-1. And instinctively he says don't do that. And he
15 goes back to a convenience store and he has the wherewithal
16 to lie to Henry Richardson.

17 And when he gets to Spartanburg Regional, he has the
18 wherewithal to walk in one door and walk out the other so
19 Mr. Richardson can't see that was all a ruse, and he doesn't
20 go back to the home where he lives. He goes to Mrs. Rogers
21 home. And he's in the process of washing away the blood.

22 That is not insanity. That is perfectly logical. He
23 knew the difference between right and wrong. He could
24 appreciate the wrongfulness of his conduct. He chose to do
25 wrong.

1 Ladies and gentlemen, in just a couple of moments
2 somebody from the defense team is gonna stand in front of
3 you and ask you for mercy. I promise you that. I promise
4 you one of the defense attorneys is gonna stand in front of
5 you and ask you for mercy.

6 But I guess my question, why is it that people that ask
7 you for mercy can't ever seem to show it to other people?

8 where was the mercy for the Emery couple?

9 where's the mercy for them?

10 He didn't have to kill them. If he needs money, ask
11 Ray Emery. He'll probably give it to you. Wait till
12 they're not home and break-in. Steal whatever you want.
13 You've done it before. Somebody will stand in front of you
14 and ask you for mercy and compassion for someone that hasn't
15 shown it to animals, or family members, or even the man that
16 gave him a ride the week before. I am not gonna ask you for
17 mercy.

18 Ladies and gentlemen, death will visit every single one
19 of us. It is the great equalizer in life. Whether we are
20 rich or poor, whether we are man or woman, every single one
21 of us is going to face death. And that is not what scares
22 us.

23 What scares us is the manner in which we are going to
24 die. Sometimes death, when it walks up in the front yard of
25 our life, it gets out of the car slowly. It walks slowly to

1 the front door and it gives you time to tell your children
2 that you love them. It gives you time to tell your spouse.
3 It gives you time to get your soul right, to make amends, to
4 apologize to whoever you need to apologize to. Sometimes
5 death walks slowly to the front door of your life and knocks
6 gently and it gives you time.

7 And then sometimes it comes and kicks in the front door
8 of your life and you don't even have time for a prayer. And
9 that's what happened to Ann and Ray Emery. A violent,
10 unprovoked, kicking in of the front door of life.

11 Regardless of what you do today, ladies and gentlemen,
12 this defendant will have time to put his life in order. He
13 can say good-bye to whoever he wants to say good-bye to. He
14 can write whoever he wants to write. He can get his soul in
15 order. Every second you spend deliberating is more time
16 than he gave.

17 Ladies and gentlemen, at this end of the jury box,
18 cornerstone for asking for mercy. I want us to imagine that
19 sweet thing we call mercy. Every one of us is needed it and
20 wanted it and benefited from it. But so has he. The mercy
21 of a man like Mr. Shackelford at Continuum of Care who cared
22 about him, the mercy shown to him despite 39 criminal
23 convictions, he's not in jail, the mercy of a probation
24 officer who says let me help you get a better job or a
25 parole officer who says I'm not gonna revoke you the first

1 time you have a positive drug test.

2 This defendant has been shown mercy in the form of
3 light prison sentences. He's been shown mercy in the form
4 of probation, parole. He was shown mercy from the
5 standpoint that he lived next door to a man, that despite
6 his past, his criminal past, Ray Emery would still give him
7 a ride. That's mercy.

8 And at the other end of the spectrum is vengeance. An
9 eye for an eye, a tooth for a tooth. And I am not gonna ask
10 you for vengeance. I'm not gonna ask you to do to him what
11 he did to them.

12 There's no gasoline. There's no hammer. There's no
13 black veil. I'm not going to ask you for vengeance. I am
14 gonna come in the middle of this vengeance and mercy to a
15 place called justice, and I am going to tell you that there
16 are some crimes that are so horrific and so brutal that they
17 cry out for society's ultimate punishment. I'm gonna stand
18 at a place called justice and I'm gonna tell you that this
19 defendant has taken too much for too long from too many
20 people.

21 Ladies and gentlemen, Ann and Ray Emery deserve mercy.

22 What would they have given to have you in their bedroom
23 on May the 11th passing judgment on their lives?

24 What would they have given to have y'all standing in
25 their bedroom as the hammer was getting ready to come down

1 and having you, you pass judgment on whether they deserve to
2 live or die?

3 They're the ones that deserve mercy. This defendant
4 deserves justice.

5 I'm just a prosecutor. I -- that's all I am. My job
6 ends on this side of the rail. You are judges. But you are
7 also the collective conscious of this community. The 12 of
8 you are the collective conscious of this place we call in
9 common, and there are some crimes that are so horrific and
10 the criminal histories are too long and the violence is too
11 severe that you have to impose the most serious punishment
12 that society can pass.

13 Ladies and gentlemen, there -- if you think back to the
14 very first exhibit I ever showed you -- and I'm about to sit
15 down. I know, I know I should sit down. My time's gone. I
16 hope I've done a good enough job of telling you what kind of
17 people Ann and Ray Emery are. That's my only fear is that I
18 hadn't done a good enough job to tell you what kind of
19 people they were.

20 The first exhibit you saw was a house. You may
21 remember it. The very first one. Deputy Danny Jones was
22 called to the stand and I showed him the State's Exhibit. I
23 think it was No. 20. It's a house. ■■■ Montgomery Street.
24 The only house Ray Emery ever lived in. His entire life.
25 Born there and raised there. Took his wife to live there.

1 For almost all of his life that house was filled with love,
2 and laughter, kindness, and goodness.

3 And then in just, in one instant, on one night in the
4 early morning hours of May the 11th that house was turned
5 into the most violent crime scene that I have ever seen, and
6 the brutality and the carnage and the damage and the
7 heartache will echo throughout eternity.

8 And for that, you have to affix the proper punishment.
9 For two murders, two unprovoked brutal murders, for
10 burglary, for walking into another couple's home under the
11 cover of darkness along with a hammer, for robbery, for
12 stepping over their bodies to steal their jewelry, for
13 raping a woman either before, during, or after he killed
14 her, you have to decide what the proper punishment is.

15 I'm gonna sit down and I'm gonna tell you this right
16 now. I'm going to show you a picture. You've seen it
17 before. If you don't want to see it again, don't look at
18 the screen. It's a crime scene photo. If you don't want to
19 look at it, don't look at the screen. I'm warning you now.
20 I'm gonna show the rest of you, and then I've got two more
21 questions and I'm gonna sit down.

22 Two questions and I'm gonna sit down.

23 If not that, then what?

24 If that's not enough, then what?

25 And if not him, who?

1 Thank you, Your Honor.

2 THE COURT: Yes, sir.

3 I'd ask the attorneys to approach briefly.

4 (Whereupon, a bench conference was held out of the
5 hearing of the jury at this time.)

6 THE COURT: You want to turn that off for us.

7 (Bailiff complies.)

8 THE COURT: All right. At this time the defense has
9 the right to make its closing argument, and I believe Mr.
10 Allen is gonna do that.

11 You may proceed, Mr. Allen.

12 MR. ALLEN: Thank you, Your Honor.

13 Help, help me, Aunt Pam. I feel it coming. Young Tony
14 did not, at that time, understand what was happening to him.
15 He did not understand what caused his feelings. He did not
16 understand what caused his episodes, his major incident, his
17 fits as they were described. And that was because Tony was
18 a mentally ill, chronically mentally ill. Suffers from
19 bipolar disorder and anxiety disorder, and bipolar is the
20 most recent episode as manic.

21 Even as a young child he had problems. Before he
22 started self-medicating, before he started using drugs, he
23 had serious chronic mental illness. So much so that he
24 would shake the crib, shake the crib so bad that he'd loosen
25 or move the slats on two sides at 14 and 15 months old.

1 In school, first and second grade, disruptive.
2 Couldn't control himself. So bad in school that he was
3 expelled from public school and put first in the McCarthy
4 Tesler School until he was put in group homes.

5 Imagine, ladies and gentlemen, how his mother felt. A
6 child that she wanted so badly, a child that she and her
7 husband, Andy, had although he didn't want her to have the
8 child, and this child has some serious problems that she
9 recognized. She understood -- she didn't understand them.
10 But she knew this child had serious serious problems. And
11 she sought help.

12 At the age of three and a half, when Tony was three and
13 a half, she had to leave him in Charleston in a psychiatric
14 hospital. And again, at age seven or eight, left him again
15 in a psychiatric hospital. Eleven psychiatric hospital
16 admissions before he was 14 years old. This child was
17 seriously mentally ill.

18 Mrs. Lamb called numerous places according to her
19 notes. Some of these places couldn't help. Some of these
20 places tried to refer her to other places. She was so
21 desperate for help that she apparently called anything and
22 everything in the phone book that referred to medical.
23 Ended up getting a medical department or medical unit of one
24 of the local prisons.

25 She wanted her son to be better. At one point she was

1 even told he had bipolar by a doctor. But for some reason
2 that diagnosis was lost, ignored, or with all the records
3 going back and forth, just not seen. There's no continuity
4 of his seeing doctors.

5 Before he was placed in group homes, Tony was placed
6 with or got involved with Continuum of Care for severely
7 emotionally disturbed children. Severely. Not every
8 emotionally disturbed child can be helped or can be placed
9 or can be seen by the Continuum of Care. Only severely
10 emotionally disturbed children. And then they began their
11 placement.

12 Put Tony into a number of different places as he was in
13 group homes. At these homes they were trying to teach Tony
14 how to modify his behavior. They treated him as a behavior
15 problem, but not necessarily as a bipolar diagnosis. His
16 mother couldn't control him. So, she had to give him up to
17 these group homes.

18 And when he went in them, except for short breaks,
19 weekend, and a few other short breaks, he was in a group
20 home. He was with other emotionally disturbed children
21 until they released him and he was almost 18 years old. He
22 was 17.

23 And the problem with the, the program that they had for
24 him was they were trying to teach him to modify his behavior
25 with rewards, group levels where we could earn privileges,

1 earn the right to go home. But that didn't always work.

2 It didn't always work because of his mental illness,
3 and it didn't always work because even when he got to that
4 level, for some reason, sometimes, he did not get a trip
5 home that he had earned, and this led to his failure, low
6 self-esteem, and yes, even other incidents and episodes.

7 As Tony grew, he turned to self-medication, drug use.
8 He started off with marijuana. He kept going to other
9 pills, alcohol, and to harder drugs, meth, because what he
10 was trying to do was to feel better. He wasn't taking
11 psychotropic medication that, at that time, was prescribed
12 for him, at various times prescribed for him because it
13 takes a while for them to work and they have side affects.
14 And he tried so hard to feel better immediately, and that's
15 why he fell then into addiction.

16 You heard that addiction, what it is, what causes it,
17 and it's like a cycle. Once an individual becomes addicted,
18 they stay that way until there can be some form of
19 treatment.

20 Now, it's interesting, ladies and gentlemen, how
21 society, as a whole, sometimes feels about mental illnesses.
22 Obviously these are illnesses that we can not see.
23 Sometimes we're ashamed of them. We hide them. We don't
24 talk about them.

25 we don't feel that way about physical illnesses, even

1 physical illnesses that may of been caused by someone's own
2 bad or unhealthy life-style. If an individual needs
3 treatment because of sclerosis because of an unhealthy
4 lifestyle or treatment for their heart, which may of been
5 caused in part by some actions of their own, we, we make
6 sure they get that. But we don't always feel that way about
7 mental illness.

8 we don't know necessarily what causes it. We know it
9 may have some like bipolar -- bipolar disorder may have some
10 genetic connection. We don't know what causes it.

11 Am I saying that Tony did not have certain choices?

12 I'm not saying that. Because he, he did. That much is
13 clear. And I'm not saying that we did not present the
14 evidence that indicates that Tony could not know right from
15 wrong because he does. That was not the purpose of that
16 testimony. If we were gonna try to convince you, ladies and
17 gentlemen, that he could not distinguish right from wrong or
18 that he is insane, that evidence would of come out earlier
19 in the other phase of the trial.

20 That's what we were talking about earlier when we were
21 talking about the difference between mitigation and a
22 defense. His mental illness is not a defense. But it is
23 something for you to consider. I ask you to consider that
24 in arriving at the appropriate verdict, the appropriate
25 penalty for Tony.

1 I know you're gonna hold him accountable. He needs to
2 be held accountable for his crimes. I'm not asking you to
3 do that. His mental illnesses do not provide an excuse or
4 justification for his crimes.

5 And yet, what we're trying to show is that because,
6 because of his bipolarism and anxiety disorder, that even
7 though he could distinguish right from wrong, his ability to
8 conform his conduct was substantially impaired because of
9 his use of drugs, his addiction, another mental illness that
10 Doctor Morton said, his ability, his ability to conform his
11 conduct was substantially impaired.

12 There are some choices, choices that Tony did not make.
13 He did not choose to grow up essential without a father. He
14 did not choose to have this mental disorder, these mental
15 illnesses. He did not choose to grow up in group homes. He
16 wanted a home. Tony was raised in group homes, psychiatric
17 institutions, and anywhere else but with his mother,
18 anywhere else but with a father, and Tony did not choose to
19 have 11 psychiatric hospitalizations before he reached the
20 age of 14.

21 Ladies and gentlemen, Tony can be managed in prison.
22 Although he's had episodes and major incidents even in group
23 homes, he's had staff to help control him. He's been in
24 prison, which is essentially without substantial problems.
25 They have the ability to control him. They can manage him.

1 They've managed him before. You saw how they can manage
2 him.

3 Prisons are structured. Inmates are told what to do.
4 And if they don't do it, as you saw, they can be brought
5 into compliance. You saw that, with what Tony did on
6 Sunday. He asked and he wanted them not to touch him, and
7 they were gonna frisk him. There's no question about that.
8 He was certainly fighting a losing battle. He, he was going
9 to be frisked.

10 As you watched that, you did not see any physical
11 aggression of Tony. You didn't see anything like that. All
12 you saw him do was to say don't touch me. At one point he
13 even said please don't touch me, please don't touch me. He
14 was pleading with them. And the officer was acting
15 according to protocol and according to what he, they were
16 trained. They immediately, immediately brought him into
17 compliance.

18 what happened after that?

19 He complied. Head down. They helped him to his feet
20 and they walked him. They walked him to medical, and he
21 complied. He wasn't compliant. Probation and parole is not
22 as structured. He can live in a structured environment. He
23 can live in prison. He can live in prison without any major
24 problems as he's done before. And Tony can be managed and
25 treated for his mental illness.

1 Tony has lived his whole life with these mental
2 illnesses. These problems caused him to be impaired in his
3 judgment, and impaired in his choices.

4 Ladies and gentlemen, I ask of you to sentence him to a
5 substantial sentence, life imprisonment without the
6 possibility of parole where he can be managed and kept safe,
7 others kept safe, and receive treatment.

8 Ladies and gentlemen, this is an extremely tough
9 sentence, tough sentence for a 28 year old man of his mental
10 problems, and a man whose been in special education and
11 raised in group, these group homes. And I ask you to give
12 this sentence and ask you to give this sentence because it
13 speaks justice and also mercy.

14 At this time, Tony would like to address you.

15 DEFENDANT: The day, it's been so long for everybody.
16 No way I can turn back the hands of time. I wish I could.
17 It hurts me. I hurt some people. But I stand in this
18 courtroom and I know I have to live every day the rest of my
19 life knowing that I been found guilty of killing my best
20 friend's parents. It hurts me inside. It really does.

21 I know y'all may look at me and see no emotion. That's
22 because all my life I have been trained not to show it. But
23 it does hurt me.

24 I say I'm sorry for, to the family, to the son, and to
25 the daughter. Like I stand up here and this is what's in

1 front of me.

2 (whereupon, the defendant tears up a piece of paper at
3 this time.)

4 DEFENDANT: I don't want to read that. I want to tell
5 you what's in my mind, my heart, cause it hurts. It hurts
6 everyday.

7 I didn't ask to be born, and I'm not asking to die. My
8 problems, they -- I don't understand them till today.
9 Drugs, I tried to take away the pain. I tried to take and
10 use it to cope with it. It didn't work. At times I thought
11 it was gonna work. It didn't. And these are the
12 consequences I face, and I have to live with them everyday.
13 And I'm so sorry.

14 And as I stand up here, it's like standing at the gates
15 asking God to let me in. I don't know what to say. I don't
16 know. I'm sorry. I know it's not gonna bring nobody back.
17 It's not gonna turn back the hands of time. Although I may
18 be hated, I just want to ask that you forgive me. Whatever
19 y'all decide, I have to live with it.

20 Thank you.

21 THE COURT: Ladies and gentlemen, that completes the
22 closing arguments or statements to the jury. I've got -- I
23 have -- it's my responsibility, at this time, to charge you
24 concerning the law. We've been going for about an hour and
25 a half now and I think it will be good time to take a break.

1 As I'll tell you on all occasions when you leave the
2 courtroom, and until I tell you to begin your deliberations,
3 please don't begin any discussions concerning this case even
4 among yourselves until such time as I have told you to do
5 so. At this time, we'll take a short break.

6 I'll ask everyone to remain seated while the jury
7 retires.

8 (Whereupon, the following takes place outside the
9 presence of the jury.)

10 THE COURT: I'll ask that everyone remain seated while
11 the defendant retires. Once that's accomplished, we'll be
12 on about a ten minute break.

13 (Whereupon, a short recess was taken at this time.)

14 THE COURT: State ready for the jury?

15 SOLICITOR GOWDY: Yes, Your Honor.

16 THE COURT: Defense ready?

17 MR. ALLEN: Yes, sir, Your Honor.

18 THE COURT: All right. Just one second. Let's let
19 everyone be seated.

20 All right. You can bring the jury in.

21 (Whereupon, the following takes place within the
22 presence of the jury.)

23 THE COURT: The record will reflect that the jury has
24 returned to the courtroom.

25 Mr. Foreman, and members of the jury, you've heard now

1 the testimony and evidence and arguments of the State and
2 the defendant. I will now explain the law that applies to
3 this particular case.

4 Under the Constitution and the laws of South Carolina,
5 you are the finders of the facts of the case. I do not have
6 the right to pass upon the facts or even express an opinion
7 that I might have concerning them.

8 You're also the judges, the sole judges of the
9 credibility, the believability of the witnesses who have
10 testified in this matter. In passing upon their
11 credibility, you can take into consideration such matters as
12 the demeanor or manner of testifying by the witness, whether
13 or not the witness had a reason to be biased or prejudiced
14 for or against one side or the other, whether a witness has,
15 whether a witness' testimony was contradicted on one hand or
16 supported or corroborated on the other hand.

17 You certainly do not -- you certainly do not determine
18 the credibility or believability by counting the numbers of
19 witnesses for either side. You have the right to believe a
20 small portion of a witness' testimony and disregard the
21 larger portion or vice versa. You may believe one witness
22 against many or many against one. All of these things you
23 will consider bearing in mind that you should give the
24 defendant the benefit of a reasonable doubt.

25 Now, in this portion of the trial I will instruct you,

1 again, and emphasize that the fact that a defendant did not
2 testify is not a factor to be considered by you, in any way,
3 in your deliberations or considerations of the questions
4 before you. It must not be considered by you in any manner
5 whatsoever. A defendant has the constitutional right to
6 remain silent and the assertion of that right should not be
7 considered by you in your deliberations.

8 And I will repeat, under your oath, you are to draw no
9 conclusion whatsoever from the fact that the defendant did
10 not testify. The fact that the defendant did not testify in
11 the case should not, should not even be discussed by you in
12 the jury room. The burden of proof throughout this trial,
13 and always in this trial, is upon the State. That burden of
14 proof remains with the State to prove its case and the
15 elements of this particular portion of the case beyond a
16 reasonable doubt.

17 Also, we had testimony from certain expert witnesses
18 who testified in this case. And as I indicated to you
19 earlier, and I'll explain again, the rules of evidence
20 ordinarily do not permit a witness to testify as to opinions
21 or conclusions. An exception to that general rule is for
22 witnesses who are called or designated as expert witnesses.
23 That's a witness, who because of their education or
24 experience, has, has become an expert in some art, science,
25 profession, or calling, and those witnesses are allowed to

1 state an opinion as to any relevant matter in which the
2 witness claims to be an expert, and may also state the
3 reasons for giving that opinion.

4 You should consider any expert's opinion received in
5 evidence in this case like any other evidence. You give it
6 the weight you think it deserves. If you decide the opinion
7 of an expert witness is not based on sufficient education or
8 experience or should you conclude that the reasons given in
9 support of an opinion are not sound or that the opinion is
10 outweighed by other evidence, you may disregard the opinion
11 entirely. The expert -- an expert witness' testimony is to
12 be given no greater weight than any, that of any other
13 witness simply because that person has been declared to be
14 an expert. Further, you're not required to accept an
15 expert's opinion even though it may not be contradicted.

16 Now, the same law and the same Constitution that makes
17 you the finders of the facts and the evidence, as I have
18 discussed with you, makes me the judge, the sole judge and
19 the only instructor in the law. You must accept the law
20 which I charge you and apply it to the evidence as you find
21 it in order to reach your verdict or your conclusion in this
22 case.

23 And finally, I charge you, in this record, that you
24 should not be concerned with what you think the law ought to
25 be. But rather be concerned with the charge of law as I

1 give it to you at this time.

2 As in other cases, there are two types of evidence
3 which you have the right to consider generally that are
4 presented during any trial. Direct evidence and
5 circumstantial evidence.

6 Direct evidence is testimony of a person who claims to
7 have actual knowledge about a fact such as someone who
8 actually witnessed or saw an event and describes that event
9 directly. It's evidence which immediately establishes the
10 main fact which is sought to be proved.

11 Circumstantial evidence you may consider also, and that
12 is proof of a chain of facts or circumstances that indicate
13 the existence of another fact. It's evidence which
14 establishes collateral facts from which a main fact may be
15 inferred. Therefore, circumstantial evidence is based upon
16 inference. Not upon personal knowledge or observation. And
17 the law makes absolutely no distinction between the weight
18 or value to be given to either direct or circumstantial
19 evidence nor is a greater degree of certainty required of
20 circumstantial evidence than that of direct evidence. You
21 should weigh all of the evidence in this case.

22 Now, I charge you further that evidence of prior crimes
23 or misconduct by the defendant should not be considered and
24 may not be used as proof of any aggravating circumstances
25 which I'll explain later. However, you may consider such

1 evidence only as it may relate to the defendant's character,
2 his characteristics. But not as proof of any alleged
3 statutory aggravating circumstances.

4 Ladies and gentlemen, Mr. Foreman, members of the jury,
5 it now becomes your duty to decide what sentence you will
6 recommend that this Court impose upon the defendant, Andres
7 Antonio Torres. There are two verdicts you are to consider
8 in this case. One is the death penalty, which in this state
9 is by electrocution or by lethal injection at the option of
10 the defendant. The other is life imprisonment without the
11 possibility of parole. Your sentence, sentencing
12 recommendation will be followed by this Court.

13 Now, the order in which I explained these two sentences
14 is by no means a recommendation by this Court as to which
15 sentence you should impose. It's simply that one must be
16 stated first and one must be stated second. Also, I will
17 instruct you that the terms life imprisonment and death
18 sentence are to be understood in their ordinary and plain
19 meaning.

20 Now, by this form that I hold in my hand at this time,
21 this form is entitled recommendation of the sentence of
22 death. You, the jury, may recommend that the Court sentence
23 the defendant to death. Please, please observe that on this
24 form, when you see it, that immediately below the body of
25 the recommendation there are lines, 12 lines, where, should

1 you decide to recommend the death penalty, each one of you
2 would sign your name. It's the law in this State, Mr.
3 Foreman, and members of jury, that a recommendation for the
4 imposition of the death penalty be a unanimous
5 recommendation and each and every juror must sign his or her
6 name to the recommendation form.

7 Now, I will read the text of the form to you. It
8 states we, the jury, in the above entitled case, having
9 found, beyond a reasonable doubt, the existence of the
10 following statutory aggravating circumstances, to wit, now,
11 below that's -- I've gotten to this point on the form.
12 There are several lines listed there that are blank. At
13 that point there are provided lines for you to indicate
14 aggravating circumstances, and I will instruct you further
15 concerning what aggravating circumstances are and how you
16 would find them later in the charge.

17 Now, below that it says now recommend to the Court that
18 the defendant, Andres Antonio Torres, be sentenced to death.
19 That is the form for the recommendation of the death
20 penalty.

21 Now, for this recommendation to be made, that is that
22 the defendant be sentenced to death, you must find first
23 that a statutory aggravating circumstance existed beyond a
24 reasonable doubt.

25 Now, what is a statutory aggravating circumstance you

1 may ask?

2 It is, in fact, an incident, a detail, or an occurrence
3 that the General Assembly has declared, by statute, would
4 make worse. That is to aggravate the offense of murder when
5 the two occurred together. In other words, it is something
6 which would increase the enormity or add to the injurious
7 consequences of the offense.

8 Now, Mr. Foreman, and ladies and gentlemen of the jury,
9 you will receive a form that's entitled statutory
10 instructions, and upon this sheet of paper which I now hold
11 in my hands are written the words again statutory
12 instructions, and, again, you'll have this paper in the jury
13 room during your deliberations. The body of the form
14 states, in determining whether to recommend that the
15 defendant, Andres Antonio Torres, be sentenced by the Court
16 to life imprisonment or to death, you may consider the
17 following statutory aggravating circumstances.

18 Number one, the defendant, Andres Antonio Torres, did
19 murder Charles Ray Emery and Ann Emery by one act or
20 pursuant to one scheme or course of conduct.

21 Number two, the defendant, Andres Antonio Torres, did
22 murder Ann Emery while engaged in the commission of the
23 crime or act of criminal sexual conduct.

24 Number three, the defendant, Andres Antonio Torres, did
25 murder Charles Ray Emery and Ann Emery while in the

1 commission of the crime or act of robbery while armed with a
2 deadly weapon.

3 Number four, the defendant, Andres Antonio Torres, did
4 murder Charles Ray Emery and Ann Emery while in the
5 commission of the crime of, or act of larceny with the use
6 of a deadly weapon.

7 Number five, the defendant, Andres Antonio Torres, did
8 murder Charles Ray Emery and Ann Emery for the purpose of
9 receiving money or a thing of monetary value.

10 And number six, that the defendant, Andres Antonio
11 Torres, did murder Charles Ray Emery and Ann Emery while in
12 the commission or the act of burglary.

13 Now, let me emphasize to you that there, there are
14 only, these are only circumstances that you may consider --
15 these are the only circumstances that you may consider as
16 aggravating circumstances. Should you find, and it must be
17 a unanimous finding, a finding that the State has proven,
18 beyond a reasonable doubt, the existence of one or more of
19 the circumstances listed on this sheet, then you would be
20 authorized, which is to say to be permitted, to consider
21 recommending, recommending to this Court that the defendant
22 be sentenced to death.

23 Now, what do I mean by proof beyond, proven beyond a
24 reasonable doubt?

25 Proof beyond a reasonable doubt is proof that leaves

1 you firmly convinced of the evidence, existence of or one of
2 the aggravating circumstances. Now, there are few things in
3 this world that can be proven to absolute certainty, and in
4 criminal cases the law does not require proof that overcomes
5 every possible doubt. If, based on your consideration of
6 the evidence, you are firmly convinced that an aggravating
7 circumstance existed, then you would be authorized, that is
8 to say permitted, to consider recommending to this Court
9 that the defendant be sentenced to death. If, on the other
10 hand, you think there's a real possibility that the
11 aggravating circumstances did not exist, you must give the
12 defendant the benefit of the doubt and in such case would
13 make no recommendation of sentence.

14 If you find that no statutory aggravating circumstances
15 exist, you will fill out a form and that one is entitled
16 Form A and stop deliberations and would sentence the
17 defendant under the law. I'll explain to you that there are
18 three forms that I have included as a group. The sheet on
19 top of that says complete only one of the following three
20 forms that have to do with your findings concerning the
21 aggravating circumstance.

22 The first one is Form A. Form A says we, the jury,
23 unanimously agree that no aggravating circumstances exist in
24 this case. If that is the finding of the jury unanimously,
25 then the, Mr. Foreman, would sign the form. That form

1 indicates that then you would stop deliberations and not
2 make a recommendation of sentence.

3 Now, if you're unable to unanimously agree as to the
4 existence of any aggravating circumstances, you would fill
5 out Form B, and that simply says we, the jury, are unable to
6 unanimously agree to the existence of aggravating
7 circumstances. Again, signed by the foreman, and that form
8 indicates that if you make that finding, then you would stop
9 deliberations and not make a recommendation at that point.

10 However, if you do find the existence of aggravating
11 circumstances, the ones that I just listed, and they will be
12 shown to you on, again, the statutory instructions that I
13 will give you in writing, then the final form, Form C, says
14 we, the jury, in the above entitled case find, beyond a
15 reasonable doubt, the following statutory aggravating
16 circumstances. There's, again, several lines for you to
17 file in those circumstances which you are able to
18 unanimously agree upon. And again, that must be signed by
19 all 12 jurors.

20 So, as to the three forms as to the findings of
21 aggravating circumstances, you must fill out one of them and
22 one of them only. And it would have to do as to whether or
23 not you are able to, whether or not you find no aggravating
24 circumstances, whether you're unable to agree as to the
25 aggravating circumstances, or that you do find aggravating

1 circumstances and you list them on that particular form.

2 Now, please pay particular attention to this. You are
3 never required to recommend the death penalty even if you
4 find that a statutory aggravating circumstance existed at
5 the time the offense occurred.

6 Now, as to those aggravating circumstances that I went
7 over with you, again, just to be sure that we're clear on
8 this, I'm going to go with you, explain what is meant by
9 those particular crimes that were alleged in the aggravating
10 circumstances. The first one, one of them is, has to do
11 with armed robbery.

12 Now, in that case, in this case, the defendant is
13 charged with the aggravating circumstance of armed robbery,
14 and armed robbery is the taking of personal property from
15 the person or presence of a person and the carrying away of
16 the property with the intent to permanently deprive the
17 owner of the use of the property and to keep the property
18 for one's own use. The taking away or carrying away of the
19 property must be done with violence or by putting the owner
20 of the property in fear of violence.

21 Finally, a person may be, must be armed with a deadly
22 weapon during the robbery and a deadly weapon is any article
23 or substance which is likely to cause death or great bodily
24 harm, and whether an instrument has been used as a deadly
25 weapon depends on the facts and circumstances of each case.

1 One of the other aggravating circumstances,
2 circumstances has to do with whether the murders were
3 committed during the act of burglary, and, therefore, the
4 defendant has been charged with the aggravating circumstance
5 of first degree, or of burglary.

6 Burglary involves the entering of a dwelling without
7 consent, intending to commit a crime, either a felony or a
8 misdemeanor, at the time of the entry. Intent may be shown
9 by acts or conduct of the defendant and other circumstances
10 from which you could naturally or reasonably infer intent.

11 Now, we also have discussed the fact that these have to
12 occur in connection with a murder, and, therefore, part of
13 the aggravating circumstances is a determination of the
14 offense of murder, and in one of the aggravating
15 circumstances has to do with, that the defendant is charged
16 with the aggravating circumstance of murder of two or more
17 persons by one act or pursuant to one scheme or course of
18 conduct, and then there was also the aggravating
19 circumstance that a murder was committed, committed for
20 money or for monetary gain.

21 Now, as to murder, murder is the killing of another
22 person with malice aforethought. Malice is hatred, ill
23 will, or hostility toward another person. It is the
24 intentional doing of a wrongful act without just cause or
25 excuse with the intent to inflict an injury or under

1 circumstances that the law will infer evil intent.

2 Malice aforethought does not require that the malice
3 exist for any particular time before the act is committed.
4 But malice must exist in the mind of the defendant just
5 before and at the time that the act is committed.
6 Therefore, there must be a combination of evil intent and
7 the act.

8 Malice aforethought can be expressed or inferred.
9 Expressed or inferred does not mean different kinds of
10 malice. Just the manner in which they may have been shown
11 to have existed. That is by direct evidence, evidence or by
12 inference from the facts and the circumstances.

13 Express malice is shown when a person speaks words
14 which express ill will or hatred for another person or when
15 the person prepares beforehand to do the act which was later
16 accomplished.

17 Malice can be inferred from conduct showing a total
18 disregard for human life and it may be inferred and also
19 arise when the deed is done with a deadly weapon. I've
20 already defined for you what a deadly weapon is. Again, any
21 article or instrument or substance which is likely to cause
22 death or great bodily harm. Whether the instrument has been
23 used as a deadly weapon depends on the circumstances of each
24 case.

25 Finally, the defendant is charged with the aggravating

1 circumstance of committing the murder of the victims while
2 in the act of criminal sexual conduct in any degree.
3 Criminal sexual conduct is the engaging in a sexual battery
4 with a victim. Sexual battery is sexual intercourse,
5 cunnilingus, fellatio, anal intercourse, or any intrusion,
6 however slight, of any part of a person's body or any object
7 into the genital or anal openings of another person's body
8 except when the intrusion is accomplished for a medically
9 recognized treatment.

10 Now, I've, I've instructed you and I will tell you that
11 should you find that the State has not proven, that such
12 circumstances existed, that is to say that you still have a
13 reasonable doubt as to the existence of the circumstances,
14 then you would use one of the forms I've already shown you
15 in the grouping and you would not make a recommendation
16 concerning sentence and the Court would sentence the
17 defendant under the law.

18 Now, should you find, beyond a reasonable doubt, that
19 one or more of the aggravating circumstances listed on the
20 statutory instructions existed at the time of the murder or
21 during the commission of the crime of murder, and should you
22 then decide, after considering the elements, in favor of a
23 recommendation of life imprisonment, about which I will
24 instruct you later, that if you then find that the
25 recommendation of the jury is that the defendant be

1 sentenced to death, then it would be your duty, Mr. Foreman,
2 to write, to write on the recommendation of this sentence
3 form, and that, again, is the form that I've shown you
4 earlier for the recommendation of the death penalty. Then
5 each and every juror would sign your names in the places
6 provided during, for that purpose.

7 Again, I will tell you that other facts about the
8 defendant's background and record have been introduced by
9 the State, and I charge you that the evidence of these
10 crimes or other crimes should be considered as substantive
11 evidence of, should not be considered as substantive,
12 substantive evidence of aggravating circumstance. But if
13 you are convinced that the defendant committed those other
14 crimes or any of them, you may consider them as evidence of
15 his character. These may be considered along with other
16 evidence and you may give them whatever weight you deem
17 proper under the circumstances under the case.

18 However, under no circumstances may you consider those
19 facts of other crimes, even if proven, as evidence of proof
20 of the statutory aggravating circumstances. Those other
21 facts, if proven, may be only considered as evidence of the
22 defendant's character and given such significance as you
23 determine they have the right to receive. They are not,
24 that is the proof of former crimes, are not proof of
25 statutory aggravating circumstances and can not be

1 considered as such.

2 Now, the other sentencing recommendation sheet that you
3 can enter, if you decide to recommend a life sentence, is
4 the recommendation of the sentence for life imprisonment,
5 and that's the form that I hold in my hand at this time, and
6 I will read to you the text of that recommendation.

7 We, the jury, in the above entitled case recommend to
8 the Court that the defendant, Andres Antonio Torres, be
9 sentenced to life imprisonment. Now, please note that
10 although you must unanimously agree before this form can be
11 completed by the foreman, only the foreman is required to
12 sign this recommendation form.

13 I will now instruct you on what you may consider in
14 making your decision as to which sentence to recommend. As
15 I previously instructed, if you find the existence, beyond a
16 reasonable doubt, of a statutory aggravating circumstance,
17 then you are permitted, but not required, to recommend the
18 death penalty. There are three conditions which you should
19 consider in reaching your decision.

20 First, whether the existence of a statutory mitigating
21 circumstance was supported by the evidence.

22 Second, whether the existence of any other mitigating
23 circumstance was supported by the evidence.

24 And third, whether, for any reason you can think of, or
25 for no reason at all, the defendant should be sentenced to

1 life imprisonment.

2 Now, I'll talk to you now about what are referred to as
3 statutory mitigating circumstance. You may ask yourself
4 just what is meant by that phrase. It's a fact, it's an
5 incident, a detail, or an occurrence which the General
6 Assembly has decided or declared, by statute, would reduce
7 the severity of the offense of murder. In other words, it
8 is circumstances recognized by statute as one, which in
9 fairness and mercy, may be considered in evaluating or
10 reducing the degree or moral culpability of the commission
11 of the act of murder.

12 A mitigating circumstance is neither a justification
13 nor an excuse for the murder. It simply lessens the degree
14 of one's guilt. That is, makes him less blameworthy or less
15 culpable.

16 What statutory mitigating circumstances should you
17 consider in this case?

18 Well, again, I'll refer to the statutory instructions
19 sheet that I'm going to give you to take into the jury room
20 and immediately below the listing of the statutory
21 aggravating circumstances, I will, I will read to you as
22 follows:

23 You may also consider the following mitigating
24 circumstances.

25 Number one, the defendant has no significant history of

1 prior criminal conviction involving the use of violence
2 against another person.

3 Number two, the murder was committed while the
4 defendant was under the influence of mental or emotional
5 disturbance.

6 Number three, the capacity of the defendant to
7 appreciate the criminality of his conduct or to conform his
8 conduct to the requirements of the law was substantially
9 impaired.

10 Number four, the mentality of the defendant or the age
11 of the defendant at the time of the crime.

12 In addition to the statutory mitigating circumstances,
13 I have, it says on the form you may also consider any
14 non-statutory mitigating circumstances such as evidence or
15 character of the defendant, of the defendant's background,
16 evidence of the defendant's prison, prison adaptability.

17 Now, a non-statutory mitigating circumstance is one
18 which is not provided for by the statute, but is one which
19 the defendant claims serves the same purpose. That is to
20 reduce the degree of his moral culpability or blame of the
21 offense. While there must be some evidence which supports a
22 finding by you that a statutory or non-statutory mitigating
23 circumstance exist, you need not find the existence of such
24 circumstances beyond a reasonable doubt.

25 You may consider any mitigating circumstance supported

1 by the evidence submitted and you must determine whether the
2 evidence exists and the significance to be given to that
3 evidence. In reaching your decision as to which sentence to
4 recommend, you will consider the aggravating and the
5 mitigating circumstances. While a statutory aggravating
6 circumstance must be found before you can consider
7 recommending the death penalty, once you, once such a
8 finding is made beyond a reasonable doubt, you may recommend
9 the death sentence even though you find the existence of a
10 statutory mitigating circumstance.

11 In other words, the existence of an alleged statutory
12 mitigating circumstance or an alleged non-mitigating,
13 mitigating circumstance or both is not a bar to the
14 imposition of the death penalty.

15 The third element you may consider, if you should
16 conclude that a statutory aggravating circumstance exist, is
17 whether the defendant should be sentenced to life
18 imprisonment for any reason or for no reason at all. This
19 is what has been traditionally referred to as a
20 recommendation of mercy. And you, and should such be your
21 decision, you would so indicate by returning to the Court
22 the recommendation of life imprisonment form, which is
23 signed, again, by the foreman alone.

24 In other words, you may choose to recommend life
25 imprisonment even if you find a statutory or a non-statutory

1 mitigating circumstance or you may choose to recommend life
2 imprisonment as an act of mercy. In any instance, you
3 should choose to recommend, should you choose to recommend
4 life imprisonment, your decision, again, must be a unanimous
5 one, but the foreman alone is required to sign that form.

6 Now, I'll summarize what I have told you. You will
7 have in the jury room with you a, several sets of forms.
8 The first set of forms, number one, is the statutory
9 instructions. Statutory instructions, again, have listed on
10 them the statutory aggravating circumstances, the statutory
11 mitigating circumstances, as well as the non-mitigating
12 circumstances that have been presented by evidence.

13 The second form that you will have will be two forms.
14 One is a recommendation of the sentence of death. The other
15 is a recommendation of the sentence of life imprisonment.
16 The third set of forms is the findings concerning
17 aggravating circumstances and you will complete one of those
18 forms in reaching your verdict.

19 Now, the statutory instructions state only the
20 aggravating circumstances which you shall consider in this
21 case. And again, should you fail to find, beyond a
22 reasonable doubt, that one of these circumstances existed at
23 the time the murder was committed, then you would go no
24 further. You would make no recommendation and the Court
25 would sentence the defendant accordingly.

1 Should you find, beyond a reasonable doubt, the
2 existence of an aggravating circumstance or circumstances,
3 then you would be authorized to consider recommending the
4 death penalty. In your deliberations, you will consider any
5 statutory or nonstatutory mitigating circumstances which are
6 supported by the evidence. You will consider the
7 aggravating circumstances or, or circumstance you found, and
8 the mitigating circumstances, and then you will decide
9 whether to recommend the death penalty or life imprisonment.

10 You may also consider any other factor in mitigation of
11 the offense, and you can recommend a sentence of life
12 imprisonment for no reason at all. If you decide to
13 recommend the death penalty, then you will complete the
14 proper form. You must write out the aggravating
15 circumstances that you found and all 12 jurors must sign
16 that recommendation.

17 Should you decide to recommend life imprisonment, only
18 the foreman will, must sign that recommendation and no
19 reason has to be given for that decision. Whatever your
20 recommendation is, it must be a unanimous one if you make a
21 recommendation. That must, means each and every juror must
22 agree to the sentencing recommendation, and the
23 recommendation will be followed by the Court.

24 In considering whether to recommend, whether the
25 defendant is to be sentenced to death or life imprisonment,

1 I charge you that, as jurors, you must decide the issue
2 involved in this proceeding without bias and without
3 prejudice to any party. You can't allow yourselves to be
4 governed by sympathy, by prejudice, by passion, by public
5 opinion, or any other arbitrary factor. Both the State and
6 the defendant have the right to expect that each of you will
7 carefully and impartially consider all of the evidence in
8 the case, and that you will follow the law as I have
9 explained it to you.

10 Now, at this point in time I need to go over some
11 matters with the attorneys before I give the case to you for
12 your deliberation. I'm going to ask you one more time to
13 step back into the courtroom, not to begin any discussions
14 until I have brought you out into the courtroom, and given
15 you your final instructions.

16 At this time you may retire to the jury room.

17 Everyone remain seated while the jury retires.

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Any exceptions to the charge from the
21 State?

22 SOLICITOR GOWDY: No exceptions, no objections.

23 THE COURT: Any exceptions, objections or exception
24 from the defense?

25 MR. ALLEN: No, Your Honor.

1 THE COURT: All right. I will ask you again to review
2 the evidence that has been presented. There's some
3 additional evidence that's come in to be sure that only the
4 proper evidence is considered by the jury.

5 We'll take a brief recess for, while that takes place.
6 (Pause.)

7 THE COURT: All right. Do we have an agreement as to
8 the exhibits by the State?

9 SOLICITOR BARNETTE: We do, Your Honor. Just one note,
10 note. There's two purses that had items inside the purses
11 that was entered as that exhibit as purses. Just making
12 sure it's clear on the record.

13 THE COURT: All right. And defense agree with the
14 exhibits as they have been segregated?

15 MR. ALLEN: Yes, Your Honor.

16 THE COURT: All right. Anything further before I bring
17 the jury back for final instructions.

18 SOLICITOR GOWDY: No, sir, Your Honor.

19 THE COURT: Anything further from defense?

20 MR. ALLEN: No, Your Honor.

21 THE COURT: Bring the jury in.

22 (Whereupon, the following takes place within the
23 presence of the jury.)

24 THE COURT: All right. The record will reflect the
25 defense, the jury is back in the courtroom.

1 Mr. Foreman, and ladies and gentlemen of the jury, at
2 this time I'm going to instruct you to begin your
3 deliberations.

4 Mr. Humphries, if you'll pass these documents to the
5 foreman for me.

6 (Bailiff complies.)

7 THE COURT: Foreman Williams, that's the documents I
8 have gone over with you during the charge. If you'll look,
9 the one at the top, I'll let you get your glasses on, is the
10 statutory instructions that I referred to indicating the
11 possible aggravating circumstances, and indicating also
12 thereafter the mitigating circumstances. Below that would
13 be the three forms that you would complete as to the
14 findings concerning aggravating circumstances and behind
15 those forms, those are all stapled together, are the two
16 recommendations either for the life sentence or for the
17 death penalty. So, those are the documents I've gone over
18 with you.

19 The exhibits have been agreed to by counsel, and will
20 again be submitted to you. That's the exhibits from the,
21 the first phase of the trial as well as the second. Those
22 will be available to you in the jury room for your
23 consideration.

24 Again, there are some items that require playment on a
25 computer. If, for any reason, the jury would like to review

1 those items, please let us know and we'll make arrangements
2 for that to occur.

3 Mr. Pappas, you are the alternate and if you'll now, at
4 this point in time, step down and go with Mr. Humphries.

5 Thank you, sir.

6 JUROR: Thank you, Your Honor.

7 THE COURT: And at this time I will instruct the jury
8 to retire to the jury room and begin your deliberations.

9 Everyone remain seated while the jury retires.

10 (Whereupon, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Any objection to my final instructions---

13 SOLICITOR GOWDY: No, sir, Your Honor.

14 THE COURT: ---from the State?

15 From the defense?

16 MR. ALLEN: No objections as to your final
17 instructions.

18 THE COURT: All right. Court will be in recess then
19 until such time as a verdict had been reached. Bailiffs
20 will deliver the evidence to the jury in the jury room.

21 Thank you very much.

22 (Whereupon the jury began deliberations at 11:56 and
23 returned with a verdict 2:10.)

24 THE COURT: All right. I have been informed by the
25 bailiffs that a verdict has been reached.

1 I will caution all those in the gallery, as I did
2 earlier, if you have a problem with containing your
3 emotions, you should leave the courtroom at this time. Any
4 outburst will be treated as contempt of Court and will be
5 handled as such.

6 So, if there's anyone who has trouble in containing
7 their emotions, they should leave the courtroom at this
8 time.

9 Bring the jury back.

10 (Whereupon, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. The record will reveal that the
13 jury has returned to the courtroom.

14 Mr. Foreman, I've been informed that a verdict has been
15 reached, is that correct?

16 FOREMAN: Yes, Your Honor, it has.

17 THE COURT: If you'll pass that to the bailiff please.

18 (Foreman complies.)

19 THE COURT: All right. In the case of the State of
20 South Carolina versus Andres Antonio Torres, Indictment
21 Number 2007-GS-42-2773, 2007-GS-42-2775, 2007-GS-42-2776,
22 and 2777, and 2778, 2008-GS-42-880, and 2008-GS-42-4677, we,
23 the jury, in the above entitled case, having found beyond a
24 reasonable doubt, the existence of the following statutory
25 aggravating circumstances, to wit, the jury found six

1 different statutory aggravating circumstances, now recommend
2 to the Court that the defendant, Andres Antonio Torres, be
3 sentenced to death.

4 Now, ladies and gentlemen of the jury, if this is your
5 verdict and still your verdict, let it be known by the
6 uplifted right-hand.

7 (Whereupon, all jurors raise their hands at this time.)

8 THE COURT: All right. Ladies and gentlemen, I'm going
9 to ask the clerk to ask you three questions. The questions
10 are whether the recommended sentences were unanimously
11 agreed upon, whether the jury found aggravating
12 circumstances beyond a reasonable doubt, and whether the
13 aggravating circumstances were unanimously agreed upon by
14 the jury, by the jury. I'll need to know if, your answers
15 to those questions separately and you can, of course, answer
16 yes to all three if you wish to do so.

17 I'll ask the clerk to poll the jury as to those
18 questions.

19 CLERK: When I call your juror number and name, please
20 stand and respond to the questions.

21 Juror Number 167, Annette Ledford.

22 THE COURT: Is the answer yes to all three?

23 JUROR: It is. Yes, to all three.

24 THE COURT: Thank you, ma'am.

25 CLERK: Juror Number 209, Richard Pack.

1 THE COURT: Is the answer yes to all three, sir?

2 JUROR: Yes, all three.

3 THE COURT: Thank you, sir.

4 CLERK: Juror Number 124, Kyra Gregory.

5 THE COURT: Is the answer yes to all three, ma'am?

6 JUROR: Yes, it is.

7 THE COURT: Thank you, ma'am.

8 CLERK: Juror Number 101, Benjamin Fricks.

9 THE COURT: The answer yes to all three questions?

10 JUROR: Yes, Your Honor, that is correct.

11 THE COURT: Thank you.

12 CLERK: Juror Number 3, Kenneth Akins.

13 JUROR: Yes, sir.

14 THE COURT: Is the answer yes?

15 JUROR: Yes, sir.

16 THE COURT: All three questions?

17 JUROR: All three.

18 THE COURT: Thank you, sir.

19 CLERK: Number 18, Melissa Ballard.

20 THE COURT: Is the answer yes to all three questions,
21 ma'am?

22 JUROR: Yes, it is.

23 THE COURT: Thank you.

24 CLERK: Number 105, Andrew Gilpin.

25 THE COURT: Is the answer yes to all three questions,

1 sir?

2 JUROR: Yes to all three.

3 THE COURT: Thank you.

4 CLERK: Number 46, Shoshannah Burnett.

5 THE COURT: Is the answer yes to all three questions,
6 ma'am?

7 JUROR: Yes, Your Honor, it is.

8 THE COURT: Thank you.

9 CLERK: Number 135, Bradson Harrison.

10 THE COURT: Is the answer yes to all three questions,
11 sir?

12 JUROR: Yes, sir.

13 CLERK: Number 139, Lee Hembree.

14 THE COURT: Is the answer yes to all three questions,
15 sir?

16 JUROR: Yes, it is, Your Honor.

17 THE COURT: Thank you.

18 CLERK: Number 289, Troy Williams.

19 THE COURT: Sir, is the answer yes to all three of my
20 questions?

21 JUROR: Yes, sir, Your Honor.

22 THE COURT: Thank you.

23 CLERK: Number 132, Ricky Hardy.

24 THE COURT: Sir, is the answer yes to all three of my
25 questions?

1 JUROR: Yes, sir.

2 THE COURT: All right. Anything further of the jury
3 before I dismiss the jury?

4 SOLICITOR GOWDY: No, sir, Your Honor.

5 THE COURT: Anything further from the defense?

6 MR. ALLEN: No, Your Honor.

7 THE COURT: All right. Ladies and gentlemen of the
8 jury, at this point in time I'm going to ask that you retire
9 to the jury room briefly. I will be stepping back to speak
10 with you shortly. But at this point in time you may retire.
11 Everyone remain seated while the jury retires.

12 (Whereupon, the following takes place outside the
13 presence of the jury.)

14 THE COURT: All right. The Court will recess briefly
15 before imposition of sentencing. I want, I want to
16 discharge the jury. Once that's completed, the Court will
17 resume for sentencing.

18 Court is in brief recess.

19 Thank you very much.

20 (Whereupon, a short recess was taken at this time.)

21 THE COURT: All right. Any matters from the State
22 before sentencing?

23 SOLICITOR GOWDY: No, sir, Your Honor.

24 THE COURT: Any matters from the defense before
25 sentencing?

1 MR. ALLEN: Your Honor, again, we raise motions for a
2 new trial and a new sentencing hearing, or in the
3 alternative, a new sentencing hearing. This motion is made
4 based upon our earlier pretrial motions and objections and
5 also objections and motions made throughout the course of
6 this trial on the grounds that we previously stated, and
7 which have been ruled upon including, but not limited to,
8 the objection that we made during the pretrial hearing
9 concerning the taking of our client's Buccal swab at, at
10 pretrial hearing last year.

11 Also the pretrial hearing and the objections we've made
12 concerning the search, which yielded the seizure of our
13 client's personal belongings, specifically the clothing and
14 shoes, and other personal belongings.

15 Also the objection and motion we made concerning the
16 statement of our client based on the questioning of him by
17 Investigator Jason Bryant.

18 Also our motion concerning the request to place into
19 evidence the evidence of third party guilt.

20 Also our objection and motions we made concerning the
21 questions that we wanted to raise on the voir dire
22 concerning the, each venire persons, the questions that we
23 were asking about the types of categories of cases
24 specifically as related to a specific aggravating
25 circumstances.

1 All of these motions are being again renewed. And
2 based upon the same grounds, statutes, United States
3 Constitution and state constitutional provisions that we
4 cited at the time of the motion, and I would ask the Court
5 to take notice of it as if it's being repeated verbatim
6 herein.

7 Thank you, Your Honor.

8 THE COURT: All right. State wish to be heard on the
9 motion?

10 SOLICITOR GOWDY: No, sir, Your Honor.

11 THE COURT: All right. Motion has been heard. Motion
12 is denied.

13 I'd ask that the defendant please stand.

14 Does the defendant wish to speak before imposition of
15 sentence?

16 DEFENDANT: Yes, sir.

17 THE COURT: Be happy to hear you, sir.

18 DEFENDANT: Your Honor, I feel, even though the jury's
19 judged my flesh, only God can judge my soul. That's all I
20 have to say.

21 THE COURT: All right. As the trial judge in the above
22 entitled, above action and prior to the imposition of the
23 death sentence upon the defendant, Andres Antonio Torres, I
24 find, as an affirmative fact, that the evidence of this case
25 warrants the imposition of the death penalty and its

1 imposition is not a result of prejudice, passions, or any
2 other arbitrary factor.

3 The defendant, Andres Antonio Torres, has been found
4 guilty by the jury of the offense of murder. The jury has
5 recommended that the death, the defendant should be
6 sentenced to death.

7 It is, therefore, the judgment of the law and the
8 sentence of this Court that the defendant, Andres Antonio
9 Torres, be taken to the county jail of Spartanburg County
10 and thence to the state penitentiary, henceforth to be kept
11 in close and safe confinement until the 22nd day of
12 December, 2008. Upon which day between the hours of six
13 o'clock a.m. and six o'clock p.m. the defendant, Andres
14 Antonio Torres, shall suffer death by electrocution or
15 lethal injection in the matter imposed by law, provided by
16 law.

17 As to other cases involved in this matter, that is the
18 sentence is the two indictments for murder. Indictments
19 Number 2007-GS-42-2777 and 2007-GS-42-2778.

20 In the case of, of 2007-GS-42-2775, that is for armed
21 robbery, the Sentence of the Court is 30 years in the State
22 Department of Corrections to be served consecutively with
23 other sentences give on today's date with credit for time
24 served.

25 As to Case Number 2008-GS-42-880, criminal sexual

1 conduct in the first degree, the Sentence of the Court is
2 confinement in the State Department of Corrections for a
3 period of 30 years. That runs consecutive to other
4 sentences given on today's date and given credit for time
5 served.

6 As to Case Number 07-GS-42-2776, burglary in the first
7 degree, the Sentence of the Court is confinement in the
8 State Department of Corrections for the term of your life.
9 Runs consecutive with other sentences given on today's date.

10 As to Case Number 07-GS-42-2773, armed robbery, the
11 Order of the Court is you be confined in the State
12 Department of Corrections for a period of 30 years and be
13 given credit for time served to run consecutive to other
14 sentences given on today's date.

15 As to Case Number 08-GS-42-4677, arson or the attempt
16 to burn, the Sentence of the Court is that you be committed
17 in the State Department of Corrections for a period of five
18 years. That runs consecutive to other sentences given on
19 today's date. You'll be given credit for time served.

20 That completes the sentencing of the Court, sir. I'd
21 ask that you be seated.

22 At this time, any members of the jury who are present
23 will be allowed to leave the courtroom.

24 (Pause.)

25 THE COURT: Anything further from the State at this

1 time?

2 SOLICITOR GOWDY: No, sir, Your Honor.

3 THE COURT: Anything further from the defense?

4 MR. ALLEN: No, Your Honor.

5 THE COURT: Court is adjourned.

6 Thank you very much.

7

8 (Whereupon, Court was in recess for the evening.)

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 Spartanburg County, South Carolina, on the 13th, 14th, 15th, 16th, 17th, 18th, 19th, 21st, 22nd, and 23rd day of October, 2008.

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

January 25th, 2009

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES ,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge committed reversible error at sentencing by allowing the State to introduce excessively gruesome and unfairly prejudicial autopsy photographs of the victims in violation of Rule 403, SCRE.

II. The trial judge committed reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued in the detention center during the “cooling off” period after he was convicted of the murders of the Emerys, as this evidence violated S.C. Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

STATEMENT OF THE CASE

On October 13 through 23, 2008, Andres Antonio (“Tony”) Torres stood trial in Spartanburg County, before Judge Roger L. Couch and a jury, on indictments charging him with two counts of murder, two counts of armed robbery, and one count each of first-degree burglary, first-degree criminal sexual conduct and attempt to burn. The victims were Torres’ neighbors, Ray and Ann Emery, who on May 11, 2007, were bludgeoned to death with a hammer in their bedroom just before dawn.

The State sought the death penalty for the murders based on six of the aggravating circumstances found in SC Code Section 16-3-20 (C) (a):

1. Murder and criminal sexual conduct;
2. murder and burglary;
3. murder and robbery while armed with a deadly weapon;
4. murder and larceny with use of a deadly weapon;
5. murder for the purpose of receiving money or a thing of monetary value; and
6. murder of two or more persons pursuant to one’s scheme or course of conduct.

Torres offered no evidence at the guilt phase. The jury found him guilty as charged.

Torres’ prior record, which the State introduced at sentencing, indicated that the 27 year-old had previously exhibited a propensity for property crimes, such as automobile break-ins and larceny. R. p. 2224 line 10- 2241 line 9. The Emerys were good people who did not deserve their fates. The central issue at sentencing, as the defense saw it, was “why Tony Torres did this” and his adaptability to prison if sentenced to life. R. 2220 line 5- 2223 line 3.

Torres is of average intelligence and exhibits no obvious brain damage. R. 2579 lines 23-25. But from an early age it was obvious to his family and others that Tony Torres

was “a little bit different.” R. 2582 lines 8-9. When he was about 14 months old Torres began having what his mother described as “episodes.” R. 2434 lines 2-11. At that time, children like Torres were thought to be merely “hyperactive.” R. 2438 lines 4-6. He was already on psychiatric medications by the time he was 19 months old. R. 2568 lines 2 - 3. By the age of two, it was clear that the electrical impulses of his brain were abnormal. R. 2565, lines 23-25

Torres exhibits a condition known as “Intermittent Explosive Disorder.” R. 2386 lines 3-10; R. 2584 lines 13-14. “It’s different than [temper tantrums],” one expert testified. R. 2568 lines 21- 22. “[T]he rage that they have is far out of proportion to any provocation.” R. 2568 line 23 – 2569 line 2. Once in the grip of these rages, a counselor who had worked with the young Torres testified, “[H]e couldn’t return from an emotional standpoint. Once he crossed that threshold, it was hard to get him to come back.” R. 2395 lines 2-5. The murders of the Emerys are classic examples of overkill.

A forensic psychiatrist testified that Torres “clearly had symptoms of bipolar disorder on and around the time of the offense. ... [H]e was clearly very sick when these crimes happened.” R. 2590 lines 19-24. Polysubstance abuse and four days without sleep only exacerbated his mental illness at the time of the incident. R. 2490 line 21 –.2493 line 15; R. 2593 line 24 - 2594 line 14.

In addition to non-statutory mitigating circumstances, the defense relied on four of the statutory mitigators provided by Section 16-3-20 (C) (b):

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
2. the murder was committed while the defendant was under the influence of mental or emotional disturbance;

3. the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
4. the age or mentality of the defendant at the time of the crime.

In allocution, Tony Torres expressed sorrow for what he had done and pleaded with the jury for forgiveness. R. 2747 line 15- 2748 line 20.

After deliberating for just over two hours, the jury returned with a recommendation of death, having found all six statutory aggravators advanced by the State. The trial judge sentenced Torres to death for the murders and imposed consecutive sentences of imprisonment totaling life plus 95 years on the remaining charges.

Tony Torres now appeals his death sentence to the South Carolina Supreme Court pursuant to SC Code Section 16-3-25.

ARGUMENTI.

The trial judge committed reversible error at the sentencing phase by allowing the State to introduce excessively gruesome and unfairly prejudicial autopsy photographs of the victims in violation of Rule 403, SCRE.

The murders of Ray and Ann Emery exhibit all the indicia of rage-fueled overkill. Their killer bludgeoned them beyond recognition with a hammer and then doused the bodies in gasoline in a failed attempt to burn down the house. The attack on Ann Emery was especially savage. R. 2362 lines 3 and 4. Mrs. Emery's daughter, Crystal, demanded to view the bodies prior to the closed-casket funeral. R. 2345 line 5-7. Her last look at her mother was nightmarish:

One of her eyes was this way and her nose was all on the side of her face... and the mouth didn't even look — none of it looked real. It just looked like a kid had used Play-Doh and sort of arranged a face. But they did the best they could with what they had to work with, which was nothing. She didn't have a face. So they tried to build her one just so that I could see her. Like I say, they did the best they could.

R. 2345 line 25 - 2346 line 7.

The defense objected at sentencing under Rule 403, SCRE, when the State sought to introduce photographs of the victims at their autopsy. "[T]hey are definitely much more prejudicial than probative," counsel argued. R. 2351 line 8 – 2352 line 9. The Solicitor responded, "There's nothing unfair about whatever prejudice is headed his way." R. 2352 lines 12-22. The judge excluded three photographs (State's Exhibits 480, 495 and 551) and allowed the State to introduce eight photographs of Ray Emery (State's Exhibits 483, 484,

488, 489, 491, 493, 549 and 550) and five of Ann Emery (State's Exhibits 485, 486, 492, 552 and 553) during the testimony of the forensic pathologist who had performed the autopsies. R. 2355 line 20- 2356 line 16. These photographs were in addition to those (State's Exhibits 448, 449, 451, 545, 455, 458, 459, 464, 465, 476 and 478) depicting the victims as they were left at the crime scene. R. 2368 line 19 - 2369 line 18.

Prior to the pathologist's testimony, the judge cautioned the spectators in the court room:

[S]ome of the photographs will be very graphic. If you do not wish to view those, now would be the appropriate time for you to leave the courtroom.

R. 2353 line 22- 2354 line 1. A forensic psychologist subsequently testified, "[I]n my 20 years in doing this work, those are the most violent crime scene pictures I've seen." R. 2593 lines 22 and 23. The photos were displayed to the jury enlarged on a screen in the darkened courtroom. R. 2356 lines 18-23; R. 2739 lines 16-21.

Rule 403, SCRE, states in part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." See, also, State v. Alexander, 303 S.C. 377, 401 S. E.2d 146 (1991). As to autopsy photos:

In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. ... The trial judge is still required to balance the prejudicial affect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader.

State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180, 186 (1986). "[N]otwithstanding the sometimes gory nature of autopsy photographs they are nonetheless admissible where they

reveal the true nature of the attack and allow the jury to determine the existence of physical torture.” State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 450 (2003), citing State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); see, also, State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003).

On the other hand, the Court has also noted that “the evaluation of the consequences of an error in the sentencing phase of capital case are more difficult because of the discretion that is given to the sentencing jury.” State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000). Autopsy photographs are unfairly prejudicial if they create “a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, 361 (1995).

The horrific autopsy photographs in this case were not relevant to prove any of the statutory aggravators advanced by the State. The only purpose served by the autopsy photos was to enflame the emotions of the jury.

For this reason, the Court should reverse Tony Torres’ death sentence and remand for resentencing.

II.

The trial judge committed reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued during the “cooling off” period after he was convicted of the murders of the Emerys, as this evidence violated SC Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

After the jury found Torres guilty of murdering the Emerys, the defense exercised its option to wait 24 hours before the start of the sentencing phase. See SC Code Section 16-3-20 (B). Torres awaited sentencing in the Spartanburg County Detention Center. That night, officers decided to move Torres from one cell to another and instructed him to put his hands on the wall, spread his legs and step back so that they could pat him down. R. 2287 line 22 – 2288 line 13.]

One manifestation of Torres’ mental illness is that “[h]e doesn’t like people touching him, especially without permission.” R. 2578 lines 22- 24. Torres refused to follow the officers’ instructions. R. 2298 lines 6- 2299 line 2; R. 2307 line 15- 2308 line 4. An officer with a video camera was summoned to record the event. R. 2289 line 9-24. Officers then pepper-sprayed Torres in the face and placed him in handcuffs. R. 2302 lines 5-7; R. 2305 lines 15-20.

The State sought to introduce the video recording (State’s Exhibit 544) at sentencing. R. 2205 lines 8-15. The defense moved to exclude it pursuant to SC Code Section 16-3-25 (C) (1) and Rule 403, SCRE. R. 2205 line 21- 2206 line 16; R. 2275 line 17- 2276 line 3; R. 2294 line 23- 2296 line 21. “[T]hey are clearly creating evidence for use against him in court,” counsel argued. R. 2293 lines 11-15. The judge overruled counsel’s

objections and the Solicitor played the video recording for the jury. R. 2297 line 24- 2299 line 2. The detention center officer through whom it was introduced added that, in his one year on the job, this was the only time he had been forced to pepper-spray an inmate. R. 2299 lines 3-8. The Solicitor later exploited this evidence in his closing argument:

[T]he night your verdicts are rendered, the night that he begins to serve whichever of the two sentences you impose on him, you saw on videotape his character. It was a very simple request. That guard was polite. He wasn't just professional. He was polite. Tried to talk him into complying. You got to get patted down. It's the rule. And you saw Torres' reaction and this is ... the middle of this trial.

R. 2731 lines 14-21.

SC Code 16-3-25 (C) (1) prohibits death sentences “imposed under the influence of passion, prejudice, or any other arbitrary factor.” Again, Rule 403, SCRE states in part, “Although relevant, evidence may be excluded if its probative value substantially outweighed by the danger of unfair prejudice.”

Section 16-3-25 (C) (1) does not limit reversal to death sentences that are “produced by” or imposed “because of” passion or prejudice. It requires the Court to determine only whether the sentence was imposed “under the influence of” such improper factors. See, also, State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000) (previously quoted).

A capital defendant's future dangerousness and his adaptability to life in prison are always critical issues at capital sentencing. See, generally, Skipper v. South Carolina, 476 U.S. 1 (1986), and State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). This was especially the case here, where the question of Torres' culpability was for all practical purposes resolved once the judge excluded the evidence of third-party guilt. R. 1579 lines 21-24.

More importantly, the State introduced no other evidence that Torres had been dangerous or a disciplinary problem previously. As the forensic psychiatrist who had examined him explained:

[H]e'd been found guilty that night... [T]hat was a pretty significant event. He was probably more agitated than he would be on any other night.

R. 2618 lines 16-22. Even the Solicitor conceded, "That's fair. He may have been." R. 2618 lines 23-25.

Whether or not the detention center officers followed proper procedures is irrelevant. See, for example, State v. Burkhart (even accurate evidence regarding general prison conditions violates Section 16-3-25 (C) (1) when injected into a capital jury's considerations). Neither is it especially significant that the video recording (unlike the autopsy photos previously discussed) might not be viewed as unduly prejudicial when viewed in isolation. "[T]he determination of prejudice [under Rule 403] must be based on the entire record, and the result will generally turn on the facts of each case. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434, 441 (2009).

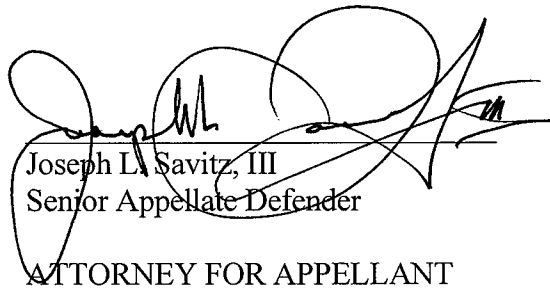
Foremost, the introduction of the video recording of the detention center incident gave that isolated occurrence undue emphasis. See State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982). In his closing argument, the Solicitor explicitly linked the video to the likelihood of Torres' future dangerousness and inability to adapt to prison. Viewed in context, this evidence violated S.C. Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

For this reason, the Court should reverse Tony Torres' death sentence and remand for resentencing.

CONCLUSION

The State's overreliance on unduly prejudicial photographs and an out-of-context video recording compromised the reliability of the death sentence returned by this jury. Pursuant to SC Code 16-3-25 (E) (2), the State has left the Court with no option other than to reverse Tony Torres' death sentence and remand for resentencing.

Respectfully submitted,



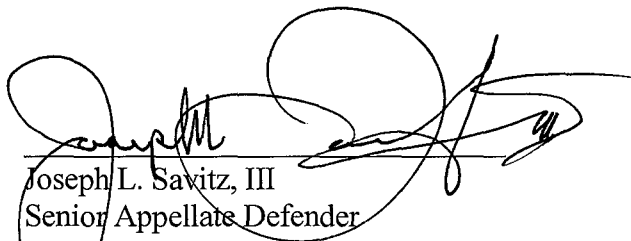
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May 20, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 20, 2010

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

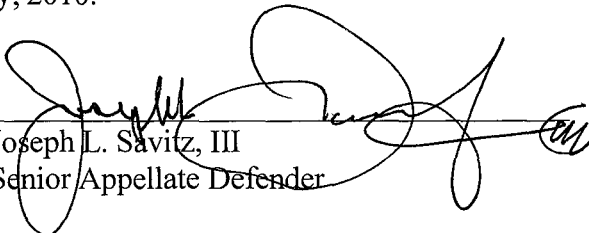
V.

ANDRES ANTONIO TORRES ,

APPELLANT

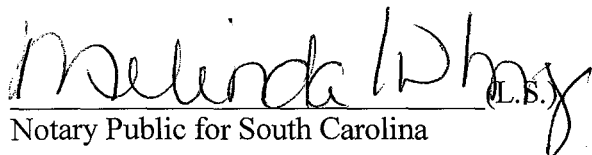
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 20th day of May, 2010.


Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2010.


Notary Public for South Carolina

My Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES,

APPELLANT

FINAL BRIEF OF RESPONDENTS

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QUESTION(S) PRESENTED

- I. Whether the trial court committed reversible error during the sentencing phase of the trial by allowing the State to introduce crime scene and autopsy photographs of victims.
- II. Whether the trial court committed reversible error at sentencing by allowing the introduction of a video recording of Appellant being pepper-sprayed and subdued in the detention center following his conviction in the guilty phase of the trial.

INTRODUCTION

Ray and Ann Emery were found badly beaten and bludgeoned to death in the bedroom of their home in Spartanburg County's Drayton community. (R. 1891-95, 1918). Following a brief investigation, their neighbor, Andres Antonio Torres ("Appellant"), a twenty-seven (27) year old with thirty-nine (39) prior convictions, was charged with two counts of murder, two counts of armed robbery, one count of first degree criminal sexual conduct, one count of burglary and one count of attempt to burn. (R. 2224-41, R. 2899-2971). Appellant stood trial in Spartanburg County on October 13th through 23rd of 2008. (R. 1583-2784). The jury found Appellant guilty on all charges and imposed a sentence of death. (R. 2195-98, 2775-79).

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury during the June 11, 2007, February 25, 2008 and August 4, 2008 Terms of Court under the following indictment numbers: (1) #07-GS-42-2773 (Armed Robbery); (2) #07-GS-42-2775 (Armed Robbery); (3) #07-GS-42-2776 (Burglary); (4) #07-GS-42-2777 (Murder); (5) #07-GS-42-2778 (Murder); (6) #08-GS-42-0880 (Criminal Sexual Conduct, First Degree); (7) #08-GS-42-4677 (Attempt to Burn). (R. 2899-2912). On October 13, 2008, Appellant's case was called to trial before the Honorable Roger L. Couch in the Spartanburg County Court of General Sessions where he was represented by attorneys Clay Allen, Kathy Hodges, and John Reckenbeil. (R. 49-61). On October 19, 2008, Appellant was convicted of all charges in the guilt phase of the trial. (R. 2195-98). The State sought the death penalty based on the following statutory aggravators: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while

armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27). Defense counsel put forth the following statutory mitigators: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime. Two days later, he was sentenced to death pursuant to section 16-3-25 of the South Carolina Code. (R. 2775-79). The Notice of Appeal was filed on October 23, 2008.

STATEMENT OF THE FACTS

At approximately 7:00 AM on May 11, 2007, the Union County 9-1-1 dispatch received a phone call reporting an accident near the Buffalo community. (R. 1664). Eyewitnesses to the accident reported seeing a van driving erratically, running off the road hitting a fire hydrant, and crashing into a fence. (R. 1663-64). Observers reported the driver, a short, stocky male wearing khaki pants and a yellow shirt, fled the scene, catching a ride with a bystander at a neighboring convenience store. (R. 1665, 1673, 1684).

When police reached the scene they found the van filled with a variety of personal items including purses, wallets, clothing, jewelry and a computer. (R. 1613). They also found the identification of Mrs. Ann Emery, the person to whom the vehicle was registered. (R. 1613). Upon running the license plate number, Corporal Jeff Wright of

the Union County Sheriff's Office called the Spartanburg County Sheriff's Office and asked that they check on the Emery's residence. (R. 1612-13).

Responding to Corporal Wright's request, Deputies Danny Jones and Jeff Valentine arrived at the Emery's residence just before 8:30AM. (R. 1613). After knocking on the door and getting no response, Deputies Jones and Valentine walked around the house and found an unlocked sliding glass door. (R. 1614). Opening the door, the deputies immediately noticed the home was hot and smelled of "either kerosene or gasoline." (R. 1615).

Upon entering the home, the deputies observed an overturned gas can and a clear pool on the hardwood floor. (R. 1615). In the kitchen, the broiler was turned on and the oven door was open. (R. 1625, 1649). The burners on the stove were left on high, with a trail of gasoline leading from the bedroom to the kitchen. (R. 1632-33). In the living room, a bloody hammer was resting atop the television. (R. 1891).

Continuing down the hall, the deputies saw a body facedown in the bed. (R. 1616). As trained, the deputies continued down the hall so as not to disturb the crime scene, secured the area and called the homicide division. (R. 1616).

Upon arriving at the crime scene, investigators discovered an additional body next to the bed. (R. 1635). The bodies were later identified as Ray and Ann Emery (R. 1654). They were badly beaten and bludgeoned with a hammer. (R. 1654). Blood was everywhere. (R. 1654). According to forensic psychiatrist Donna Schwartz-Watts, who testified on Appellant's behalf, the crime scene was the most violent she had ever observed in her 20 years of practice. (R. 2593).

Ray Emery, who slept with the aid of a breathing device, was found facedown with the apparatus still attached to his face. (R. 1892). The back of his skull was crushed. (R. 1779-84). His wife Ann, was found in the floor with her legs to her chest, half-naked; her dental bridge sticking out of her neck. (R. 1635, 1800). Her face was completely unrecognizable and her eye was missing. (R. 1786-87). Both bodies were covered in gasoline. (R. 1786).

The ensuing investigation quickly focused on Appellant. (R. 1955). Consequently, investigators Jason Bryant and Reid Lindsey were sent to Appellant's grandmother's house, where Appellant was known to stay. (R. 1523). Appellant's grandmother answered the door at which time Appellant, who was sitting on the couch, indicated he knew why the investigators were there. (R. 1528). After a brief conversation with Appellant and his grandmother, investigators Bryant and Lindsey recovered the shoes and clothing Appellant was wearing earlier in the day. (R. 1956). Appellant then voluntarily accompanied the detectives to the Sheriff's Office to be questioned. (R. 1525). He received his Miranda warnings in the squad car. (R. 1529).

At the Sheriff's office, investigator Lindsey confronted Appellant asking him if he committed the murders at the Emery's residence. (R. 1503). Appellant asked for an attorney and questioning ceased. (R. 1504). Shortly thereafter, Appellant was charged with two counts of Murder, two counts of Robbery and one count of Burglary. (R. 2146-49). While awaiting trial, Appellant was further charged with Criminal Sexual Conduct and Attempt to Burn. (R. 2149-51). The State sought the death penalty based on six of the aggravating circumstances put forth in section 16-3-20(C)(a) of the South Carolina Code, namely: (1) murder and criminal sexual conduct; (2) murder and burglary; (3)

murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27).

GUILT PHASE

During the guilt phase of the trial the State presented a variety of forensic evidence implicating Appellant. Specifically, the State presented testimony from SLED Agent and DNA expert Matt Fitts, who concluded the semen taken from a vaginal swab of Ann Emery, matched the DNA profile of Appellant to a probability of one in one-hundred ten quadrillion. (R. 2074). Fitts also testified Ann Emery was a major contributor of the DNA found on the hammer recovered from the crime scene. (R. 2069). He further stated a minor contributor consistent with the DNA of both Ray Emery and Appellant was found on the hammer. (R. 2070). DNA evidence taken from Appellant's clothing and shoes also indicated blood from Appellant and the victims. (R. 2076-78, 2080-81). Blood found on a jewelry box discovered in the van wrecked by Appellant matched the DNA profile of Ray Emery to a probability of one in four-hundred twenty quadrillion. (R. 2079). There was testimony from fingerprint analyst Hugh Murphy that Appellant's fingerprints were found both on and inside the van. (R. 1825). Appellant also left a fingerprint on a flowerpot that was stained with the blood of Ray Emery. (R. 1825, 2073-74). Additionally, SLED Agent Vicki Hallman testified the footprints at the crime scene were consistent with the tread on the shoes Appellant gave investigators Bryant and Lindsey. (R. 2047).

Meanwhile, the defense chose to rely upon challenging the State's burden of proof declining to present evidence or call witnesses. (R. 2125). At the charge conference, defense counsel requested the trial court charge the jury on "mere presence" and "larceny as a lesser-included offense of armed robbery." (R. 2117-21). The trial court denied defense counsel's request and the jury was charged. (R. 2121, 2146-69). Thereafter, the jury found Appellant guilty on all charges—two counts of murder, two counts of armed robbery, one count of criminal sexual conduct, one count of burglary, and one count of attempt to burn. (R. 2197-98). Defense counsel then exercised, pursuant to section 16-3-20(B) of the South Carolina Code, its option to wait twenty-four (24) hours before beginning the sentencing phase. (R. 2200).

SENTENCING PHASE

I. The State's Case for seeking the Death Penalty

In support of the death penalty, the State sought the aforementioned statutory aggravators: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. The State also introduced a variety of evidence showing Appellant's character and the circumstances surrounding the crime, as well as victim impact testimony.

Demonstrating Appellant's character, the State elicited testimony from Ashley Harley, who, on the night of the murders, received a phone call from Appellant, wherein he threatened to kill her in her sleep. (R. 2253). In that same vein, the State introduced a video taken during trial in which Appellant refused to comply with the requests of

corrections officers, leading to his being pepper-sprayed. (R. 2290, 2297-99). The State also presented Appellant's criminal record showing thirty-nine (39) previous convictions and detailed his parole and probation violations. (R. 2225-39, 2317-28). Finally, the State, in an effort to show both Appellant's character and the circumstances surrounding the crime, introduced crime scene and autopsy photographs. (R. 2352-72).

II. Video Recording from the Spartanburg County Detention Center

During the twenty-four (24) hour waiting period, Appellant was involved in an altercation with the corrections officers at the Spartanburg County Detention Center. (R. 2290, 2297-99). The altercation occurred when officers, pursuant to detention center policy, attempted to search Appellant before moving him to a new cell, asking Appellant to spread his legs and step back so they could pat him down. (R. 2289-90). Appellant refused to comply despite the officers repeated requests. (R. 2289-90). The officers then, for liability purposes, retrieved a camera to record the incident and after refusing additional requests for compliance, pepper-sprayed Appellant. (R. 2298-99).

Upon reviewing the recording, the State informed defense counsel of its intent to introduce the recording in the sentencing phase of the trial. (R. 2205). Defense counsel sought to suppress the evidence in a motion in limine arguing the recording was irrelevant pursuant to Rule 401, SCRE. (R. 2208). The trial court deferred ruling on the motion after which, the sentencing phase of the trial began. (R. 2208-09).

During the sentencing phase, the State attempted to introduce the recording as evidence of Appellants character and adaptability to prison life. (R. 2205, 2285). Defense counsel objected, this time on the grounds that the use of pepper spray was contrary to the detention center's force policy thereby rendering the recording irrelevant

under Rule 401, SCRE. (R. 2275). Defense counsel maintained in the alternative that even if the recording was relevant under Rule 401, SCRE, it was inadmissible pursuant to Rule 403, SCRE. (R. 2275). After a short proffer regarding the detention center's force policy, the trial court overruled defense counsel's objection. (R. 2285).

Following the court's ruling, defense counsel again objected, this time arguing an alleged Miranda violation. (R. 2291-93). The trial court overruled defense counsel's objection. (R. 2296). Thereafter, defense counsel lodged a third objection asserting the introduction of the recording would amount to an "arbitrary factor" for arriving at a sentence of death pursuant to section 16-3-25(C)(1) of the South Carolina Code. (R. 2294-95). This objection was also overruled and the jury viewed the recording. (R. 2297, 2297-99).

III. The Autopsy and Crime Scene Photographs

Later during the sentencing phase, another evidentiary issue arose regarding the admission of photographs.¹ Specifically, defense counsel, outside the presence of the jury and pursuant to Rule 403, SCRE, objected to the State's introduction of autopsy and crime scene photographs arguing the prejudicial nature of the photos would significantly outweigh their probative value. (R. 2352). Elaborating, defense counsel stated, "we . . . object to all the photographs on, on the bases (sic) that they, they are much more prejudicial than probative at this point in the trial [but] [i]n fairness and in candor . . . these are not the worse (sic) of the worst photographs." (R. 2352).

The State responded to defense counsel's objection noting that the purpose of the sentencing phase is to determine the proper punishment in relation to the crime. (R.

¹ This issue had previously been addressed in chambers after which the objections and arguments were put on the record. (R. 2352).

2352). Continuing, the State maintained the jury is allowed to review both the circumstances of the crime and character of the defendant in reaching that conclusion. (R. 2352). Finally, the State added that Rule 403, SCRE, addresses “unfair prejudice” and as Appellant had already been convicted of the offense, the prejudice flowing from the admission of the photos would be *de minimis*. (R. 2352).

The trial court, while admitting a majority of the photographs on the basis that they fairly depicted the scene or the bodies after the event, utilized its discretion and excluded two photographs concluding they were duplicitous. (R. 2353). The trial court also excluded a third photograph taken from the dissection portion of the autopsy concluding it was highly prejudicial. (R. 2353). Following the trial court’s ruling, the jury was called into the courtroom at which point the State, first through Dr. David Wren and then through Officer Dominick Baird, entered the photographs into evidence and published them to the jury. (R. 2355-72).²

IV. The Defense Case for Mitigation

Following admission of the autopsy photos, the State rested and defense counsel began the mitigation portion of the trial. (R. 2372). Defense counsel relied on the following statutory mitigators as provided for in section 16-3-20(C)(b) of the South Carolina Code: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his

² During this process, defense counsel renewed their previous objections. (R. 2355). Defense counsel also renewed their objections at the end of the State’s case. (R. 2372).

conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime.

Defense counsel offered testimony from a cast of family, social workers, a corrections expert and mental health professionals maintaining that Appellant, who was diagnosed as bipolar at age seven, had a troubled childhood. (R. 2378-2712). There was also evidence Appellant suffered from Intermittent Explosive Disorder (“IED”) a mental disorder in which one, with little provocation, gets disproportionately upset and potentially violent.³ (R. 2568-69). Additionally, defense Counsel offered testimony from Dr. Alex Morton discussing the problems associated with Appellant’s substance abuse and self-medication, particularly with respect to alcohol, methamphetamine and Clonopin.⁴ (R. 2573, 2585).

Following the close of defense counsel’s mitigation case, the jury was charged and returned a verdict in favor of death finding the State proved all six of the statutory aggravators it previously advanced. (R. 2775-76). Thereafter, defense counsel filed a timely notice of appeal.

STANDARD OF REVIEW

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). “An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law.” State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the

³ Interestingly enough, forensic psychiatrist Dianna Schwartz-Watts, who testified in the mitigation case, noted she did not believe Appellant suffered from IED. (R. 2584-86).

⁴ Clonopin is a form of Benzodiazepine used to treat anxiety similar to Xanax or Valium. (R. 2491).

admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENTS

- I. The trial court correctly found the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the photographs as the photographs corroborated testimony of witnesses, showed the circumstances of the crime and the character of the person committing it, factors which a jury may consider during the sentencing phase of a capital trial

Appellant contends the trial judge erred in admitting the autopsy photographs into evidence pursuant to Rule 403, SCRE, however, this contention is incorrect as it ignores the vast majority of precedent set forth by this Court. Rule 403, SCRE, provides in relevant part, that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. “Unfair prejudice” has been explained as a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” Rosemond, 335 S.C. at 597, 518 S.E.2d at 590.

In applying the Rule 403, SCRE balancing test during the sentencing phase of a capital case, the scope of the probative value is much broader than it would be otherwise. Id. at 596, 518 S.E.2d at 590. As noted in State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986), “the purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase.” To that end, “the trial court may permit the introduction of additional evidence in extenuation, mitigation or *aggravation*.” Id. (emphasis in original). A jury may be able to see photographs depicting the bodies of murder victims in substantially the same condition in which the defendant left them.

Rosemond, 335 S.C. at 596, 518 S.E.2d at 590. Additionally, both autopsy and crime scene photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant. Id. at 597, 518 S.E.2d at 590. Moreover, if a photograph corroborates testimony, it is not an abuse of discretion to admit it. State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 cert. denied 518 U.S. 1026 (1996).

The photographs in question are clearly probative as they corroborated the testimony of Dr. David Wren and Investigator Dominick Baird. Dr. Wren, who performed the autopsy, gave detailed testimony regarding the nature of the injuries and the means Appellant used to inflict them. (R. 2356-64). Specifically, the photos corroborated Dr. Wren's testimony regarding the number of wounds suffered by Ray Emery—at least eight—and the cause of death—both sharp and blunt force trauma to the back of the head. (R. 1786, 2356-61). The photographs also corroborated Dr. Wren's testimony regarding the extent of Ann Emery's injuries. As was the case with her husband, the photographs corroborated Dr. Wren's testimony that the cause of death was sharp and blunt force trauma to the head. (R. 1787-92). It further corroborated his testimony that the wounds were consistent with that of a hammer. (R. 1793).

Likewise, the crime scene photographs corroborated Investigator Baird's testimony. Specifically, the photographs in question, while admittedly graphic, accurately depict the Emery's in substantially the same condition in which Appellant left them—bloodied, beaten and dead. (R. 2368-71). As noted above, Ray Emery's skull was crushed by the repeated blows to his head, specifically near the top of the neck and the ears, this is accurately portrayed in the photographs. (R. 1779-84). With regard to Ann Emery, the photographs simply illustrated the sheer ferocity with which the crime

was committed. She was missing her eye. (R. 1786). Her face was unrecognizable, her mouth was where her cheek should be, her dental bridge was essentially sticking out of her neck. (R. 1786-87). Quite simply, this was the condition in which Appellant left his victims—battered, beaten and dead.

The photographs also helped the jury understand the circumstances of the crime and the character of the person committing it. There was no evidence to suggest the Emery's had any ill will towards Appellant. In fact, Ray Emery had recently given Appellant a ride to the grocery store to buy groceries. (R. 2344). Nonetheless, he was killed in his sleep, his breathing machine still attached to his face, while his wife was raped and beaten beyond recognition. (R. 1892, 1786-87). Appellant then took as much as he could carry, doused the Emery's and their house in gas, and stole their van. The photographs simply memorialized the brutal death of two completely undeserving people, while simultaneously displaying Appellant's complete disregard for human life. Accordingly, the trial court did not err in admitting either the crime scene or the autopsy photographs.⁵

- I. The trial court properly admitted the video recording of Appellant being pepper-sprayed as it was evidence of Appellant's character and adaptability to prison-life, two factors which a jury can properly consider in the sentencing phase of a capital trial

⁵ A review of relevant case law also dictates this result. In Rosemond, this Court ruled that photographs taken of the victims at both the crime scene and autopsy were admissible pursuant to Rule 403, SCRE, finding the probative value of the photographs, outweighed the risk of unfair prejudice to the appellant as the photographs corroborated previous testimony regarding the wounds sustained by the victims. Rosemond, 335 S.C. at 597, 518 S.E.2d at 590; see also State v. Tucker, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996) (holding photographs depicting victims at the crime scene were not unduly prejudicial as they went to both the circumstances of the crime and character of the victim); State v. Williams, 321 S.C. 327, 338, 468 S.E.2d 626, 632 (1996) (upholding the admission of autopsy photographs where they illustrated the extent of the wounds to victims' bodies and depicted the manner in which they were committed).

Appellant further contends the trial court erred in admitting a video recording of his being pepper sprayed for failure to comply with the commands of corrections officers. Specifically, Appellant points to section 16-3-25(C)(1) of the South Carolina Code and Rule 403, SCRE, as authority for exclusion of the video recording claiming it was both an arbitrary factor for arriving at a sentence of death under section 16-3-25(C)(1) and failed the Rule 403, SCRE balancing test.⁶ The State addresses Appellant's contention regarding section 16-3-25(C)(1) and Rule 403, SCRE, in tandem.

It is essential the jury have before it, "all possible relevant information about the individual defendant whose fate it must determine." State v. Skipper, 285 S.C. 42, 47-48 328 S.E.2d 58, 61 (1985) reversed on other grounds, 476 U.S. 1 (1986) (internal quotation omitted). The attention of the jury must be focused on both the specific circumstances surrounding the crime and the characteristics of the person committing it. State v. Stewart, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984). In evaluating these questions, a jury may review the defendant's future danger to society, his prospects for rehabilitation and restoration to a useful place in society. State v. Tucker, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996). A jury may also consider the "defendant's adaptability to prison life." State v. Burkhardt, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

A. Admission of the Jailhouse Video

In the present case, the trial court, in an effort to give the jury "all possible relevant information" regarding Appellant, allowed the introduction of the recording to show his character and adaptability to prison life. As noted in Burkhardt, Tucker, and Stewart, these factors are in no way arbitrary, but are important factors to be considered

⁶ Section 16-3-25(C)(1) of the South Carolina Code provides that the Supreme Court of South Carolina should review "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."

by the jury in the sentencing phase of a capital trial. Employing the Rule 403, SCRE balancing test, it is clear the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the video recording. In fact, nothing could have been more probative with respect to the issue of Appellant's character and adaptability to prison life than this video. Appellant refused to comply with an order requiring him to surrender to a search. (R. 2298-99). The search, as explained to Appellant at the time, was required under detention center policy, whenever an inmate was transferred from one cell to another. (R. 2298). This fact was repeatedly stressed to Appellant over the entirety of the eight minutes leading up to his being pepper-sprayed. (R. 2298). Nonetheless, Appellant chose not to comply with the corrections officer's request evidencing his disregard for authority in an environment predicated on order, a system in which members of the mitigation team urged, he could thrive. (R. 2527-28, 2594-95).

Moreover, despite Appellant's contention to the contrary, his failure to comply with procedures and regulations is not new. As noted in the testimony of Deputy Clerk Charlena Tinsley, Appellant, who at the time of sentencing was twenty-seven (27) years old, had thirty-nine (39) previous convictions, evidencing a long-term pattern of disregard for the law and law enforcement officers. (R. 2224-41, 2587). Furthermore, Appellant violated the terms of his probation and parole failing to hold down a job, attend mental health counseling and attend substance abuse counseling. (R. 2318-21, 2325-27). Clearly, disobeying the law and law enforcement is not new to Appellant, but is instead the norm.

Accordingly, the recording was not an arbitrary factor for arriving at a sentence of death, nor did the risk of unfair prejudice to Appellant substantially outweigh the

recording's probative value. Instead, the recording clearly demonstrated Appellant's character and adaptability to prison life—completely relevant factors for a jury's consideration in the sentencing phase of a capital case. As such, the trial court did not abuse its discretion in admitting the recording and its' ruling should therefore be affirmed.

B. The Closing Argument Issue

Appellant also maintains the video recording “might not be unduly prejudicial when viewed in isolation” but may be prejudicial when viewed against the entirety of the record, specifically pointing to the State's reference to the recording during closing arguments. During closing, the State linked the recording to the likelihood of Appellant's future dangerousness and inability to adapt to prison life, stating:

[T]he night your verdicts are rendered, the night that he begins to serve whichever of the two sentences you impose on him, you saw on videotape his character. It was a very simple request. That guard was polite. He wasn't just professional. He was polite. Tried to talk him into complying. You got to get patted down. It's the rule. And you saw Torres reaction and this is . . . the middle of trial.

(R. 2731). Appellant alleges this amounts to improper argument.

As an initial matter, this issue is not preserved for appellate review as defense counsel failed to object during closing arguments. See State v. Richardson 358 S.C. 586, 597, 595 S.E.2d 858, 863-64 (Ct. App. 2004) (holding failure to object to comments made during closing arguments precludes appellate review). In addressing the merits of Appellant's argument, the State submits it was not improper to link the recording to the factors of future dangerousness and inability to adapt to prison life. The recording itself was in evidence and the factors of future dangerousness and inability to adapt to prison life were clearly issues for the jury to consider. See Tucker, 324 S.C. at 174, 478 S.E.2d

at 270 (finding the jury may evaluate the defendant's future danger to society); Burkhart, 371 S.C. at 488, 640 S.E.2d at 453 (concluding a jury may consider the defendant's adaptability to prison life). Despite Appellant's contention that the recording placed an undue emphasis on the incident itself, the recording was accompanied by a variety of evidence demonstrating Appellant's disregard for the law. Furthermore, the incident was cast against the backdrop of Appellant's mitigation case providing the jury with a fair portrait of the character and circumstances surrounding the crime. See Burkhart, 371 S.C. at 487, 640 S.E.2d at 453 (holding the sole function of the jury in the sentencing phase of a capital trial is to make a sentencing determination based upon the character of the defendant and the circumstances of the crime). Accordingly, the State properly admitted the video recording of Appellant being pepper-sprayed.

CONCLUSION

As the trial court correctly found the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the autopsy photographs and the trial court properly admitted the video recording of Appellant being pepper-sprayed, the State asks this Court uphold the conviction and sentence of Appellant.

Respectfully Submitted,

HENRY D. McMASTER
Attorney General

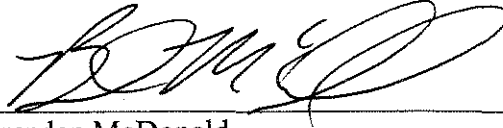
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A handwritten signature in black ink, appearing to read 'B. McDonald', written over a horizontal line.

Brendan McDonald
ATTORNEY(S) FOR RESPONDENTS

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Joseph L. Savitz, III, Esquire, at the South Carolina Office of Indigent Defense, P.O. Box 11589, Columbia, SC 29211-1589, on this 1st day of June, 2010.



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ATTORNEY FOR RESPONDENTS

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L Couch, Special Circuit Court Judge

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V.

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APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

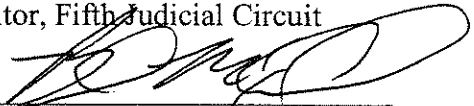
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26904 - State v. Torres

THE STATE OF SOUTH CAROLINA In The Supreme Court

The State, Respondent,

v.

Andres Antonio Torres, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 26904
Heard September 22, 2010 - Filed December 13, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan J. McDonald, Office of the Attorney General, all of Columbia; Harold W. Gowdy, III, Seventh Circuit Solicitor's Office, of Spartanburg, for Respondent.

JUSTICE HEARN: Anthony Andres Torres ("Torres") appeals the circuit court's admission into evidence of autopsy photographs and a videotape recording during the sentencing phase of his capital murder trial. Torres contends the photographs should have been excluded based on South Carolina Rule of Evidence 403, and the videotape recording should have been excluded based on either Rule 403 or Section 16-3-25(C)(1) of the South Carolina Code (2003). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In May of 2007, Union County Emergency Services received a call reporting a one-car accident involving a van. Subsequently, Torres was identified by witnesses in a police photo line-up as the driver of the van.

Officers arrived on the scene of the accident shortly after Torres fled the area and discovered that the van was registered in the name of Ann Emery. Officers found Ann and her husband Charles Ray Emery's (collectively "the Emerys") belongings in the van, and based on that discovery, requested a welfare check on their residence.

Upon arriving at the Emerys' residence and getting no response at the front door, officers walked around the house to check for signs of forced entry. Finding none, officers entered the residence through an unsecured door, immediately smelled the odor of gasoline, and noticed the house felt hot. Officers discovered the body of Charles Ray Emery lying face down on the mattress in the bedroom. The body of Ann Emery was discovered on the floor beside the bed after EMS arrived on scene. Due

to the extent of their injuries, neither body could be identified at the scene, and identification was accomplished at the hospital during an autopsy. Due to the compromising position of Ann Emery's body at the scene, a sexual assault kit was administered. Semen taken from Ann Emery's body by way of the kit matched DNA of Torres. Torres was indicted on: two counts of armed robbery; two counts of murder; one count of burglary of a dwelling, first degree; one count of attempt to burn; and one count of criminal sexual conduct, first degree. A jury trial was held, resulting in a verdict of guilty on all counts.

During the sentencing phase, the State sought to introduce a video recording showing prison guards using pepper-spray to force Torres to comply with a pat-down request. The events documented on the tape occurred the night that Torres was found guilty. Torres refused to allow prison guards to touch him when the guards requested that he place his hands on the wall for a pat-down. The guards explained that the pat-down was policy and indicated that if he continued to refuse, Torres would be pepper-sprayed. Torres continued to resist after several requests for compliance, so the guards used pepper-spray to restrain him. Torres objected, citing Section 16-3-25(C)(1) of the South Carolina Code (2003); Rule 403, SCORE; and a violation of *Miranda v. Arizona*. However, the trial judge overruled Torres' objections and admitted the video recording. Additionally, the State introduced sixteen autopsy photographs of the Emerys. Torres objected again, citing Rule 403. The trial judge excluded three of the photographs based on Rule 403 and admitted the remaining thirteen.

The defense called various witnesses who testified regarding Torres' mental issues throughout his childhood and adult life and his substance abuse problems. James Aiken, a prison consultant, testified nothing in Torres' records or in the video recording shown by the State gave him any concern about Torres' ability to adapt to life in prison because wardens would be able to manage his behavior.

At the end of the sentencing phase, the jury recommended Torres be sentenced to death. The trial judge sentenced Torres to death, finding the evidence warranted the imposition of the death penalty, and the imposition was not the result of prejudice, passion, or any other arbitrary factor.

ISSUES

Torres raises two issues on appeal:

1. Did the trial judge commit reversible error at sentencing by allowing the State to introduce autopsy photographs of the victims in violation of Rule 403, SCORE?
2. Did the trial judge commit reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued in the detention center in violation of Section 16-3-25(C)(1) of the South Carolina Code (2003) and Rule 403, SCORE?

STANDARD OF REVIEW

Generally, "[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

LAW/ANALYSIS

I. Autopsy Photographs

Torres contends the trial judge should have excluded the autopsy photographs of the Emerys because the photographs were more prejudicial than probative in violation of Rule 403, SCORE, and only served to inflame the emotions of the jury. We disagree, as we do not believe the trial judge abused his discretion in admitting the photographs.

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCORE, "evidence may be excluded if its probative

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value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. See *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986).

The State offered several autopsy photographs into evidence during the sentencing phase of the trial. The State argues that the photographs were properly admitted because they corroborated witness testimony and were introduced to illustrate the circumstances of the crime and the character of the defendant. It is well settled in this state that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); see also *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). In addition, this Court has held that autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant. See *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007).

The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view; some of the photographs are close-ups of the victims' injuries and are graphic in nature. However, the purpose of the close-ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emerys, which goes straight to circumstances of the crime.

Moreover, the trial judge did exercise his discretion by excluding three of the State's photographs, ruling that they were duplicative and prejudicial. While the admitted photographs graphically depict the injuries of the victim, this was a particularly horrific crime, and the admission of the photographs did not unduly prejudice the jury. See *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72. Accordingly, we affirm the trial judge's decision to admit them.

Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

II. Video Recording

As part of its case-in-chief during the sentencing phase, the State introduced a video recording of Torres in prison. Torres argues that the introduction of this video recording injected an arbitrary factor into the sentencing phase in violation of section 16-3-25(C)(1) and Rule 403, SCRE. We disagree.

As mentioned above, a trial judge has wide latitude concerning the admissibility of evidence. See *Rosemond*, 335 S.C. at 596, 518 S.E.2d at 589-90. Nonetheless, section 16-3-25(C)(1) establishes that a death sentence must be vacated if it was "imposed under the influence of passion, prejudice, or any other arbitrary factor."

Evidence admitted during the sentencing phase of a capital murder trial must be relevant to the character of the defendant or the circumstances of the crime. See *Burkhardt*, 371 S.C. at 487, 640 S.E.2d at 453; *State v. Copeland*, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982). "[A]daptability to prison life . . . is clearly admissible [] and . . . evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the *defendant's personal behavior* in those conditions." *Burkhardt*, 371 S.C. at 488, 640 S.E.2d at 453 (emphasis added); see also *State v. Tucker*, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996) (determining that defendant's future dangerousness and his adaptability to prison life are legitimate interests in the sentencing phase of a capital case).

The video recording in this case demonstrates exactly the type of evidence that *Burkhardt* permits. The video shows Torres' behavior in a routine prison situation where he repeatedly refused to accede to prison guards' numerous requests to submit to a pat-down. Because the video recording is probative on the issue of Torres' adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case, the video does not introduce an arbitrary factor into the jury's determination.

Nonetheless, this evidence is still subject to Rule 403, SCRE. The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court. See *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009). We believe the trial judge's ruling was correct because the probative value far outweighs any prejudice stemming from the video and any unfair prejudice is *de minimis*. The video recording presented the jury with competent evidence to showcase Torres' character and adaptability to prison life by illustrating Torres in an actual routine prison situation. While prior testimony had already established Torres' prior convictions and his problems with maintaining parole conditions, this video recording was unique in its application to a specific parameter held by this Court to not be arbitrary in the sentencing phase of a capital murder trial. See *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453.

As his final argument, Torres claims that introducing the video recording gave undue emphasis to the evidence, relying on *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982). We find *Gulledge* is readily distinguishable from the present case. *Gulledge* held that allowing the jury to take a tape recording transcript into the jury room placed undue emphasis on that evidence. *Id.* at 371-72, 287 S.E.2d at 490. Torres is not arguing that the jury should not have been allowed to take the video into the jury room; rather he argues the video should not have been introduced in the first place. Nothing in *Gulledge* supports the idea that the tape recording was not appropriately introduced. Instead, *Gulledge* provides that the trial judge should not have allowed the jury to take the tape transcripts into the jury room. Furthermore, the video recording here goes to Torres' adaptability to prison life and character, factors which are clearly relevant to the jury's sentencing decision. See *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453. Therefore, the trial judge properly allowed the video into evidence.

PROPORTIONALITY REVIEW

Pursuant to Section 16-3-25(C) of the South Carolina Code (2003), we must conduct a proportionality review. We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. See, e.g., *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009) (involving double murder and arson); *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009) (imposing the death penalty for murder, first degree burglary, and criminal sexual conduct).

CONCLUSION

For the aforementioned reasons, we affirm Appellant's death sentence.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

Andrés Torres, #6028)

APPLICATION FOR
POST-CONVICTION RELIEF

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2011-CP-42-1851

INSTRUCTIONS- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention: Lieber Correctional Institution
2. Name and location of Court which imposed sentence: Spartanburg County Court of General Sessions
3. Name(s) of co-defendant(s) (if any): _____
4. The indictment number or numbers (if known) upon which the offense for which sentence was imposed:

- (a.) 2007-GS-42-2773-2778
- (b.) 2008-GS-42-880
- (c.) 2008-GS-42-4677

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(m)

5. The date upon which sentence was imposed and the terms of the sentence:
- (a.) (Death Sentence)
- (b.) _____
- (c.) _____
6. Check whether a finding of guilty was made:
- (a.) after a plea of guilty: _____
- (b.) after a plea of not guilty: X
- (c.) after a plea of nolo contendere: _____
7. Did you appeal from the judgment of conviction of the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed: Andres Torres (2010)
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. December 13, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Andres Antonio Torres, 390 S.C. 618, 703 S.E.2d 226
- ii. _____
- iii. _____

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9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel in violation of the Sixth Amendment
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Defense counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to consult and retain a private DNA expert to oppose the state's DNA presentation at trial since such an expert was essential to impeach the state's DNA evidence as unreliable.
- (b) Defense counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to object and move for a continuance based on the state's belated revelation of its DNA evidence since such failure was highly prejudicial to petitioner's case.
- (c) Appellate counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to argue that the sexually explicit crime scene photographs constituted an impermissible arbitrary factor in violation of S.C. Code §16-3-25 since they had to tendency to cause a verdict based on passion or prejudice.

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12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? None other than the mandatory appeal to the State Supreme Court
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions, or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(b) the name and location of the Court in which each was filed:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(c) the disposition thereof:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(d) the date of each such dispositions:

- i. n/a

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- ii. n/a
- iii. n/a
- iv. n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. n/a
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. n/a
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) This is the first PCR
- (b) _____
- (c) _____

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17. Where you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Clay Allen, 7th Judicial Circuit Public Defender's Office, 366 North Church Street, Spartanburg, South Carolina 29303
- ii. Kathleen Hodges, 7th Judicial Circuit Public Defender's Office, 366 North Church Street, Spartanburg, South Carolina 29303
- iii. John G. Reckenbeil, Law Office of John Reckenbeil, P.O. Box 1633, Spartanburg, South Carolina 29304
- iv. Joseph L. Savitz, III, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589

(b) the proceedings at which each attorney presented you:

- i. Mr. Allen, Ms. Hodges, and Mr. Reckenbeil- trial
- ii. Mr. Savitz- appeal
- iii. _____

19. State clearly the relief you seek in filing this application.

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF _____) VERIFICATION

I, Andres Antonio Torres, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Andres A. Torres

SUBSCRIBED AND SWORN TO before me
 this 19 day of April, 2011.

Walter T. Key (L.S.)

Notary Public for South Carolina

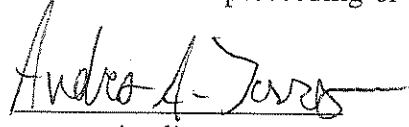
My Commission Expires: Sept. 22, 2018.

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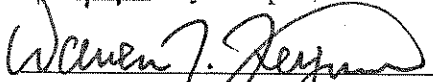
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT IN SUPPORT THERE OF**

I, Andres Antonio Torres, hereby apply for leave to proceed in this action without prepayment of fees or costs or security, therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SUBSCRIBED AND SWORN TO before me
this 19 day of April, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: Sept. 22, 2018

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**STATE OF SOUTH CAROLINA
IN THE COUNTY OF SPARTANBURG
COURT OF COMMON PLEAS**

Andres Antonio Torres, #6028

Petitioner,

vs.

The State of South Carolina,

Respondent,

#2011-CP-42-1851

**RETURN AND MEMORANDUM OF
LAW IN SUPPORT OF MOTION
TO DISMISS**

I. INTRODUCTION

Ray and Ann Emery were found badly beaten and bludgeoned to death in the bedroom of their home in Spartanburg County's Drayton community. (R. 1891-95, 1918). Following a brief investigation, their neighbor, Andres Antonio Torres ("Applicant"), a twenty-seven (27) year old with thirty-nine (39) prior convictions, was charged with two counts of murder, two counts of armed robbery, one count of first degree criminal sexual conduct, one count of burglary and one count of attempt to burn. (R. 2224-41, R. 2899-2971). Applicant stood trial in Spartanburg County on October 13th through 23rd of 2008, where he was found guilty on all charges and received a sentence of death. (R. 1583-2784, 2195-98, 2775-79). On appeal, Applicant's convictions and sentence were affirmed. See State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). Applicant now seeks post-conviction relief ("PCR").

II. FACTUAL BACKGROUND

At approximately 7:00 AM on May 11, 2007, the Union County 9-1-1 dispatch received a phone call reporting an accident near the Buffalo community. (R. 1664). Eyewitnesses to the accident reported seeing a van driving erratically, running off the road hitting a fire hydrant, and

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crashing into a fence. (R. 1663-64). Observers reported the driver, a short, stocky male wearing khaki pants and a yellow shirt, fled the scene, catching a ride with a bystander at a neighboring convenience store. (R. 1665, 1673, 1684).

When police reached the scene they found the van filled with a variety of personal items including purses, wallets, clothing, jewelry and a computer. (R. 1613). They also found the identification of Mrs. Ann Emery, the person to whom the vehicle was registered. (R. 1613). Upon running the license plate number, Corporal Jeff Wright of the Union County Sheriff's Office called the Spartanburg County Sheriff's Office and asked that they check on the Emery's residence. (R. 1612-13).

Responding to Corporal Wright's request, Deputies Danny Jones and Jeff Valentine arrived at the Emery's residence just before 8:30AM. (R. 1613). After knocking on the door and getting no response, Deputies Jones and Valentine walked around the house and found an unlocked sliding glass door. (R. 1614). Opening the door, the deputies immediately noticed the home was hot and smelled of "either kerosene or gasoline." (R. 1615).

Upon entering the home, the deputies observed an overturned gas can and a chair pole on the hardwood floor. (R. 1615). In the kitchen, the broiler was turned on and the oven door was open. (R. 1625, 1649). The burners on the stove were left on high, with a trail of gasoline leading from the bedroom to the kitchen. (R. 1632-33). In the living room, a bloody hammer was resting atop the television. (R. 1891).

Continuing down the hall, the deputies saw a body facedown in the bed. (R. 1616). As trained, the deputies continued down the hall so as not to disturb the crime scene, secured the area and called the homicide division. (R. 1616).

Upon arriving at the crime scene, investigators discovered an additional body next to the bed. (R. 1635). The bodies were later identified as Ray and Ann Emery (R. 1654). They were badly beaten and bludgeoned with a hammer. (R. 1654). Blood was everywhere. (R. 1654). According to forensic psychiatrist Donna Schwartz-Watts, who testified on Applicant's behalf, the crime scene was the most violent she had ever observed in her 20 years of practice. (R. 2593).

Ray Emery, who slept with the aid of a breathing device, was found facedown with the apparatus still attached to his face. (R. 1892). The back of his skull was crushed. (R. 1779-84). His wife Ann, was found in the floor with her legs to her chest, half-naked; her dental bridge sticking out of her neck. (R. 1635, 1800). Her face was completely unrecognizable and her eye was missing. (R. 1786-87). Both bodies were covered in gasoline. (R. 1786).

The ensuing investigation quickly focused on Applicant. (R. 1955). Consequently, investigators Jason Bryant and Reid Lindsey were sent to Applicant's grandmother's house, where Appellant was known to stay. (R. 1523). Applicant's grandmother answered the door at which time Applicant, who was sitting on the couch, indicated he knew why the investigators were there. (R. 1528). After a brief conversation with Applicant and his grandmother, investigators Bryant and Lindsey recovered the shoes and clothing Applicant was wearing earlier in the day. (R. 1956). Applicant then voluntarily accompanied the detectives to the Sheriff's Office to be questioned. (R. 1525). He received his Miranda warnings in the squad car. (R. 1529).

At the Sheriff's office, investigator Lindsey confronted Applicant asking him if he committed the murders at the Emery's residence. (R. 1503). Applicant asked for an attorney and questioning ceased. (R. 1504). Shortly thereafter, Applicant was charged with two counts

of Murder, two counts of Robbery and one count of Burglary. (R. 2146-49). While awaiting trial, Applicant was further charged with Criminal Sexual Conduct and Attempt to Burn. (R. 2149-51). The State sought the death penalty based on six of the aggravating circumstances put forth in section 16-3-20(C)(a) of the South Carolina Code, namely: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27).

III. GUILT PHASE

During the guilt phase of the trial the State presented a variety of forensic evidence implicating Applicant. Specifically, the State presented testimony from SLED Agent and DNA expert Matt Fitts, who concluded the semen taken from a vaginal swab of Ann Emery, matched the DNA profile of Applicant to a probability of one in one-hundred ten quadrillion. (R. 2074). Fitts also testified Ann Emery was a major contributor of the DNA found on the hammer recovered from the crime scene. (R. 2069). He further stated a minor contributor consistent with the DNA of both Ray Emery and Applicant was found on the hammer. (R. 2070). DNA evidence taken from Applicant's clothing and shoes also indicated blood from Applicant and the victims. (R. 2076-78, 2080-81). Blood found on a jewelry box discovered in the van wrecked by Applicant matched the DNA profile of Ray Emery to a probability of one in four-hundred twenty quadrillion. (R. 2079). There was testimony from fingerprint analyst Hugh Murphy that Applicant's fingerprints were found both on and inside the van. (R. 1825). Applicant also left a fingerprint on a flowerpot that was stained with the blood of Ray Emery. (R. 1825, 2073-74). Additionally, SLED Agent Vicki Hallman testified the footprints at the crime scene were

consistent with the tread on the shoes Applicant gave investigators Bryant and Lindsey. (R. 2047).

Meanwhile, the defense chose to rely upon challenging the State's burden of proof declining to present evidence or call witnesses. (R. 2125). At the charge conference, defense counsel requested the trial court charge the jury on "mere presence" and "larceny as a lesser-included offense of armed robbery." (R. 2117-21). The trial court denied defense counsel's request and the jury was charged. (R. 2121, 2146-69). Thereafter, the jury found Applicant guilty on all charges—two counts of murder, two counts of armed robbery, one count of criminal sexual conduct, one count of burglary, and one count of attempt to burn. (R. 2197-98). Defense counsel then exercised, pursuant to section 16-3-20(B) of the South Carolina Code, its option to wait twenty-four (24) hours before beginning the sentencing phase. (R. 2200).

IV. SENTENCING PHASE

A. The State's Case for seeking the Death Penalty

In support of the death penalty, the State sought the aforementioned statutory aggravators: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. The State also introduced a variety of evidence showing Applicant's character and the circumstances surrounding the crime, as well as victim impact testimony.

Demonstrating Applicant's character, the State elicited testimony from Ashley Harley, who, on the night of the murders, received a phone call from Applicant, wherein he threatened to kill her in her sleep. (R. 2253). In that same vein, the State introduced a video taken during trial

in which Applicant refused to comply with the requests of corrections officers, leading to his being pepper-sprayed. (R. 2290, 2297-99). The State also presented Applicant's criminal record showing thirty-nine (39) previous convictions and detailed his parole and probation violations. (R. 2225-39, 2317-28). Finally, the State, in an effort to show both Applicant's character and the circumstances surrounding the crime, introduced crime scene and autopsy photographs. (R. 2352-72).

B. Video Recording from the Spartanburg County Detention Center

During the twenty-four (24) hour waiting period, Applicant was involved in an altercation with corrections officers at the Spartanburg County Detention Center. (R. 2290, 2297-99). The altercation occurred when officers, pursuant to detention center policy, attempted to search Applicant before moving him to a new cell, asking Applicant to spread his legs and step back so they could pat him down. (R. 2289-90). Applicant refused to comply despite the officers repeated requests. (R. 2289-90). The officers then, for liability purposes, retrieved a camera to record the incident and after refusing additional requests for compliance, pepper-sprayed Applicant. (R. 2298-99).

Upon reviewing the recording, the State informed defense counsel of its intent to introduce the recording in the sentencing phase of the trial. (R. 2205). Defense counsel sought to suppress the evidence in a motion *in limine* arguing the recording was irrelevant pursuant to Rule 401, SCRE. (R. 2208). The trial court deferred ruling on the motion after which, the sentencing phase of the trial began. (R. 2208-09).

During the sentencing phase, the State attempted to introduce the recording as evidence of Applicants character and adaptability to prison life. (R. 2205, 2285). Defense counsel objected, this time on the grounds that the use of pepper spray was contrary to the detention

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center's force policy thereby rendering the recording irrelevant under Rule 401, SCRE. (R. 2275). Defense counsel maintained in the alternative that even if the recording was relevant under Rule 401, SCRE, it was inadmissible pursuant to Rule 403, SCRE. (R. 2275). After a short proffer regarding the detention center's force policy, the trial court overruled defense counsel's objection. (R. 2285).

Following the court's ruling, defense counsel again objected, this time arguing an alleged Miranda violation. (R. 2291-93). The trial court overruled defense counsel's objection. (R. 2296). Thereafter, defense counsel lodged a third objection asserting the introduction of the recording would amount to an "arbitrary factor" for arriving at a sentence of death pursuant to section 16-3-25(C)(1) of the South Carolina Code. (R. 2294-95). This objection was also overruled and the jury viewed the recording. (R. 2297, 2297-99).

C. The Autopsy and Crime Scene Photographs

Later during the sentencing phase, another evidentiary issue arose regarding the admission of photographs.¹ Specifically, defense counsel, outside the presence of the jury and pursuant to Rule 403, SCRE, objected to the State's introduction of autopsy and crime scene photographs arguing the prejudicial nature of the photos would significantly outweigh their probative value. (R. 2352). Elaborating, defense counsel stated, "we . . . object to the photographs on, on the bases (sic) that they, they are much more prejudicial than probative at this point in the trial [but] [i]n fairness and in candor . . . these are not the worse (sic) of the worst photographs." (R. 2352).

The State responded to defense counsel's objection noting that the purpose of the sentencing phase is to determine the proper punishment in relation to the crime. (R. 2352).

¹ This issue had previously been addressed in chambers after which the objections and arguments were put on the record. (R. 2352).

Continuing, the State maintained the jury is allowed to review both the circumstances of the crime and character of the defendant in reaching that conclusion. (R. 2352). Finally, the State added that Rule 403, SCRE, addresses “unfair prejudice” and as Applicant had already been convicted of the offense, the prejudice flowing from the admission of the photos would be *de minimis*. (R. 2352).

The trial court, while admitting a majority of the photographs on the basis that they fairly depicted the scene or the bodies after the event, utilized its discretion and excluded two photographs concluding they were duplicitous. (R. 2353). The trial court also excluded a third photograph taken from the dissection portion of the autopsy concluding it was highly prejudicial. (R. 2353). Following the trial court’s ruling, the jury was called into the courtroom at which point the State, first through Dr. David Wren and then through Officer Dominick Baird, entered the photographs into evidence and published them to the jury. (R. 2355-72).²

D. The Defense Case for Mitigation

Following admission of the autopsy photos, the State rested and defense counsel began the mitigation portion of the trial. (R. 2372). Defense counsel relied on the following statutory mitigators as provided for in section 16-3-20(C)(b) of the South Carolina Code: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime.

² During this process, defense counsel renewed their previous objections. (R. 2355). Defense counsel also renewed their objections at the end of the State’s case. (R. 2372).

Defense counsel offered testimony from a cast of family, social workers, a corrections expert and mental health professionals maintaining that Applicant, who was diagnosed as bipolar at age seven, had a troubled childhood. (R. 2378-2712). There was also evidence Applicant suffered from Intermittent Explosive Disorder ("IED") a mental disorder in which one, with little provocation, gets disproportionately upset and potentially violent.³ (R. 2568-69). Additionally, defense Counsel offered testimony from Dr. Alex Morton discussing the problems associated with Applicant's substance abuse and self-medication, particularly with respect to alcohol, methamphetamine and Clonopin.⁴ (R. 2573, 2585).

Following the close of defense counsel's mitigation case, the jury was charged and returned a verdict in favor of death finding the State proved all six of the statutory aggravators it previously advanced. (R. 2775-76).

V. PROCEDURAL HISTORY

Applicant was indicted by the Spartanburg County Grand Jury during the June 11, 2007, February 25, 2008 and August 4, 2008 Terms of Court under the following indictment numbers: (1) #07-GS-42-2773 (Armed Robbery); (2) #07-GS-42-2775 (Armed Robbery); (3) #07-GS-42-2776 (Burglary); (4) #07-GS-42-2777 (Murder); (5) #07-GS-42-2778 (Murder); (6) #08-GS-42-0880 (Criminal Sexual Conduct, First Degree); (7) #08-GS-42-4677 (Attempt to Turn (R. 2899-2912). On October 13, 2008, Applicant's case was called to trial before the Honorable Roger L. Couch in the Spartanburg County Court of General Sessions where he was represented by attorneys Clay Allen, Kathy Hodges, and John Reckenbeil. (R. 49-61). On October 19, 2008, Applicant was convicted of all charges in the guilt phase of the trial. (R. 2195-98). The State sought the death penalty based on the following statutory aggravators: (1) murder and criminal

³ Interestingly enough, forensic psychiatrist Dianna Schwartz-Watts, who testified in the mitigation case, noted she did not believe Applicant suffered from IED. (R. 2584-86).

⁴ Clonopin is a form of Benzodiazepine used to treat anxiety similar to Xanax or Valium. (R. 2491).

sexual conduct; (2) murder and burglary; (3) murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27). Meanwhile, defense counsel put forth the following statutory mitigators: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime. Two days later, Applicant was sentenced to death pursuant to section 16-3-25 of the South Carolina Code. (R. 2775-79).

The Notice of Appeal was filed on October 23, 2008. See Notice of Appeal in State v. Torres. On appeal, appellate counsel Joseph L. Savitz, III, argued the trial court abused its discretion in admitting, over defense counsel's objections, autopsy photographs during the sentencing phase of trial. See Final Brief of App. p. 3. Appellate counsel further argued the trial court abused its discretion in allowing the State to introduce a video recording of Applicant being pepper-sprayed while he was imprisoned at the Spartanburg County Detention Center. See Final Brief of App. p. 3. On December 13, 2010, Applicant's convictions and sentence were affirmed. See State v. Torres, 390 S.C. 618, 703 S.E.2d, 226 (2010). Thereafter, a petition for rehearing was filed on December 21, 2010. See Petition for Rehearing in State v. Torres. On January 6, 2011, rehearing was denied and the remittitur was sent. See Remittitur in State v. Torres.

Following issuance of the remittitur, Applicant, through Robert Dudek of the Office of Appellate Defense, sought a Stay of Execution to pursue PCR. See Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge in State v. Torres. The State filed its return and on February 17, 2011, a stay was issued allowing Applicant to seek PCR. See Return to Stay of Execution and for the Appointment of a Post-Conviction Relief Judge in State v. Torres; Order Granting Stay of Execution to Seek Post-Conviction Relief in State v. Torres. Applicant further requested PCR counsel and on March 10, 2011, an appointment of counsel hearing was conducted before the newly appointed PCR Judge, the Honorable J. Derham Cole, however, counsel was not appointed. Subsequently, on April 22, 2011, Applicant, with the help of counselor Dudek, filed an application seeking PCR in the Spartanburg County Court of Common Pleas.⁵ See PCR Application in #2011-CP-42-1851.

VI. ATTACHMENTS

1. Notice of Appeal in State v. Torres
2. Record on Appeal in State v. Torres
3. Final Brief of Appellant in State v. Torres
4. Final Brief of Respondent in State v. Torres
5. State v. Torres, 390 S.C. 618, 703 S.E.2d, 226 (2010)
6. Petition for Rehearing in State v. Torres
7. Remittitur in State v. Torres
8. Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge in State v. Torres
9. Return to Stay of Execution and for the Appointment of a Post-Conviction Relief Judge in State v. Torres

⁵ The State believes counselor Dudek has a copy of all materials listed in Section IV, and as such, will not attach the materials listed in Section IV. However, upon the appointment of PCR counsel, the State intends to serve appointed counsel with all attachments listed in Section IV.

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10. Stay of Execution to Seek Post-Conviction Relief in State v. Torres

11. PCR Application in #2011-CP-42-1851

12. Notice of Motion and Motion to Compel Discovery dated September 16, 2008

VII. APPLICATION FOR PCR

Applicant alleges he is entitled to relief due to ineffective assistance of counsel. See PCR Application in #2011-CP-42-1851. Specifically, in section (10) of his application, Applicant argues counsel was ineffective based upon the following grounds:

- (a) Defense counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to consult and retain a private DNA expert to oppose the State's DNA presentation at trial since such an expert was essential to impeach the State's DNA evidence as unreliable
- (b) Defense counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to object and move for a continuance based on the State's belated revelation of its DNA evidence since such failure was highly prejudicial to petitioner's case.
- (c) Appellate counsel was ineffective, in derogation of petitioner's rights under the Sixth Amendment to the United States Constitution, for failing to argue that the sexually explicit crime scene photographs constituted an impermissible arbitrary factor in violation of S.C. Code §16-3-25 since they had to [sic] tendency to cause a verdict based on passion or prejudice

See PCR Application in #2011-CP-42-1851.

A. General Law on Ineffective Assistance Of Counsel

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably

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choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should “decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial.” Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

... the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Applicant must also establish prejudice by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. 668, 694 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. It is insufficient to show only that the errors had

some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. “The Petitioner bears the ‘highly demanding’ and ‘heavy burden’ in establishing actual prejudice.” Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d-822 (1998), the South Carolina Supreme Court restated the “prejudice” prong in a capital sentencing proceeding as being established when “there is a reasonable probability that, absent [counsel’s] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) (“[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.” Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath’s favor.”)

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

B. Effective Assistance of Appellate Counsel Generally

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel’s performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003).

Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as “[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.” Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate “that his counsel was objectively unreasonable in failing” to identify and argue present significant and obvious issues on appeal, and “a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal.” Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that “[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim” on direct appeal, the Supreme Court has recently reiterated that “[v]ery often it is difficult to demonstrate that counsel was incompetent.” Robbins, 528 U.S. at 288. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (4th Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*).

C. Ground 10(a) Should Be Denied and Dismissed

Applicant argues defense counsel was ineffective in allegedly failing to consult and retain a private DNA expert to oppose the State's DNA presentation at trial. See PCR Application in #2011-CP-42-1851. To that end, Applicant maintains such an expert was essential to impeach

the State's DNA evidence as unreliable. See PCR Application in #2011-CP-42-1851. The State denies that defense counsel's representation was deficient. Likewise, the State submits that even assuming that counsel's representation was deficient, the record conclusively reflects that Applicant would be unable to prove prejudice in light of the weight of the evidence against him.

As explained in Strickland, the Applicant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Indeed, it is insufficient to show that the errors had some conceivable effect on the outcome of the proceeding, because nearly every act or omission of counsel would meet such a test. Id. at 693.

As highlighted above in section III, the State presented a variety of forensic evidence implicating Applicant. Specifically, the State presented testimony from SLED Agent and DNA expert Matt Fitts, who concluded the semen taken from a vaginal swab of Ann Emery, matched the DNA profile of Applicant to a probability of one in one-hundred ten quadrillion. (R. 2074). Fitts also testified Ann Emery was a major contributor of the DNA found on the hammer recovered from the crime scene. (R. 2069). He further stated a minor contributor consistent with the DNA of both Ray Emery and Applicant was found on the hammer. (R. 2070). DNA evidence taken from Applicant's clothing and shoes also indicated blood from Applicant and the victims. (R. 2076-78, 2080-81). Blood found on a jewelry box discovered in the van wrecked by Applicant matched the DNA profile of Ray Emery to a probability of one in four-hundred twenty quadrillion. (R. 2079). There was testimony from fingerprint analyst Hugh Murphy that Applicant's fingerprints were found both on and inside the van. (R. 1825). Applicant also left a fingerprint on a flowerpot that was stained with the blood of Ray Emery. (R. 1825, 2073-74).

Finally, SLED Agent Vicki Hallman testified the footprints at the crime scene were consistent with the tread on the shoes Applicant gave investigators Bryant and Lindsey. (R. 2047).

Accordingly, Ground 10(a) must be denied and dismissed. Even assuming defense counsel was deficient in failing to call a DNA expert, Applicant is unable to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. As highlighted above, the records conclusively reflect there was overwhelming evidence supporting the jury’s conclusion that Applicant committed the crimes with which he was charged. As such, Applicant cannot prevail on Ground 10(a).

D. Ground 10(b) Should be Denied and Dismissed

Applicant further argues defense counsel was ineffective in failing to object or and move for a continuance based on the State’s allegedly belated revelation of its DNA evidence. See PCR Application in #2011-CP-42-1851. In particular, Applicant argues that counsel’s alleged failure was “highly prejudicial to petitioner’s case.” See PCR Application in #2011-CP-42-1851. Again, the State denies Applicant’s allegations concerning defense counsel’s alleged deficient representation and as an initial matter, questions whether a continuance or objection was even warranted. Specifically, the record indicates Applicant received notice of the DNA evidence, at the absolute latest, on September 2, 2008, over a month before trial. See Notice of Motion and Motion to Compel Discovery dated September 16, 2008. Within this motion, defense counsel admits that it received Fitts’ DNA reports dated September 2, 2008, on September 3, 2008, and further admits to receiving the results of the DNA testing orally in January 2008. Furthermore, even assuming defense counsel was deficient, the record conclusively demonstrates that Applicant is unable to prove prejudice, and as such, relief must be denied.

As detailed in Strickland, the Applicant must establish prejudice by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693.

As explained in section III and section VII(C), *supra*, the record clearly shows that Applicant cannot demonstrate Strickland prejudice as no objection or request for a continuance would have changed the overwhelming evidence against Applicant. At trial, the State presented testimony from SLED Agent and DNA expert Matt Fitts, who concluded the semen taken from a vaginal swab of Ann Emery, matched the DNA profile of Applicant to a probability of one in one-hundred ten quadrillion. (R. 2074). Fitts also testified Ann Emery was a major contributor of the DNA found on the hammer recovered from the crime scene. (R. 2069). He further stated a minor contributor consistent with the DNA of both Ray Emery and Applicant was found on the hammer. (R. 2070). DNA evidence taken from Applicant's clothing and shoes also indicated blood from Applicant and the victims. (R. 2076-78, 2080-81). Blood found on a jewelry box discovered in the van wrecked by Applicant matched the DNA profile of Ray Emery to a probability of one in four-hundred twenty quadrillion. (R. 2079). There was testimony from fingerprint analyst Hugh Murphy that Applicant's fingerprints were found both on and inside the van. (R. 1825). Applicant also left a fingerprint on a flowerpot that was stained with the blood of Ray Emery. (R. 1825, 2073-74). Finally, SLED Agent Vicki Hallman testified the footprints at the crime scene were consistent with the tread on the shoes Applicant gave investigators Bryant and Lindsey. (R. 2047).

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Accordingly, Ground 10(b) must be denied and dismissed as defense counsel's purported failure to object or request a continuance was not deficient. Moreover, even assuming such a failure was deficient, Applicant is simply unable to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As noted above, there is overwhelming evidence in the record supporting the jury's conclusion that Applicant was guilty of all charges. In light of this fact, Applicant cannot show that but for counsel's failure to object or request a continuance, the outcome of this case would have been different as is required under Strickland, and as such, Ground 10(b) must be dismissed.

E. Ground 10(c) Should be Denied and Dismissed

In ground 10(c), Applicant contends appellate counsel was allegedly ineffective for failing to argue that the sexually explicit crime scene photographs constituted an impermissible arbitrary factor in violation of S.C. Code § 16-3-25. Specifically, Applicant maintains the photographs caused a verdict based on passion or prejudice. However, the record conclusively reflects that such a claim lacks merit as the issue was not preserved for appellate review and as such, appellate counsel did not err in failing to raise such an issue. Furthermore, even if one were to assume this issue was properly preserved, Applicant was not prejudiced in failing to raise such an issue on appeal.

As noted in section VII(B), a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability

that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

Preservation of Ground 10(c) at Trial

During the sentencing phase, an evidentiary issue arose regarding the admission of photographs.⁶ Specifically, defense counsel, outside the presence of the jury and pursuant to Rule 403, SCRE, objected to the State's introduction of autopsy and crime scene photographs arguing the prejudicial nature of the photos would significantly outweigh their probative value. (R. 2352). Elaborating, defense counsel stated, "we . . . object to all the photographs on the bases (sic) that they, they are much more prejudicial than probative at this point in the trial [but] [i]n fairness and in candor . . . these are not the worse (sic) of the worst photographs." (R. 2352).

The State responded to defense counsel's objection noting that the purpose of the sentencing phase is to determine the proper punishment in relation to the crime. (R. 2352). Continuing, the State maintained the jury is allowed to review both the circumstances of the crime and character of the defendant in reaching that conclusion. (R. 2352). Finally, the State added that Rule 403, SCRE, addresses "unfair prejudice" and as Applicant had already been

⁶ This issue had previously been addressed in chambers after which the objections and arguments were put on the record. (R. 2352).

convicted of the offense, the prejudice flowing from the admission of the photos would be *de minimis*. (R. 2352).

The trial court, while admitting a majority of the photographs on the basis that they fairly depicted the scene or the bodies after the event, utilized its discretion and excluded two photographs concluding they were duplicitous. (R. 2353). The trial court also excluded a third photograph taken from the dissection portion of the autopsy concluding it was highly prejudicial. (R. 2353). Following the trial court's ruling, the jury was called into the courtroom at which point the State, first through Dr. David Wren and then through Officer Dominick Baird, entered the photographs into evidence and published them to the jury. (R. 2355-72).⁷ At no point did defense counsel object to the admission of the evidence pursuant to § 16-3-25(c), and as such, the trial court failed to rule on the issue. See State v. Sheppard, 391 S.C. 415, --, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.") (citations omitted). Accordingly, appellate counsel was not deficient in failing to raise such a claim on appeal as the claim was not available for appellate review. See Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002) (holding appellate counsel is not deficient for failing to raise an argument not preserved for appellate review).

Applicant was not Prejudiced by Appellate Counsel's Failure to Raise the Issue on Appeal

⁷ During this process, defense counsel renewed their previous objections. (R. 2355). Defense counsel also renewed their objections at the end of the State's case. (R. 2372).

Moreover, even assuming the aforementioned issue was available for appellate review, the record conclusively shows Applicant cannot demonstrate that Applicant was prejudiced for failing to raise such an issue to the appellate court as there is no "reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Robbins, 528 U.S. at 285. Indeed, Applicant could not be prejudiced where the trial court correctly admitted the crime scene photographs into evidence and as such, would have lost on such an issue had it been raised on appeal.

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

As noted in State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986), "the purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." To that end, "the trial court may permit the introduction of additional evidence in extenuation, mitigation or *aggravation*." Id. (emphasis in original). A jury may be able to see photographs depicting the bodies of murder victims in substantially the same condition in which the defendant left them. Rosemond, 335 S.C. at 596, 518 S.E.2d at 590. Additionally, crime scene photographs may be presented to the jury in an effort to show the circumstances of the crime and character of

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the defendant. Id. at 597, 518 S.E.2d at 590. Moreover, if a photograph corroborates testimony, it is not an abuse of discretion to admit it. State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 cert. denied 518 U.S. 1026 (1996).

Here, the crime scene photographs corroborated Investigator Baird's testimony. Specifically, the photographs in question, while admittedly graphic, accurately depict the Emery's in substantially the same condition in which Appellant left them—bloodied, beaten and dead. (R. 2368-71). As noted above, Ray Emery's skull was crushed by the repeated blows to his head, specifically near the top of the neck and the ears—this is accurately portrayed in the photographs. (R. 1779-84). With regard to Ann Emery, the photographs simply illustrated the sheer ferocity with which the crime was committed. She was missing her eye. (R. 1786). Her face was unrecognizable, her mouth was where her cheek should be, her dental bridge was essentially sticking out of her neck. (R. 1786-87). Quite simply, this was the condition in which Appellant left his victims—battered, beaten and dead.

The photographs also helped the jury understand the circumstances of the crime and the character of the person committing it. There was no evidence to suggest the Emery's had any ill will towards Appellant. In fact, Ray Emery had recently given Appellant a ride to the grocery store to buy groceries. (R. 2344). Nonetheless, he was killed in his sleep, his breathing machine still attached to his face, while his wife was raped and beaten beyond recognition. (R. 1786-87). Appellant then took as much as he could carry, doused the Emery's and their house in gas, and stole their van. The photographs simply memorialized the brutal death of two completely undeserving people, while simultaneously displaying Appellant's complete disregard for human life.

Accordingly the State submits Ground 10(c) must be denied and dismissed. As explained above, the record clearly reflects that appellate counsel was not deficient in failing to argue an issue which was not preserved for appellate review. Furthermore, even assuming this issue was available for appellate review, Applicant cannot demonstrate prejudice as the evidence at issue was clearly admissible and there is no "reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Robbins, 528 U.S. at 285.

VIII. CONCLUSION

As the record conclusively refutes Applicant's claims for relief, the State contends Applicant's application should be dismissed. See Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981) (explaining that a hearing on an allegation is only required where the factual allegations upon which relief is premised are not conclusively refuted by the record). The State further requests a status conference pursuant to Section 17-27-160(C) of the South Carolina Code.

Respectfully Submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

BRENDAN J. McDONALD
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

May 18, 2011

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**STATE OF SOUTH CAROLINA
IN THE COUNTY OF SPARTANBURG
COURT OF COMMON PLEAS**

Andres Antonio Torres, #6028

Petitioner,

vs.

The State of South Carolina,

Respondents.

#2011-CP-42-1951

CERTIFICATE OF SERVICE

I, Brendan J. McDonald, Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's **Return and Memorandum of Law in Support of Motion to Dismiss** on Petitioner by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Andres Torres, #6028
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

This 18th day of May, 2011.


BRENDAN J. McDONALD

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Andres Antonio Torres,	)	
SCDC # 6028,	)	
	)	
Applicant,	)	C.A. No. 11-CP-42-1851
-vs-	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

**FIRST AMENDED APPLICATION FOR
POST CONVICTION RELIEF**

DEATH SENTENCED APPLICANT

This is Andres Antonio Torres First Amended Application for Post-Conviction Relief. He files this application with the express caveat that he does so without the benefit of: 1) a complete investigation into the trial and appellate transcripts and trial counsel files; 2) a review of the evidence that was submitted at trial, and more importantly, the evidence that was *not* submitted at trial; and 3) the opinions and guidance of expert witnesses and consultants. As a consequence, the applicant reserves the right to further amend this Application by both adding and deleting grounds for relief as they evolve during the continuation of the investigation.¹

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court that imposed sentence: Spartanburg County Court of General Sessions.

¹ The filing of an amended application should not be taken in any way to suggest that the case is ready for a merits hearing. To conduct a merits hearing prior to the completion of a full investigation will produce an adjudication of "a claim that was materially incomplete" and result in the matter being remanded for additional hearings. See *Winston v Pearson*, 4th Cir., June 25, 2012 opinion 11-4, "when a state unreasonably refuses to permit further development of the facts of a claim, *de novo* review might be appropriate." (Pages 9-10).

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3. Name of co-defendant: none.
4. Indictment number(s) upon which and offenses for which sentence was imposed:
 - a. 2007-GS-42-2773; Armed Robbery of Ann Emery 30 years consecutive;
 - b. 2007-GS-42-2775; Armed Robbery of Charles Ray Emery 30 years consecutive;
 - c. 2007-GS-42-2776; Burglary of a Dwelling First Degree, life consecutive;
 - d. 2007-GS-42-2777; murder of Charles Ray Emery, death;
 - e. 2007-GS-42-2778; murder of Ann Emery, death;
 - f. 2007-GS-42-4677; Attempt to Burn Dwelling; 5 years consecutive;
 - g. 2007-GS-42-0880; Criminal Sexual Conduct First Degree of Ann Emery, 30 years consecutive.
5. Date upon which sentence was imposed and terms of the sentence:
 - a. All sentences were imposed on October 23, 2008.
6. A finding of guilty was made by a jury after a plea of not guilty.
7. Applicant appealed from judgment of conviction and imposition of multiple sentences.
8. Appeals:
 - a. Courts to which applicant appealed:
 - i. South Carolina Supreme Court
 - b. Result:
 - i. Affirmed
 - c. Date of result:
 - i. December 13, 2010.
 - d. Citation:

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- i. *The State v Andres Antonio Torres*, 390 SC 618, 703 SE2d 226 (2010).

9. Not applicable.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
11. State concisely and in the same order the facts which support each of the grounds set out in question 10:

GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

11(a): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel failed to conduct adequate *voir dire*. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant has been found guilty of murder (*see Morgan v. Illinois*, 504 U.S. 719 (1992)), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to *voir dire* for racial bias as guaranteed by *Turner v. Murray* in this case which involved a defendant of Puerto Rican descent and Caucasian victims.

2. Trial counsel were ineffective for failing to recognize and respect the strength of the State's evidence and severely prejudiced Applicant by arguing, in the opening statement, not just that the State had the burden to prove guilt, but affirmatively contending that Applicant was "not guilty," implying that the defense would have some evidence to counter the charge of guilt, but knowing that the defense was not planning to present any evidence in the guilt phase of trial.

3. Trial counsel were ineffective for failing to adequately investigate and present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's errors include failing to adequately investigate and present evidence concerning fingerprints, shoe impressions, blood typing and serology, and forensic autopsy evidence; each issue being presented by the State during trial with separate expert witnesses.

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- (A) Trial counsel were ineffective in failing to investigate and challenge potential contaminants on the applicant's clothing that might have influenced critical forensic testimony regarding sexual assault (DNA).
- (B) Trial counsel were ineffective in failing to investigate and challenge that the sexual assault occurred on or near the victim's bed when the assault may have occurred with the aid of a third party at a different location in the victims' house.
- (C) Trial counsel were ineffective in failing to investigate and present evidence that the applicant was a visitor to the victim's home for legitimate and lawful purposes prior to the murders.
- (D) Trial counsel were ineffective in failing to investigate and present evidence that there was extreme blood splattering at the location of the assault, yet witnesses who saw the applicant soon after the alleged time of the crime did not notice any blood on his clothing.
- (E) Trial counsel were ineffective in failing to investigate and present evidence that the alleged murder weapon was a tool commonly found in the home and there was little or no forensic evidence that connected the applicant to the alleged murder weapon. If the State's theory was correct that the murder weapon was a tool belonging to the victims, then the suggestion that the murder was premeditated by the applicant becomes more suspect, as most premeditated murderers come armed.
- (F) Trial counsel were ineffective in failing to investigate and present evidence to more particularize the time of death which, as presented by the state, was problematic and adversely impacted the applicant's ability to establish a legitimate alibi.
- (G) Trial counsel were ineffective in failing to investigate and present evidence challenging the chain of custody regarding the collection of evidentiary and *Schmerber* biological samples.²
- (H) Trial counsel were ineffective in failing to investigate and challenge foot pattern evidence when those patterns were possibly confused with patterns left by law enforcement personnel and to investigate and challenge other issues associated with the processing of the crime scene.
- (I) Trial counsel were ineffective in failing to investigate and challenge the manner of collection of biological samples, their preservation, the process of preparing the DNA profiles and the conclusions to be drawn from the samples.
- (J) Trial counsel were ineffective in failing to challenge the actual statistics offered by the State's DNA expert, to challenge whether the correct statistical population base was used to derive the ultimate numbers offered during the testimony and in failing to object to the testimony as a "match" or words suggesting the same.
- (K) Trial counsel were ineffective for failing to investigate and present evidence that Ann Emery was murdered in a different location than the room where her body was found and with the assistance of another.

² *Schmerber v California*, 384 U.S. 757 (1966).

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4. Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions during the trial of the case included, but are not limited to, the following:

(A) in failing to object when the judge informed the jury that the first trial was "to determine the guilt of the [applicant]" when that marginalized the applicant's right to the presumption of innocence.

(B) in failing to object when the judge informed the jury that the State would go first "followed by whatever evidence or defense the defense wishes to present at the time" when a caution to the jury was required at this exact point that there was no burden upon the applicant to produce any evidence at any time and no inference of guilt could be drawn from that fact. Without such a timely caution the applicant's right to the presumption of innocence was demeaned and diminished.

(C) in failing to object to the State's opening remark that the semen Doctor Wren found in Ann Emery's body matched the [applicant] one hundred and ten quadrillion to one" and that "it matched the Defendant," which is not consistent with standard DNA protocols or the testimony as it was later presented.

(D) in failing to object to the court's charge to the jury that the pathologist had been qualified as an expert and for that reason could give opinions without a contemporaneous statement that the expert is no different from any other witness and the jury could believe part of the expert's testimony, all or none.

(E) in failing to object to the pathologist multiple statements offered as opinions where the pathologist was speculating, including testimony where the pathologist said "[he] believed it was," or "if [he] was not mistaken," or "[he] would imagine" or "[he] could not say" or what "probably" occurred, or what something "could be approximated to," and generally, when the witness was not required to couch and limit his opinions to those he believed were most probable, to a reasonable degree of forensic pathological certainty.

(F) in failing to object to the qualification of the State's fingerprint examiner and in failing to object to the opinions offered by the State's fingerprint examiner that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of fingerprint analysis. For example, the State's fingerprint examiner testified, without objection, that two of the crime scene prints in question "belonged to" the Applicant, as if this were an absolute fact. He was even allowed to testify, again without objection, that it was not just his opinion that the questioned fingerprints belonged to Applicant, but said "that's a fact." Additionally, trial counsel failed to object to the lack of foundation to the admission of the comparative exhibits used by the fingerprint examiner.

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(G) in failing to object to the qualification of the State's footwear comparison expert and in failing to object to the opinions offered by the State's footwear comparison expert that were not offered as those opinions she believed were most probable, to a reasonable degree of scientific certainty within the field of footwear comparison. For example, she was allowed to testify, without objection, that the shoeprint comparison between what was purported to be the Applicant's shoe and a shoeprint found at the scene were "almost an absolute match" or "very close" to an absolute match. She was also allowed to testify, without foundation and without objection, that Converse shoeprints are not seen "very often at all."

(H) in failing to object to the qualification of the State's DNA analysis expert and in failing to object to the opinions offered by the State's DNA analysis expert that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of DNA analysis. For example, he was allowed to testify, without objection, that in many instances blood found at the scene "matched" the DNA profile of one of the victims or of the Applicant.

(I) in failing to object to the publication of the indictment by the judge without first conforming the indictment to the evidence of record when such indictment included entirely irrelevant listings of provocative weapons and modes of death.

(J) in failing to object to the judge's charge that the jury could only find the applicant not guilty if it found "a real possibility that the [applicant] is not guilty."

(K) in failing to object to the judge's charge concerning circumstantial evidence which was in violation of *State v Gippon*, 327 SC 79 (1997) and *State v Cherry*, 361 SC 588 (2004).

(L) in failing to object to prejudicial and improper arguments made by the State in closing argument, and arguments unsupported by the evidence.

(M) in failing to object to the judge's charge concerning criminal sexual conduct in that no instruction concerning lack of consent was provided.

10(b): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

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1. Counsel were deficient in failing to conduct an adequate *voir dire*. See 11(a)(1) *supra*.

2. Counsel were deficient to the prejudice of the applicant by failing to investigate and present evidence of the applicant's profoundly abnormal early childhood, including, but not limited to, the socio-economic and medical circumstances surrounding his conception, his *in utero* development, and his early childhood and by failing to employ and utilize appropriate expert consultants and witnesses.

3. Counsel were deficient to the prejudice of the applicant by failing to make a reasonable and diligent search for early childhood medical records which were necessary and indispensable for the appropriate experts to be informed of the nature and extent of the applicant's early childhood medical condition.

4. Counsel were deficient to the prejudice of the applicant in presenting expert witnesses who were neither qualified to render opinions concerning early childhood conditions, or whose opinion was that they did not understand, and no other person understood, the pathology or behavioral consequences of the applicant's early childhood medical condition.

5. Counsel were deficient to the prejudice of the applicant by failing to investigate and present evidence of medical conditions known to them or, on proper investigation, should have been known by them including, but not limited to, such conditions as fetal alcohol spectrum disorder.

6. Counsel were deficient to the prejudice of the applicant, as a consequence of the global effects of the enumerated errors, in presenting a mitigation case that would both inform and enable the jury to make a meaningful and reasoned moral assessment of the applicant's personal culpability and thereafter fashion an individualized sentence.

7. Counsel were deficient to the prejudice of the applicant by failing to object to irrelevant, unsubstantiated, and inflammatory testimony, questioning and closing arguments by the State concerning whether other persons with mental illness committed the same crimes and atrocities as the applicant; and since the others had not, then the applicant should be sentenced to death.

8. Counsel were deficient to the prejudice of the applicant by failing to object to the State's questions and argument to the jury that the applicant had failed to satisfy all terms and conditions of his probationary sentences for minor offenses since probation was not relevant to the sentencing in this case and violated the statutory constraint against irrelevant sentencing information and because the suggestion was in any way possible.

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9. Counsel were deficient to the prejudice of the applicant by failing to object to the admission of the post-conviction custodial video offered by the State as evidence of future dangerousness since the introduction of the evidence violated *SC Code Ann.*, § 16-3-20(B).

10. Counsel were deficient to the prejudice of the applicant by failing to request that the post-conviction custodial video offered by the State as evidence of future dangerousness be redacted to demonstrate the applicant's refusal to submit to touching and exclude the remedies imposed by law enforcement.

11. Counsel were deficient to the prejudice of the applicant by failing to introduce evidence of the long term effects of institutional living upon an individual sentenced to life without the possibility of parole including that individual's likelihood of adapting and complying with institutional rules and regulations.

12. Counsel were deficient to the prejudice of the applicant by failing to use the foundational support of peer reviewed data so that the expert on adaptability could render meaningful and complete testimony regarding the applicant's ability to adapt to prison conditions over his expected, yet reduced, lifetime.

13. Counsel were deficient to the prejudice of the applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have objected to the use of the word "recommend" which erroneously conveyed to the jury that its sentence was advisory, in violation of *SC Code Ann.*, § 16-3-20(c) that requires the judge to impose whatever sentence is returned by the jury.

14. Counsel were deficient to the prejudice of the applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that the sentencing statute required that the court impose whatever sentence the jury returned.

15. Counsel were deficient to the prejudice of the applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you

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recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that a sentence of life meant a sentence of life without the possibility of parole.

16. Counsel were deficient to the prejudice of the applicant in allowing the errors alleged in paragraphs 13, 14 and 15 to persist and to infect the final charge to the jury where the judge made multiple repeated references to the jury's role being to make a "recommendation," with only a minimal gratuitous suggestion that the sentence the jury returned is the sentence the statute required to be imposed upon the applicant and that a life sentence meant life without the possibility of parole.

17. Counsel were deficient to the prejudice of the applicant by failing to object to victim impact testimony elicited during the sentencing proceeding that exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

18. Counsel were deficient to the prejudice of the applicant by failing to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments.

19. Counsel were deficient to the prejudice of the applicant by failing to object to the State's cross-examination of a medical expert wherein it required an opinion of the criminal conduct of other persons, unknown and unspecified, who had similar mental illnesses as the applicant.

20. Counsel were deficient to the prejudice of the applicant by failing to object to the State's cross-examination of a medical expert wherein it required that the witness perform a proportionality assessment of the degree of severity of the crime for which the applicant was convicted and other crimes committed by other unspecified people.

21. Counsel were deficient to the prejudice of the applicant by failing to object to the State's closing argument in the sentencing phase which compared the applicant and his mental illnesses with the conduct and mental illnesses of other unspecified people to, further, failing to object to when the State argued that those unknown people have not committed crimes proportionately similar to those for which the applicant stood convicted.

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10(d): Applicant's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

11(d): Supporting facts: Errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1. Using the word "recommendation", and its variants, as the title to the sentencing forms, and specifically charging the jury, orally and in writing, that their only function in sentencing was to make a "recommendation" to the court as to the sentence the court should impose, and thereafter repeating 60 times in the course of a few minutes that the jury's role in sentencing was to make a "recommendation" without clarifying that the court was required to impose the sentence the jury returned, impermissibly led the jury to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

2. Using the word "recommendation", and its variants, as the title to the sentencing forms, and specifically charging the jury, orally and in writing, that their function in sentencing was to make a "recommendation" to the court as to the sentence the court should impose, and thereafter repeating 60 times in the course of a few minutes that the jury's role in sentencing was to make a "recommendation" without clarifying that the court was required to impose the sentence the jury returned, so impugned the jury's understanding of its function as the ultimate sentencer that confidence in the jury's deliberation upon the mitigation case is undermined.

3. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

4. Applicant's death sentence was obtained in part as a result of the State's inflammatory, irrelevant, arbitrary and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), *cert. dismissed*, 127 S. Ct. 2022 (2007). Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments.

5. Victim impact testimony elicited during the sentencing proceeding exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

6. The cumulative prejudicial impact of all errors during the guilt-innocence and sentencing trials resulted in a fundamentally unfair sentencing proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (concluding that “the cumulative effect” of “damaging circumstances” of case “violated the due process guarantee of fundamental fairness”).

10(e): The trial court’s erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Torres of his right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). A “juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.” *Morgan*, 504 U.S. at 729. Further, “[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial.” *Morgan*, 504 U.S. at 738-39. Therefore any juror whose predispositions about the propriety of the death penalty – either generally or related to the specific case – are such that the juror’s ability to follow the trial court’s instruction that he or she consider the defendant’s mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during voir dire in this case. *See* 9(a) and 10(a), *supra*.

10(f): Applicant’s death sentence was obtained in violation of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by unsubstantiated and irrelevant testimony that other mentally ill persons had not committed the crimes Mr. Torres had committed. And by advancing in evidence and argument the post-conviction video improperly suggesting future dangerousness.

11(f): Supporting facts: Evidence of a defendant’s future dangerousness must be properly noticed and not result in speculation.

10(g) Applicant was denied the effective assistance of counsel during the sentencing

phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

11(g) During the trial and sentencing phase, Applicant's counsel failed to adequately preserve various issues for appellate review, as more particularly set forth in the First Amended Application.

10(h) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequate(y present evidence of Applicant's mental state.

11(h) During the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways as more particularly stated herein. Counsel's omissions were both unreasonable and prejudicial in sentencing. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984).

12. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina Law? None other than mandatory appeal to the Supreme Court of South Carolina.
- b. Any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- c. Any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in question 8? No.
- d. Any other petitions, motions, or applications in this or any other Court? No.

13. If you answered "yes" to any part of question 12, list with respect to each petition, motion or application:

- a. The specific nature thereof: none
- b. The name and location of the Court in which each was filed: none

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- c. The disposition thereof: none
 - d. The date of such disposition: none
 - e. If known, citations of any written opinions or orders entered pursuant to each such disposition: none.
14. Has any ground set forth in question 10 been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? None.
15. If you answered "yes" to question 14 identify:
- a. Which grounds have been presented? None
 - b. The proceedings in which each ground was raised: None
16. If any ground set forth in question 10 has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: This is the initial Post Conviction Relief Application.
17. Where you represented by an attorney at any time during the course of:
- a. Your arraignment and plea? Yes
 - b. Your trial, if any? Yes
 - c. Your sentencing? Yes
 - d. Your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to on or more parts of question 17, list:
- a. The name and address of each attorney who represented you:
 - i. Clay T. Allen, Esq. 7th Circuit Public Defender 366 North Church Street, Spartanburg, South Carolina 29303; Kathleen Hodges, Esq. 7th Circuit Public Defender's Office 366 North Church Street, Spartanburg, South Carolina 29303; John G. Reckenbeil, Esq. Post Office Box 1633, Spartanburg, South Carolina 29304; Joseph L. Savitz, III, Esq. Chief Appellate Defender, Commission on

Indigent Defense, Division of Appellate Defense, Post Office Box
11589, Columbia, South Carolina 29211-1589

b. The proceedings at which each attorney represented you:

i. Messrs.' Allen, Reckenbeil and Ms. Hodges represented the
applicant at trial and Mr. Savitz represented the applicant on direct
appeal.

19. State clearly the relief you seek in filing this application:

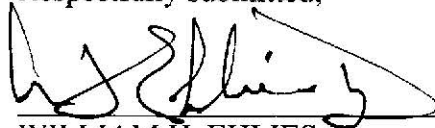
A new jury trial de novo.

20. Are you under any sentence from any other court that you have not
challenged?

No.

July 6, 2012.

Respectfully submitted,



WILLIAM H. EHLIES, II
TROY A. TESSIER
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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Andres Antonio Torres,	)	
SCDC # 6028,	)	
	)	
Applicant,	)	C.A. No. 11-CP-42-1851
-vs-	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

**SECOND AMENDED APPLICATION FOR
POST CONVICTION RELIEF**

DEATH SENTENCED APPLICANT

This is Andres Antonio Torres's Second Amended Application for Post-Conviction Relief. He files this application with the express caveat that he does so without the benefit of: 1) completion of his investigation into the trial and appellate transcripts and trial counsel files; 2) completion of his review of certain evidence that was *not* submitted at trial; and 3) finalized opinions and guidance of expert witnesses and consultants. As a consequence, the Applicant reserves the right to further amend this Application by both adding and deleting grounds for relief as they evolve during the continuation of the investigation.¹

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court that imposed sentence: Spartanburg County Court of General Sessions.

¹ The filing of an amended application should not be taken in any way to suggest that the case is ready for a merits hearing. To conduct a merits hearing prior to the completion of a full investigation will produce an adjudication of "a claim that was materially incomplete" and result in the matter being remanded for additional hearings. See *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012) "when a state unreasonably refuses to permit further development of the facts of a claim, *de novo* review might be appropriate."

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3. Name of co-defendant: none.
4. Indictment number(s) upon which and offenses for which sentence was imposed:
 - a. 2007-GS-42-2773; Armed Robbery of Ann Emery 30 years consecutive;
 - b. 2007-GS-42-2775; Armed Robbery of Charles Ray Emery 30 years consecutive;
 - c. 2007-GS-42-2776; Burglary of a Dwelling First Degree, life consecutive;
 - d. 2007-GS-42-2777; Murder of Charles Ray Emery, death;
 - e. 2007-GS-42-2778; Murder of Ann Emery, death;
 - f. 2007-GS-42-4677; Attempt to Burn Dwelling; 5 years consecutive;
 - g. 2007-GS-42-0880; Criminal Sexual Conduct First Degree of Ann Emery, 30 years consecutive.
5. Date upon which sentence was imposed and terms of the sentence:
 - a. All sentences were imposed on October 23, 2008.
6. A finding of guilty was made by a jury after a plea of not guilty.
7. Applicant appealed from judgment of conviction and imposition of multiple sentences.
8. Appeals:
 - a. Courts to which Applicant appealed:
 - i. South Carolina Supreme Court
 - b. Result:
 - i. Affirmed
 - c. Date of result:
 - i. December 13, 2010.

d. Citation:

- i. *The State v. Andres Antonio Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010).

9. Not applicable.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

11. State concisely and in the same order the facts which support each of the grounds set out in question 10:

GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a) The applicant's sentence of death violates Article I, Section 15 of the Constitution of the State of South Carolina, the Eighth Amendment to the Constitution of the United States and clearly established federal law as announced by the Supreme Court of the United States in the cases of *Daryl Renard Atkins v Commonwealth of Virginia*, 536 US 304 (2002), *Donald Roper v Christopher Simmons*, 543 US 551 (2005), and by the Supreme Court of South Carolina in the case of *State of South Carolina v James William Wilson*, 306 SC 498 (1992) as the applicant suffers with genetic anomalies which substantially diminish his capacity to appreciate the wrongfulness of his conduct and to modulate his decisions and he is by this reason less morally culpable, at least equal in extent to an intellectually disabled person, and, for that reason alone the applicant is categorically ineligible for a sentence of death.

10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

11(ba): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel failed to conduct adequate *voir dire*. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant has been found guilty of murder (*see Morgan v. Illinois*, 504 U.S. 719 (1992)), failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to *voir dire* for racial bias as guaranteed by *Turner v. Murray* in this case which involved a defendant of Puerto Rican descent and Caucasian victims.

2. Trial counsel were ineffective for failing to recognize and respect the strength of the State's evidence and severely prejudiced Applicant by arguing, in the opening statement, not just that the State had the burden to prove guilt, but affirmatively contending that Applicant was "not guilty," which in effect, assumed a burden of coming forward with a defense while knowing that the defense was not planning to present any evidence in the guilt phase of trial.

3. Trial counsel were ineffective for failing to pursue a negotiated resolution of less than death as required by Rule 10.9.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

4. Trial counsel were ineffective for failing to adequately investigate and present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's errors include failing to adequately investigate and present evidence concerning fingerprints, shoe impressions, blood typing and serology, and forensic autopsy evidence; each issue being presented by the State during trial with separate expert witnesses.

(A) Trial counsel were ineffective in failing to investigate and challenge potential contaminants on the Applicant's clothing that might have influenced critical forensic testimony regarding sexual assault (DNA).

(B) Trial counsel were ineffective in failing to investigate and challenge that the sexual assault occurred on or near the victim's bed when the assault may have occurred with the aid of a third party at a different location in the victims' house.

(C) Trial counsel were ineffective in failing to investigate and present evidence that the Applicant was a visitor to the victim's home for legitimate and lawful purposes prior to the murders.

(D) Trial counsel were ineffective in failing to investigate and present evidence that there was extreme blood splattering at the location of the assault, yet witnesses who saw the Applicant soon after the alleged time of the crime did not notice any blood on his clothing.

(E) Trial counsel were ineffective in failing to investigate and present evidence that the alleged murder weapon was a tool commonly found in the home and there was little or no forensic evidence that connected the Applicant to the alleged murder weapon. If the State's theory was correct that the murder weapon was a tool belonging to the victims, then the suggestion that the murder was premeditated by the Applicant becomes more suspect, as most premeditated murderers come armed.

(F) Trial counsel were ineffective in failing to investigate and present evidence to more particularize the time of death which, as presented by the state, was problematic and adversely impacted the Applicant's ability to establish a legitimate alibi.

(G) Trial counsel were ineffective in failing to investigate and present evidence challenging the chain of custody regarding the collection of evidentiary and *Schmerber* biological samples.²

(H) Trial counsel were ineffective in failing to investigate and challenge foot pattern evidence when those patterns were possibly confused with patterns left by law enforcement personnel and to investigate and challenge other issues associated with the processing of the crime scene.

(I) Trial counsel were ineffective in failing to investigate and challenge the manner of collection of biological samples, their preservation, the process of preparing the DNA profiles and the conclusions to be drawn from the samples.

(J) Trial counsel were ineffective in failing to challenge the actual statistics offered by the State's DNA expert, to challenge whether the correct statistical population base was used to derive the ultimate numbers offered during the testimony and in failing to object to the testimony as a "match" or words suggesting the same.

(K) Trial counsel were ineffective for failing to investigate and present evidence that Ann Emery was murdered in a different location than the room where her body was found and with the assistance of another person or persons.

(L) Trial counsel were ineffective for failing to specifically request any information from prosecutors regarding the possible involvement in the crime of another person or person(s) pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

5. Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions during the trial of the case included, but are not limited to, the following:

(A) failing to object when the judge informed the jury that the first trial was "to determine the guilt of the [Applicant]" when that marginalized the Applicant's right to the presumption of innocence.

(B) failing to object when the judge informed the jury that the State would go first "followed by whatever evidence or defense the defense wishes to present at the time" when a caution to the jury was required at this exact point that there was no burden upon the Applicant to produce any evidence at any time and no inference of guilt could be drawn from that fact. Without such a timely caution the Applicant's right to the presumption of innocence was demeaned and diminished.

(C) failing to object to the State's opening remark that the semen Dr. Wren found in Ann Emery's body "matched the [Applicant] one hundred and ten quadrillion to one" and that "it matched the Defendant," which is not consistent with standard DNA protocols or the testimony as it was later presented.

(D) failing to correct aggressive and misleading statements of the prosecutor to the jury concerning the allegation of the Applicant's sexual assault of the female victim;

² *Schmerber v. California*, 384 U.S. 757 (1966).

(E) failing to object to the court's charge to the jury that the pathologist had been qualified as an expert and for that reason could give opinions without a contemporaneous statement that the expert is no different from any other witness and the jury could believe part of the expert's testimony, all or none.

(F) failing to object to the pathologist multiple statements offered as opinions where the pathologist was speculating, including testimony where the pathologist said "[he] believed it was," or "if [he] was not mistaken," or "[he] would imagine" or "[he] could not say" or what "probably" occurred, or what something "could be approximated to," and generally, when the witness was not required to couch and limit his opinions to those he believed were most probable, to a reasonable degree of forensic pathological certainty.

(G) failing to object to the qualification of the State's fingerprint examiner and in failing to object to the opinions offered by the State's fingerprint examiner that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of fingerprint analysis. For example, the State's fingerprint examiner testified, without objection, that two of the crime scene prints in question "belonged to" the Applicant, as if this were an absolute fact. He was even allowed to testify, again without objection, that it was not just his opinion that the questioned fingerprints belonged to Applicant, but said "that's a fact." Additionally, trial counsel failed to object to the lack of foundation to the admission of the comparative exhibits used by the fingerprint examiner.

(H) failing to object to the qualification of the State's footwear comparison expert and in failing to object to the opinions offered by the State's footwear comparison expert that were not offered as those opinions she believed were most probable, to a reasonable degree of scientific certainty within the field of footwear comparison. For example, she was allowed to testify, without objection, that the shoeprint comparison between what was purported to be the Applicant's shoe and a shoeprint found at the scene were "almost an absolute match" or "very close" to an absolute match. She was also allowed to testify, without foundation and without objection, that Converse shoeprints are not seen "very often at all."

(I) failing to challenge the footwear expertise as junk science inadmissible under either *State v. Jones*, 383 S.C. 535 (2009) or *State v. White*, 382 S.C. 265 (2009).

(J) failing to object to the qualification of the State's DNA analysis expert and in failing to object to the opinions offered by the State's DNA analysis expert that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of DNA analysis. For example, he was allowed to testify, without objection, that in many instances blood found at the scene "matched" the DNA profile of one of the victims or of the Applicant.

(K) failing to object to the publication of the indictment by the judge without first conforming the indictment to the evidence of record when such indictment included entirely irrelevant listings of provocative weapons and modes of death.

(L) failing to object to the judge's charge that the jury could only find the Applicant not guilty if it found "a real possibility that the [Applicant] is not guilty."

(M) failing to object to the judge's charge concerning circumstantial evidence which was in violation of *State v. Gippon*, 327 S.C. 79 (1997) and *State v. Cherry*, 361 S.C. 588 (2004).

(N) failing to object to prejudicial and improper arguments made by the State in closing argument, and arguments unsupported by the evidence.

(O) failing to object to the judge's charge concerning criminal sexual conduct in that no instruction concerning lack of consent was provided.

(P) failing to object to Mr. Gowdy's statement that "There is no evidence that anyone else committed this crime."

(Q) failing to object to Mr. Gowdy's repeated questions and statements that other persons who had lived in situations similar to Mr. Torres and received similar treatments for Mr. Torres's psychiatric conditions had not committed murder.

6. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. See *Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

10(c): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

11(c): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel were deficient in failing to conduct an adequate *voir dire*. See 11(a)(1) *supra*.

2. Counsel were deficient to the prejudice of the Applicant by failing to investigate and present evidence of the Applicant's profoundly abnormal early childhood, including, but not limited to, the socio-economic and medical circumstances surrounding his conception, his *in utero* development, and his early childhood and by failing to employ and utilize appropriate expert consultants and witnesses.

3. Counsel were deficient to the prejudice of the Applicant by failing to make a reasonable and diligent search for early childhood medical records which were necessary and indispensable for the appropriate experts to be informed of the nature and extent of the Applicant's early childhood medical condition.

4. Counsel were deficient to the prejudice of the Applicant in presenting expert witnesses who were neither qualified to render opinions concerning early childhood conditions, or whose opinion was that they did not understand, and no other person understood, the pathology or behavioral consequences of the Applicant's early childhood medical condition.

5. Counsel were deficient to the prejudice of the Applicant by failing to investigate and present evidence of medical conditions known to them or, on proper investigation, should have been known by them including, but not limited to, such conditions as fetal alcohol spectrum disorder, genetic and other disorders.

6. Counsel were deficient to the prejudice of the Applicant, as a consequence of the cumulative prejudice of the enumerated errors, in presenting a mitigation case that would both inform and enable the jury to make a meaningful and reasoned moral assessment of the Applicant's personal culpability and thereafter fashion an individualized sentence.

7. Counsel were deficient to the prejudice of the Applicant by failing to object to irrelevant, unsubstantiated, and inflammatory testimony, questioning and closing arguments by the State concerning whether other persons with mental illness committed the same crimes and atrocities as the Applicant; and since the others had not, then the Applicant should be sentenced to death.

8. Counsel were deficient to the prejudice of the Applicant by failing to object to the State's questions and argument to the jury that the Applicant had failed to satisfy all terms and conditions of his probationary sentences for minor offenses since probation was not relevant to the sentencing in this case and violated the statutory constraint against irrelevant sentencing information and because the suggestion was in any way possible.

9. Counsel were deficient to the prejudice of the Applicant by failing to object to the admission of the post-conviction custodial video offered by the State as evidence of future dangerousness since the introduction of the evidence violated S.C. Code. Ann. § 16-3-20(B).

10. Counsel were deficient to the prejudice of the Applicant by failing to request that the post-conviction custodial video offered by the State as evidence of future dangerousness be redacted to demonstrate the Applicant's refusal to submit to touching and exclude the remedies imposed by law enforcement.

11. Counsel were deficient to the prejudice of the Applicant by failing to introduce evidence of the long term effects of institutional living upon an individual sentenced to life without the possibility of parole including that individual's likelihood of adapting and complying with institutional rules and regulations.

12. Counsel were deficient to the prejudice of the Applicant by failing to use the foundational support of peer reviewed data so that the expert on adaptability could render meaningful and complete testimony regarding the Applicant's ability to adapt to prison conditions over his expected, yet reduced, lifetime.

13. Counsel were deficient to the prejudice of the Applicant by failing to argue to the court that the sentencing statute in question, S.C. Code Ann. § 16-3-20(C), is unconstitutional under both the United States and South Carolina constitutions to the extent that statute makes the jury the sole sentencing authority but then characterizes the jury's sentence as a "recommendation."

14. Counsel were deficient to the prejudice of the Applicant by failing to ask for a specific charge conference on all charges, both for the guilt and sentencing phases in advance of jury selection.

15. Counsel were deficient to the prejudice of the Applicant by failing to insure that the Judge's written charge correctly stated the law and that a copy of the written mitigation charge was given to the jury for its use during sentencing deliberations.

16. Counsel were deficient to the prejudice of the Applicant in failing to object to judge's statements to potential jurors during *voir dire* that they could be required to give a "recommendation" to the court regarding whether or not to sentence Mr. Torres to death.

17. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have objected to the use of the word "recommend" which erroneously conveyed to the jury that its sentence was advisory, in violation of S.C. Code Ann. § 16-3-20(C) that requires the judge to impose whatever sentence is returned by the jury.

18. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that the sentencing statute required that the court impose whatever sentence the jury returned.

19. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that a sentence of life meant a sentence of life without the possibility of parole.

20. Counsel were deficient to the prejudice of the Applicant in allowing the errors alleged in paragraphs 13 through 19 to persist and to infect the final charge to the jury where the judge made multiple repeated references to the jury's role being to make a "recommendation," with only a minimal gratuitous suggestion that the jury's recommended sentence will be followed by the court.

21. Counsel were deficient to the prejudice of the Applicant in failing to object to the Court's initial charge defining the jury's "sole function" to be to make a "sentence recommendation" when the Court did not, at that time, include that it was required to impose the "recommended" sentence.

22. Counsel were deficient to the prejudice of the Applicant by failing to obtain and introduce evidence that another person or person(s) were integrally involved in the commission of the crime, which was important mitigation evidence in showing that Mr. Torres's role in the offense was substantially more limited than what the State argued before the jury.

23. Counsel were deficient to the prejudice of the Applicant by failing to argue that the court's ruling that evidence that another person or person(s) were integrally involved in the commission of the crime could not be admitted unless it showed that Mr. Torres was innocent was unconstitutional in violation of the United States and South Carolina constitutions, for the admission of such evidence in the mitigation phase could have resulted in a determination that Mr. Torres was not death-eligible under the U.S. Constitution.

24. Counsel were deficient to the prejudice of the Applicant by failing to obtain and introduce evidence, in the mitigation case, that another person or person(s) actually committed the actions which resulted in the Emerys losing their lives, where such evidence would have made Mr. Torres ineligible for capital punishment under the United States Constitution.

25. Counsel were deficient to the prejudice of the Applicant by failing to request and obtain the statutory mitigators set forth in S.C. Code Ann. §§ 16-3-20(C)(b)(4) and (5).

26. Counsel failed to object to victim impact testimony elicited during the sentencing proceeding that exceeded the scope permitted by *Payne v. Tennessee*, 501