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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

ANDRES ANTONIO TORRES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000842

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
	)	
STATE OF SOUTH CAROLINA	)	INDICTMENT NOS.:
	)	2007-GS-42-2773, 2007-GS-42-2775,
	)	2007-GS-42-2776, 2007-GS-42-2777,
	)	2007-GS-42-2778, 2008-GS-42-0880,
	)	and 2008-GS-42-4677
vs.	)	
	)	
	)	SENTENCE
	)	
ANDRES ANTONIO TORRES	)	
	)	

The Defendant, Andres Antonio Torres, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Andres Antonio Torres, be taken to the County Jail of Spartanburg County, and thence to the State Penitentiary, henceforth to be kept in close and safe confinement until the 22nd day of December, 2008, upon which day between the hours of six o'clock A.M. and six o'clock P.M., the Defendant, Andres Antonio Torres, shall suffer death by electrocution or lethal injection in the manner provided by law.

Spartanburg, SC

October 23, 2008

ROGER L. COUCH, PRESIDING JUDGE

MARC KITCHENS

2008 OCT 23 PM 5:34

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
	)	
STATE OF SOUTH CAROLINA	)	INDICTMENT NOS.:
	)	2007-GS-42-2773, 2007-GS-42-2775,
	)	2007-GS-42-2776, 2007-GS-42-2777,
	)	2007-GS-42-2778, 2008-GS-42-0880,
	)	and 2008-GS-42-4677
vs.	)	
	)	RECOMMENDATION OF SENTENCE
	)	(DEATH)
ANDRES ANTONIO TORRES	)	
	)	

WE THE JURY IN THE ABOVE ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE(S), TO WIT:

(1) The Defendant, Andres Antonio Torres, did murder Charles Ray Emery & Ann Emery by one act or pursuant to on scheme or course of conduct. (2) Did murder Ann Emery while in the commission of t crime or act of criminal sexual conduct in any degree. (3) Did murder Charles Ra Emery and Ann Emery while in the commission of the crime or act of robbery while armed with a deadly weapon (armed robbery). (4) Did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of larceny with use of a deadly weapon. (5) Did murder Charles Ray Emery & Ann Emery for the purpose o receiving money or a thing of monetary value. (6) Did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of Burglary in any degree.

NOW RECOMMEND TO THE COURT THAT THE DEFENDANT, ANDRES ANTONIO TORRES, BE SENTENCED TO DEATH.

FOREPERSON Troy Lee Will

JUROR Quentin Crawford

JUROR Shashanrial E Burnett

JUROR Nina Gregory

MARC MITCHENS
2008 OCT 23 PM 5:34

JUROR Lee W. Hembree

JUROR

JUROR Kenneth R. Akins II

JUROR Richard K. Pack

JUROR Braden T. Hampton

JUROR

JUROR

JUROR Benjamin H. Fricks

Spartanburg, SC

Date: 10/23/08

MARC KITCHENS
2008 OCT 23 PM 5:34

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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]

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 FEB 14 PM 2:34
M HOPE BLACKLEY

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."

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:

GROUNDS 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," 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

[2] *Schmerber v. California*, 384 U.S. 757 (1966).

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;
(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(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:

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 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.

27. Counsel failed 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.

28. 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's conviction and death sentence were obtained in violation of the Fifth, Sixth, Eighth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

11(c): 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 approximately 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 only function in sentencing was to make a "recommendation" to the court as to the sentence the court should impose, and thereafter repeating approximately 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 sentence that confidence in the jury's deliberation upon the mitigation case is undermined.

3. 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.

4. 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.

5. 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(d): 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(d): 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(e): 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(e): Supporting facts: Evidence of a defendant's future dangerousness must be properly noticed and not result in speculation.

10(f) 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(f) During the trial and sentencing phases, Applicant's counsel failed to adequately preserve various issues for appellate review, as more particularly set forth in the First Amended Application.

10(g): Applicant was denied the right to effective assistance of appellate 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(g): Supporting facts: Despite having a number of meritorious grounds for eligible to be raised on appeal, appellate counsel failed to raise grounds which could have entitled the Applicant to relief from his conviction and/or sentence of death. These issues include, but are not necessarily limited to, the following:

(A) The trial court erroneously 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) The trial court erroneously 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) The trial court erroneously allowed the State's opening remark that the semen Dr. Wren found on 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) The trial court erroneously charged 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) The trial court erroneously published the indictment without first conforming the indictment to the evidence of record when such indictment included entirely irrelevant listings of provocative weapons and modes of death.
(F) The trial court erroneously charged the jury that it could only find the Applicant not guilty if it found "a real possibility that the [Applicant] is not guilty."
(G) The trial court erroneously charged the jury 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).
(H) The trial court erroneously charged the jury on criminal sexual conduct in that no instruction concerning lack of consent was provided.
(I) The trial court erroneously told 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.

(J) The trial court erroneously allowed the State to argue to the jury that the application 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.
(K) The trial court erroneously admitted the post-conviction custodial video offered by the State as evidence of future dangerousness in violation of S.C. Code Ann. § 16-3-20(B).
(L) The trial court erroneously charged the jury at the beginning of the sentencing proceeding 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." This charge 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.
(M) The trial court erroneously charged the jury at the beginning of the sentencing proceeding 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" without informing the jury that the sentencing statute required that the court impose whatever sentence the jury returned.
(N) The trial court erroneously charged the jury at the beginning of the sentencing proceeding 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" without informing the jury that a sentence of life meant a sentence of life without the possibility of parole.
(O) The trial court erroneously and consistently referenced the jury's role being to make a "recommendation," with only a minimal gratuitous suggestion to the jury that the sentence it returned is the sentence the statute required the court to impose upon the Applicant and that a life sentence meant life without the possibility of parole.
(P) The sentencing statute in question, S.C. Code Ann. § 16-3-20(C), is unconstitutional under both the United States and South Carolina constitutions.
(Q) The trial court erroneously ruled that Mr. Torres could not introduce evidence that another person or person(s) was involved in the planning and/or commission of the crime, even though he was entitled to introduce such evidence in the mitigation phase and such evidence could have resulted in a determination that Mr. Torres was not death-eligible under the U.S. Constitution.

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 adequately 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

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 one 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.

Respectfully submitted,

WILLIAM H. EHLIES, II
TROY A. TESSIER

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February 10, 2014

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

ANDRES ANTONIO TORRES,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

C.A. NO.: 2011-CP-42-1851

AFFIDAVIT OF SERVICE

This is to certify that Catherine A. Bryant, an employee of the firm Wyche, P.A., Attorneys for Applicant, did cause this day copies of the Second Amended Application for Post Conviction Relief – Death Sentenced Applicant to be served on all counsel of record by electronic mail and by sending First Class Mail, postage prepaid, to the following:

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Alan Wilson, Esq.
John W. McIntosh, Esq.
Donald J. Zelenka, Esq.
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SC OFFICE OF ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211-1549

Catherine A. Bryant, Litigation Paralegal

SWORN to before me this
10th day of February, 2014.

Jackie C. Ballard
Notary Public for South Carolina
My Commission Expires: 3-6-2023

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

ANDRES ANTONIO TORRES,

Applicant,

vs. C.A. NO.: 2011-CP-42-1851

STATE OF SOUTH CAROLINA,

Respondent.

APPLICANT'S SUMMARY JUDGMENT MOTION
DEATH SENTENCED APPLICATION FOR POST CONVICTION RELIEF

TO: THE RESPONDENT AND ITS ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE, that the applicant hereby moves the Court for an order granting him summary judgment in this post-conviction relief action and ordering a new sentencing trial based upon clearly established federal law as announced by the Supreme Court of the United States in *Caldwell v Mississippi*, 472 US 320 (1985). This motion, filed pursuant to Rule 56, SCRCP, is based upon the following undisputed facts:

1. Immediately prior to commencing the mitigation portion of the case, the judge charged the jury that the purpose of the sentencing trial was to: "...determine the punishment that the Court [was] to impose upon the defendant...With respect to your particular role in this proceeding, you will be asked to recommend to the Court whether it should sentence the defendant, 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 this phase of the trial." Trial Transcript pps. 2214-2215 (emphasis added). By this charge, the court staked out sole sentencing authority, to the exclusion of the jury, and even went so far as to tell the jurors that their "role" was to make a "recommendation" to the court. This charge was without any caveat or declaration that the jury was the sole sentencing authority and that the judge was required by law to impose the "recommended" sentence. This clearly erroneous charge was then followed by days of sentencing testimony.
2. Thereafter, at the close of the sentencing trial, the judge again charged the jury that it was expected to make a "recommendation" to the court. He used the word "recommend" or its variants some 61 times during the course of this charge, and always maintained that the court was the sole sentencing authority; only at the trailing end of days of testimony and after a jury charge that took up twenty-two pages of the trial transcript did the trial judge

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mention twice, in passing, that the jury's recommendation "[would] be followed by the court." Trial Trans pps. 2754, 2770).

3. After this erroneous charge, the jury then received the trial judge's written charge to use during its deliberations. The written charge declared that the jury was simply making a "recommendation" regarding whether the court should sentence the applicant to death or life. That written charge never stated that the jury was the sole sentencing authority and that the court was required to impose the sentence the jury returned whether or not the court thought that the sentence was appropriate.[1]
4. The jurors were then provided with what became the *coup de grace* -- written verdict forms bearing titles that indicated the jury was providing a "RECOMMENDATION OF SENTENCE" (either life or death); thus irretrievably and irrevocably perpetuating what was a perfidious and pernicious error of law that infected the entire sentencing process and undermines confidence in the outcome. By repeatedly telling the jurors, orally and in writing, that they were simply making a "recommendation" as to sentence and never telling them that they were the sole sentencing authority in the case, the trial court violated the Applicant's Constitutional rights as set forth in *Caldwell v. Mississippi*, *supra*.
5. During this entire process, trial counsel were ineffective, and their performance fellow below an objective standard of reasonableness,[2] to the prejudice of the applicant by 1) never objecting; 2) never asking for a copy of the judge's written jury charge regarding the sentencing phase of the trial prior to the commencement of jury selection; 3) never asking to see the judge's verdict forms prior to jury selection; 4) never asking for a charge conference with the judge prior to jury qualification, selection, and deliberation; and 5) never asking for any curative instruction to make clear to the jury that they alone were the sole sentencing authority in the case.
6. Trial counsel were ineffective to the prejudice of the applicant by not challenging the Constitutionality of the sentencing protocol set forth in *SC Code Ann.*, § 16-3-20 to the extent that it designates the jury as the sole sentencing authority and then states: "Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death." Such a sentence is ambiguous to the extreme and is both facially unconstitutional and unconstitutional in its application where, as in this case, the statute purports to make the jury the sole sentencing authority but allows the trial judge to use the statutory word "recommendation" while charging the jury. By setting up a statutory scheme that allows a trial judge to use the word "recommendation" in the context of capital sentencing, the statute directly lessens the degree of importance of the jury's determination. "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the

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[1] *SC Code Ann.*, § 16-3-20 provides that the jury is the sole sentencing authority in a capital case. This section gives the trial judge discretion to refuse to impose the sentence returned by the jury only if he finds as an "affirmative fact" in a written opinion that the sentence was "the result of prejudice, passion, or [some] other arbitrary factor." If he so certifies, the trial judge's only option is to order a new sentencing trial before a new jury. The trial judge has no option to impose his own sentence.

[2] *Strickland v Washington*, 466 US 668 (1984).

defendant's death rests elsewhere." *Caldwell v Mississippi*, 472 at 328. Constitution of the United States of America; Amendments 5, 6, 8 and 14.[3]

For the foregoing reasons, and based upon the principles of law as marshalled in the attached memorandum, the applicant believes he is entitled to a new sentencing proceeding as a matter of law.

Respectfully submitted,

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[3] The allegations in paragraphs 5 and 6 that trial counsel's performance fell below an objective standard of reasonableness is derived from the absence in the trial record of any motion or requests as itemized in those two paragraphs.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

ANDRES ANTONIO TORRES,

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Respondent.

C.A. NO.: 2011-CP-42-1851

APPLICANT'S CORRECTED[1] MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Applicant Andres Antonio Torres ("Applicant") respectfully provides this memorandum in support of his motion for summary judgment in his application for post-conviction relief from a sentence of death. Specifically, South Carolina's statutory scheme for the imposition of the death penalty, codified at S.C. Code Ann. § 16-3-20(C), is unconstitutional because, by using the word "recommendation" with respect to the jury's sentencing role, it misleads the jury into a belief that responsibility for determining the appropriateness of the defendant's death rests elsewhere.[2] Even if the statute survives facial review, when the trial court charges only the "recommendation" portion of the statute and not the next sentence which states that the judge "shall impose" the jury's recommendation, the statute then becomes unconstitutional in its application because it is inherently ambiguous. Compounding the constitutional infirmity of the statute, the trial court in Applicant's capital trial committed an egregious violation of Applicant's rights when he repeatedly instructed the jury that its sentencing role was solely to provide a recommendation to the Court. The trial judge did not adequately instruct the jury that the

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[1] The original filing of this memorandum neglected to include copies of the trial transcript excerpts and exhibits referenced herein. This corrected version adds those documents as exhibits, but makes no substantive changes.

[2] The statute also acknowledges that if the jury gives a "recommendation" of death, the trial judge "shall sentence the defendant to death." The very fact that the statute recognizes the need to clarify the "recommendation" language confirms the statute is ambiguous and that the use of the word "recommendation" is misleading.

sentence they "recommended" was actually the sentence that would be imposed. Finally, Applicant was denied the effective assistance of trial counsel when Applicant's trial counsel failed to object to or otherwise attempt to correct this Constitutional violation. For the reasons set forth in his motion and in this memorandum, Applicant is entitled to a new sentencing trial.

Introduction and Background Facts

This case involves a request for post-conviction relief in a capital case. In 2007 and 2008, Applicant was indicted by a Spartanburg County Grand Jury alleging two counts of armed robbery; two counts of murder; one count of burglary of a dwelling, first degree; one count of attempting to burn; and one count of criminal sexual conduct, first degree. These charges arose out of the deaths of Charles Ray Emery and Ann Emery. A jury trial was held in October 2008, at which trial Torres was represented by attorneys Clay Allen, John Reckenbeil, and Kathy Hodges. The jury trial resulted in guilty verdicts on all counts and a sentence of death.

At the very beginning of the sentencing phase of the trial, the trial court (the Honorable Judge Roger L. Couch) instructed the jury as follows:

> So our purpose in conducting the proceeding in which we are now engaged is to determine whether the defendant Andres Antonio Torres, should be sentenced **by the Court** to death or life imprisonment. With respect to your particular role in this proceeding, you will be asked to make a **recommendation** to the court whether it **should** sentence [Applicant] 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**.

Tr. 2214:23-2215:8 (emphasis added).[3]

This introduction to the sentencing phase set the stage for the jury, and unequivocally instructed the jury that the "only issue" before it was to provide a recommendation to the court as to sentence. After this introduction to the role of the jury in recommending a sentence, the jury

[3] Excerpts from the trial transcript cited in this memorandum are attached hereto collectively as Exhibit D except where otherwise indicated.

heard opening statements on sentencing from both the State and the defense. Tr. 2216-2223.[4] The jury then heard the evidence in the sentencing phase of the trial (Tr. 2223-2713) and closing arguments from counsel for the State and for the defense. Tr. 2720-2748.[5] The initial introductory charge was, without question, in violation of both federal and state law as expressed in *Caldwell v Mississippi*, *infra* and *State v Davis*, 306 SC 246, 411 SE2d 220 (1991). The question then becomes whether the error was ever sufficiently corrected that the jury was disabused of the notion they had already received concerning their role in the sentencing phase. The prejudice to the applicant was compounded by the fact that the initial charge set the parameters by which the jury filtered all the sentencing phase evidence; that they were simply making a recommendation and not really sentencing the applicant to death.

After the parties concluded their arguments, the Court provided its oral charge to the jury on sentencing. In that oral charge to the jury at the sentencing phase, Judge Couch used some form of the words "recommend" or "recommendation" no fewer than fifty-eight (58) times. Tr. 2754-2771[6]. With the previous introduction provided by the Court, the jury was instructed sixty-one (61) times that its role was to provide a recommendation as to sentence. Only two times in the

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[4] This excerpt of the transcript is excluded from Exhibit D.

[5] These excerpts from the trial transcript are excluded from Exhibit D.

[6] "Foreman Williams, that's the documents I have gone over with you during the charge.....Below that would be the three forms that you would complete as to the findings concerning aggravating circumstances and behind those forms, those are all stapled together, are the two *recommendations* either for life sentence or for the death penalty..." (Trial Transcript p. 2773 Emphasis Added).

In a seminal work of interest, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*; Miller, Campbell, The Journal of Abnormal and Social Psychology, Vol 59(1) July 1959, the conclusion, established with empirical validity, confirmed what was already commonly known; that people remember the first and last things they hear. In this case, the first thing the judge told the jurors, days earlier, was that their sole function in sentencing was to make a "recommendation" of whether the judge should sentence the defendant to death or to life in prison (Trial Trans pps. 2146-47). The last thing the judge told the jurors was that the verdict forms which were "the two recommendations either for the life sentence or for the death penalty" where now available to them to complete. (Trial Trans. p. 2773). Sandwiched between the numerous references that the jurors' sole function was to make a recommendation, was a passing remark that the "recommendation will be followed." This remark telegraphed to the jurors not that they were the sole sentencing authority, but that the judge was, and the remark implied that the judge could choose to accept or reject the "recommendation."

course of the entire instruction provided to the jury did the Court mention that the jury's "recommended" sentence "will be followed" by the Court. Tr. 2754:11-12; 2770:22-23, and they were attenuated from each other.

To further compound the Constitutional violation, two written jury instruction forms concerning the specific sentence were provided to the jury after the Court concluded its instructions on sentence. The Court described these forms to the jury foreman as "the two recommendations either for the life sentence or for the death penalty." Tr. 2773:15-17. Each of these forms contains the caption, "RECOMMENDATION OF SENTENCE" – one for death and one for life imprisonment. (Copies of these two forms are attached hereto as Exhibits A and B). The verdict form recommending death made no reference to the Court being bound to follow the recommendation, but instead stated that the jury, having found certain prerequisite aggravating circumstances, "NOW RECOMMEND THAT THE DEFENDANT, ANDRES ANTONIO TORRES, BE SENTENCED TO DEATH." (Exhibit A).

In addition to the 61 times the Court orally charged the jury on their sentencing role and in addition to the fact that the written jury verdict forms provided only that the jury was giving a recommendation as to sentence, the Court provided written instructions, entitled "Statutory Instructions," to the jury on sentencing. **Nowhere** in those written instructions does the Court indicate that it is bound to impose any sentence "recommended" by the jury. Instead, the written jury instruction given to the jury and taken by the jury into their deliberations further provide that, "IN DETERMINING WHETHER TO **RECOMMEND** THAT THE DEFENDANT, ANDRES ANTONIO TORRES BE SENTENCED BY THE COURT..." (Jury Instructions, p. 1) (emphasis added). (A copy of these written jury instructions provided to the Court are attached hereto as Exhibit C).

Thus, the very first and last instructions the jury received on sentencing in this case, and the only written instructions they received, unequivocally provided that their role was to give the Court a recommendation as to sentence.

Argument

As the United States Supreme Court has expressly recognized, under the Eighth Amendment, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *California v. Ramos*, 463 U.S. 992, 998-999 (1983).

Justice Brennan put it this way:

> The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. ...Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident.... A prisoner remains a member of the human family.... His punishment is not irrevocable.

Furman v. Georgia, 408 U.S. 239, 289-290 (1972) (Brennan, J., concurring).

Because of the severity and finality of death, this highest degree of scrutiny must be kept foremost in the Court's mind in evaluating the state sentencing scheme and the specific jury charge in any capital case. Here, such scrutiny reveals a Constitutional violation. In the seminal case of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court of the United States held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. The Court noted that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333. The Court ultimately vacated the sentence, because the instruction to the jury

"depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." *Id.* at 336.

The Supreme Court of South Carolina recognized the dilemma inherent in telling the jurors that they were to "recommend" a particular sentence and not, at the same time, clearly conveying to the jurors that the sentence they recommended would in fact be the sentence imposed. In *State v Davis*, 306 SC 246, 411 SE2d 220 (1991), the first post-*Caldwell* decision in South Carolina, the Court took a large step towards requiring a more discrete and accurate statement of the jurors' role in the capital sentencing process. The *Davis* Court tightened the previous suggestion in *State v Lindler*, 276 SC 304, 278 SE2d 335 (1981), *State v Bellamy*, 293 SC 103, 359 SE2d 63 (1987) and *State v Middleton,* 295 SC 318, 368 SE2d 457 (1988) that the use of "recommendation" would be sufficient if the charge included such additional specific admonitions as "the ultimate punishment of the defendant will be in your hands" *Middleton*, at 325, "whatever you recommend will be the sentence given to the defendant" *Sims* at SC 421, requiring instead that the charge as a whole clearly convey the true nature of the jurors' role in sentencing.

In *Davis*, the Court attempted to harmonize existing State practice with the *Caldwell* mandate. The Court reversed a conviction and sentence of death on *Batson*[7] grounds, and then noted that the use of the word "recommendation" without clearly conveying to the jury that its' sentencing decision would be final and followed would result in an impermissible impression that the ultimate sentencing authority lay elsewhere. After reviewing the trial court's sentencing charge, the *Davis* Court stated: "Not only did the trial judge refuse appellant's requested charge [that the jurors' recommendation would be accepted by the judge and the sentence imposed accordingly], nowhere in the record does the trial judge refer to the jury's sentencing decision as

[7] *Batson v Kentucky*, 476 US 79 (1986).

anything more than a recommendation." The Court then went on to state that the trial judge was required to convey the understanding to the jury that its' sentencing recommendation was going to be the sentence imposed. This standard was not met by the trial judge in Mr. Torres' case.

The South Carolina statutory scheme for capital sentencing is unconstitutional as applied in the Applicant's case. Using the statutory "recommendation" language as a jury charge, without also including the next sentence that the judge shall impose the jury's recommendation, results in a *Caldwell* violation. The statutory language characterizes the jurors' role as advisory and sets up the erroneous impression that any sentence they agree upon is just that - merely a recommendation to the Court and not the actual sentence to be imposed on the defendant. To make matters worse, the oral and written instructions provided to Applicant's jury stand in direct contravention to both federal and South Carolina law. In an effort to correct what would otherwise be an obvious constitutional violation, the statute also indicates that the Court has **no discretion** to ignore a unanimous jury "recommendation" of death: "Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge **shall** sentence the defendant to death." S.C. Code Ann. § 16-3-20(C) (emphasis added). Thus, the statute itself recognizes that the use of the term "recommendation" is misleading. If it were not, there would be no need to clarify the "recommendation" language in this manner. Appellant takes the position that this clarifying language remains insufficient to meet the requirements of *Caldwell* and that, to be accurate and compliant with due process and Eighth Amendment jurisprudence, as clearly announced by the Supreme Court of the United States, the expression that the jurors are to "recommend" a sentence should be redacted.

Under the mandate of *Caldwell*, it is impermissible for the sentencing jury to be misled into thinking that the responsibility for any ultimate determination of death will rest with someone else,

like the trial judge. Presenting the statute and the specific jury instructions given to a capital jury in the form of a "recommendation" as to sentence does just that. Merriam-Webster defines "recommend" as "to present as worthy of acceptance or trial" or "advise." Inherent in both of these definitions, and in the plain meaning of the word "recommend" or "recommendation" itself, is the lack of finality or decisiveness. A "recommendation" is, simply put, a suggestion, not a decision. The average juror would take this term at its ordinary meaning, and would not understand the term "recommendation" to mean "final decision." Indeed, the Court instructed this very jury to take words at their ordinary and plain meeting elsewhere in the charge itself.[8] At best, if the instruction is even ambiguous on whether the jury is the final decision-maker on life or death, it impermissibly and unconstitutionally deprives Applicant of due process and injects an arbitrary feature into the sentencing process in violation of the Eighth Amendment and clearly established federal law as announced by the United States Supreme Court in *Caldwell*.[9]

It is required, under both the Federal and South Carolina Constitutions, that it be conveyed to the jury in capital cases that its decision will be followed, meaning the sentence the jury "recommends" is actually not advisory in any way – it is the sentence that, as the statute puts it, **shall be imposed.** Misleading the jury on this point is Constitutional error requiring a vacation of the sentence. In *State v Davis*, *infra*, the trial court gave a charge almost identical to the one given in Mr. Torres' case. That charge was found defective by the *Davis* Court, stating:

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[8] E.g., "I will instruct you that the terms life imprisonment and death sentence are to be understood in their ordinary and plain meaning." Tr. 2754:16-19.

[9] In another capital case, *State v Sims*, 304 SC 246, 411 SE2d 220 (SC; 1991) the Court stated that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. *Sims*, 304 SC at 422. In Mr. Torres' case the charge as a whole is manifestly in error and the isolated casual remark that the jury's "recommendation" would be followed does not suffice to change the course of an overwhelmingly erroneous charge as a whole.

"...this Court has required that the trial judge convey to the jury in the sentencing phase of a capital trial the idea that its sentencing recommendation will be followed. This requirement comports with the rule that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 2634, 86 L.Ed.2d 231, 239 (1985). Not only did the trial judge refuse appellant's requested charge, *nowhere* in the record does the trial judge refer to the jury's sentencing decision as anything more than a recommendation.

Id., 306 SC at 250. (Emphasis in the original).

Even with the trial judge's mention that the "recommendation" would be followed, it was an outlier remark, too little too late for the jury to grasp that they were the sole sentencing authority in the case. The slightly mentioned detail of sentencing, that the recommendation will be followed, completely failed to measure up to the Court mandate in *Davis* that the trial court inform the jury that what they were doing was more than "recommending" a sentence. The burden of sentencing to death was, and is intended to be, upon the corporate shoulders of the community at large as represented and reflected in and by the jury. The jury was never made aware of the finality of their decision. Failure to inform the jury that the judge was required to impose the sentence "recommended" by them was also ruled reversible error in the case of *State v Plemmons*, 296 SC 76, 370 SE2d 871 (1988).

Even if the South Carolina statute (with its "clarifying" language about the court imposing the sentence "recommended" by the jury) were accepted as constitutional, the Supreme Court of South Carolina has also recognized this constitutional mandate, holding that "[t]he idea should be conveyed to the jury that its sentencing recommendation **will be followed**." *State v. Bellamy*, 293 S.C. 103, 107 (1987) (emphasis added) (overruled on other grounds, *State v. Torrence*, 305 S.C. 45 (1991) (abolishing *in favorem vitae* review as an outdated doctrine)). The Supreme Court explained the law more fully in *State v. Davis*, 306 S.C. 246 (1991), in which it wrote:

> Since *State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987),[10] this Court has **required** that the trial judge convey to the jury in the sentencing phase of a capital trial the idea that its sentencing recommendation **will** be followed. This **requirement** comports with the idea that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Not only did the trial judge refuse appellant's requested charge, *nowhere* in the record does the trial judge refer to the jury's sentencing decision as anything more than a recommendation. **This is reversible error**.

Davis, 306 S.C. at 250 (citations omitted) (emphasis added).

Without question, then, the charge given in Appellant's case would be reversible error under the authority of *State v. Davis* if the trial judge never indicated in the record that the jury's sentencing decision was anything more than a recommendation. Here, the Court gave only two indications to the contrary, and gave them only in the oral charge to the jury. In other words, the question here is whether the trial court's two isolated statements – in the oral charge alone – that the jury's recommendation "will be followed by the Court" are sufficient to overcome (1) the 61 other times when the trial judge used the word recommendation to describe the jury's role on sentence; (2) charging the jury at the outset of the sentencing phase that its only role was to make a recommendation as to sentence; (3) the use of a written jury charge devoid of any indication that the jury's "recommendation" was not a recommendation at all, but the actual sentence the court must impose; and (4) the use of a written jury verdict form that provides no indication that the jury is presenting anything other than a sentencing recommendation to the court. Here, the trial court's two isolated statements simply amplify confusion, instead of correcting the error, especially given

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[10] While it is true that in *State v. Linder*, 276 S.C. 304 (1981), the Supreme Court of South Carolina held that it was not error for a judge to refuse a defendant's trial counsel's request that the court clarify to the jury in a capital case that its recommendation on the sentence would be followed, Applicant notes that this case was decided several years before the Supreme Court's decision in *Caldwell*, and notes that the *Linder* holding is severely contravened by the *Davis* Court's note that since *Bellamy*, "this Court has required that the trial judge convey to the jury in the sentencing phase of a capital trial the idea that its sentencing recommendation will be followed." 306 S.C. at 250.

that these two isolated statements came amid no less than 58 instructions that the jury was merely "recommending" a sentence.

The first and last instructions the jury received on sentencing in this case, and the only written instructions they received, unequivocally provided that their role was to give the Court a recommendation as to sentence. In between these two bookends, the jury was instructed over and over again that it was merely providing a recommendation, with only two passing references to any mandate on the part of the Court to follow that recommendation. The oral and written jury charge, taken as a whole, cannot be viewed in any way to pass Constitutional muster.

The applicable test is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates due process:

> The relevant inquiry for the Court in this matter is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Todd v. State*, 355 S.C. 396, 403, 585 S.E.2d 305, 309 (2003). In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation. *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); Todd, 355 S.C. at 402, 585 S.E.2d at 308.

Lowry v. State, 376 S.C. 499, 505 (2008).

The Supreme Court of South Carolina has also recognized that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Lowry v. State*, 376 S.C. 499, 506 (2008) (quoting *Francis v. Franklin*, 471 U.S. 307, 315 (1985)). Here, the trial court used some form of the word "recommend" or "recommendation" no less than 61 times, and only stated twice in the middle of the instruction that the recommendation "will be followed by the Court." The trial court compounded the problem by issuing written instructions that were devoid of any indication that the jury's sentence "recommendation" was actually the sentence that must be imposed on Applicant, and finished it

off by providing jury verdict forms that again indicated only that the jury was providing a "recommendation" as to sentence, with no notation whatsoever that the recommendation must be imposed by the court.

These instructions, taken as a whole, present more than a reasonable likelihood that the jury would be, at minimum, confused as to whether or not they were the final arbiter of life or death for the Applicant. Such an instruction is constitutionally infirm. As a result, Applicant is entitled to summary judgment on this issue and the Court should order a new sentencing trial for the Applicant under the circumstances present here.

Respectfully submitted,

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Attorneys for Applicant Andres Antonio Torres

Dated: March 21, 2014

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 MAR 21 AM 10: 25
M. HOPE BLACKLEY

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
	)	
STATE OF SOUTH CAROLINA	)	INDICTMENT NOS.:
	)	2007-GS-42-2773, 2007-GS-42-2775,
	)	2007-GS-42-2776, 2007-GS-42-2777,
	)	2007-GS-42-2778, 2008-GS-42-0880,
	)	and 2008-GS-42-4677
vs.	)	
	)	RECOMMENDATION OF SENTENCE
	)	(DEATH)
ANDRES ANTONIO TORRES	)	

WE THE JURY IN THE ABOVE ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE(S), TO WIT:

(1) The Defendant, Andres Antonio Torres, did murder Charles Ray Emery & Ann Emery by one act or pursuant to one scheme or course of conduct. (2) Did murder Ann Emery while in the commission of the crime or act of criminal sexual conduct in any degree. (3) Did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of robbery while armed with a deadly weapon (armed robbery). (4) Did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of larceny with use of a deadly weapon. (5) Did murder Charles Ray Emery & Ann Emery for the purpose of receiving money or a thing of monetary value. (6) Did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of Burglary in any degree.

NOW RECOMMEND TO THE COURT THAT THE DEFENDANT, ANDRES ANTONIO TORRES, BE SENTENCED TO DEATH.

FOREPERSON Troy Alan Will

JUROR Quette Crawford

JUROR Shoshannah E Burnett

JUROR Nina Ergon

JUROR Lee W. Hembree

JUROR

JUROR Kenneth L. Akins II

JUROR Richard K. Parks

JUROR Braden T. Hampton

JUROR

JUROR

JUROR Benjamin K. Fricks

Spartanburg, SC

Date: 10/23/08

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	INDICTMENT NOS.:
	)	2007-GS-42-2773, 2007-GS-42-2775,
	)	2007-GS-42-2776, 2007-GS-42-2777,
	)	2007-GS-42-2778, 2008-GS-42-0880,
	)	and 2008-GS-42-4677
vs.	)	
	)	RECOMMENDATION OF SENTENCE
	)	(LIFE IMPRISONMENT)
ANDRES ANTONIO TORRES	)	
_____	)	

WE THE JURY IN THE ABOVE ENTITLED CASE, RECOMMEND TO THE COURT THAT THE DEFENDANT, ANDRES ANTONIO TORRES, BE SENTENCED TO LIFE IMPRISONMENT.

Spartanburg, SC

Date: _____

_____
SIGNATURE OF FOREMAN

MARC KITCHENS
2008 OCT 23 PM 5:29
CLERK OF COURT
FILED

EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF GENERAL SESSIONS FOR THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA vs. ANDRES ANTONIO TORRES	)	INDICTMENT NOS.: 2007-GS-42-2773, 2007-GS-42-2775, 2007-GS-42-2776, 2007-GS-42-2777, 2007-GS-42-2778, 2008-GS-42-0880, and 2008-GS-42-4677 STATUTORY INSTRUCTIONS

IN DETERMINING WHETHER TO RECOMMEND THAT THE DEFENDANT, ANDRES ANTONIO TORRES BE SENTENCED BY THE COURT TO LIFE IMPRISONMENT OR TO DEATH, YOU MAY CONSIDER THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES:

THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF THE FOLLOWING ACTS:

1. The Defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery by one act or pursuant to one scheme or course of conduct.

Section 16-3-20(C)(a)(9) of the Code of Laws of South Carolina (Law Co-op. 1976), as amended (Cum. Supp. 1991).

2. The Defendant, Andres Antonio Torres, did murder Ann Emery while in the commission of the crime or act of criminal sexual conduct in any degree.

Section 16-3-20(C)(a)(1)(a) of the Code of Laws of South Carolina (Law Co-op. 1976), as amended (Cum. Supp. 1991).

3. The Defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of robbery while armed with a deadly weapon (armed robbery).

Section 16-3-20(C)(a)(1)(d) of the Code of Laws of South Carolina (Cum. Supp. 1991).

4. The Defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of larceny with use of a deadly weapon.

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Section 16-3-20(C)(a)(1)(e) of the Gode of Laws of South Carolina (Cum. Supp. 1991).

5. The Defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery for the purpose of receiving money or a thing of monetary value.

Section 16-3-20(C)(a)(4) of the Code of Laws of South Carolina (Cum. Supp. 1991).

6. The Defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the commission of the crime or act of Burglary in any degree.

Section 16-3-20(C)(a)(1)(c) of the Code of Laws of South Carolina (Law Co-op. 1976), as amended (Cum. Supp. 1991).

YOU MAY ALSO CONSIDER THE FOLLOWING STATUTORY MITIGATING CIRCUMSTANCES:

1. The Defendant has no significant history of prior criminal conviction involving the use of violence against another person.
Section 16-3-20 (C)(b)(1), Code of Laws of South Carolina, (1976)(Suppl.).

2. The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
Section 16-3-20 (C)(b)(2), Code of Laws of South Carolina, (1976)(Suppl.).

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.
Section 16-3-20 (C)(b)(6), Code of Laws of South Carolina, (1976)(Suppl.).

4. The age or mentality of the defendant at the time of the crime.
Section 16-3-20 (C)(b)(7), Code of Laws of South Carolina, (1976)(Suppl.).

YOU MAY ALSO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES SUCH AS:

a. Evidence or character of the Defendant's background.
b. Evidence of the Defendant's prison adaptability.

Spartanburg, SC
October 23, 2008

Roger L. Couch, Presiding Judge

NO. 052 P. 2
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EXHIBIT D

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA, PLAINTIFF, VS. ANDRES ANTONIO TORRES, DEFENDANT.	TRANSCRIPT OF RECORD 07-GS-42-2773 - 2778 08-GS-42-880 08-GS-42-4677

October 13th - 23rd, 2008
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

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

TREY GOWDY, BARRY BARNETTE, AND CINDY CRICK
Solicitor, Deputy Solicitor, and Assistant Solicitor
Attorneys for the State

CLAY ALLEN, KATHY HODGES, AND JOHN RECKENBEIL
Public Defender, Assistant Public Defender, and Esq.
Attorneys for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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Charge by the Court

Verdict

Sentencing

Certificate

E X H I B I T S

NO.	DESCRIPTION	ID	EV
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(Whereupon, the stipulation was marked as Court's Exhibit No. 10 for identification purposes only at this time.)

THE COURT: Any other issues from the State before we begin this phase of the trial?

SOLICITOR GOWDY: No, sir, Your Honor.

THE COURT: Any other issues from the defense?

MR. ALLEN: No, Your Honor.

THE COURT: No issues concerning proper notice of seeking the death penalty, anything of that nature, is that correct?

MR. ALLEN: No, Your Honor.

THE COURT: Okay. All right. Let's bring the jury back.

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

THE COURT: The record will reflect that the jury has returned to the courtroom.

Good morning, ladies and gentlemen. I trust everyone has had a good rest and is ready now to begin with the second phase of this trial. The defendant, Andres Antonio Torres, has been convicted of the crime of murder on two separate indictments and of the defenses, the other offenses of burglary, criminal sexual conduct in the first degree, attempt to burn, and armed robbery on two indictments.

Because of the conviction for the crime of murder on two separate indictments, we must conduct an additional

proceeding to determine the punishment that the Court is to impose upon the defendant for the crime of murder. South Carolina Code Section 16-3-20 provides, in part, that a person who is convicted of murder must be punished by death or by imprisonment for life. That section, as further amended, also provides, in part, that upon conviction of a defendant for murder the Court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

So, our purpose in conducting the proceeding in which we are now engaged is to determine whether the defendant, Andres Antonio Torres, should be sentenced by the Court to

death or life imprisonment.

With respect to your particular role in this proceeding, you will be asked to recommend to the Court whether it should sentence the defendant, 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 this phase of the trial.

You will be hearing testimony of aggravating circumstances, if any, surrounding the murders, and testimony in mitigation or extenuation. When that testimony has been completed, each side will present arguments for and against the death penalty and I will give you certain instructions of the law and then you will retire and decide whether to return a sentence of death or life imprisonment.

evidence only as it may relate to the defendant's character, his characteristics. But not as proof of any alleged statutory aggravating circumstances.

Ladies and gentlemen, Mr. Foreman, members of the jury, it now becomes your duty to decide what sentence you will recommend that this Court impose upon the defendant, Andres Antonio Torres. There are two verdicts you are to consider in this case. One is the death penalty, which in this state is by electrocution or by lethal injection at the option of the defendant. The other is life imprisonment without the possibility of parole. Your sentence, sentencing recommendation will be followed by this Court.

Now, the order in which I explained these two sentences is by no means a recommendation by this Court as to which sentence you should impose. It's simply that one must be stated first and one must be stated second. Also, I will instruct you that the terms life imprisonment and death sentence are to be understood in their ordinary and plain meaning.

Now, by this form that I hold in my hand at this time, this form is entitled recommendation of the sentence of death. You, the jury, may recommend that the Court sentence the defendant to death. Please, please observe that on this form, when you see it, that immediately below the body of the recommendation there are lines, 12 lines, where, should

you decide to recommend the death penalty, each one of you

would sign your name. It's the law in this State, Mr. Foreman, and members of jury, that a recommendation for the imposition of the death penalty be a unanimous recommendation and each and every juror must sign his or her name to the recommendation form.

Now, I will read the text of the form to you. It states we, the jury, in the above entitled case, having found, beyond a reasonable doubt, the existence of the following statutory aggravating circumstances, to wit, now, below that's -- I've gotten to this point on the form. There are several lines listed there that are blank. At that point there are provided lines for you to indicate aggravating circumstances, and I will instruct you further concerning what aggravating circumstances are and how you would find them later in the charge.

Now, below that it says now recommend to the Court that the defendant, Andres Antonio Torres, be sentenced to death. That is the form for the recommendation of the death penalty.

Now, for this recommendation to be made, that is that the defendant be sentenced to death, you must find first that a statutory aggravating circumstance existed beyond a reasonable doubt.

Now, what is a statutory aggravating circumstance you

may ask?

It is, in fact, an incident, a detail, or an occurrence that the General Assembly has declared, by statute, would

make worse. That is to aggravate the offense of murder when the two occurred together. In other words, it is something which would increase the enormity or add to the injurious consequences of the offense.

Now, Mr. Foreman, and ladies and gentlemen of the jury, you will receive a form that's entitled statutory instructions, and upon this sheet of paper which I now hold in my hands are written the words again statutory instructions, and, again, you'll have this paper in the jury room during your deliberations. The body of the form states, in determining whether to recommend that the defendant, Andres Antonio Torres, be sentenced by the Court to life imprisonment or to death, you may consider the following statutory aggravating circumstances.

Number one, the defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery by one act or pursuant to one scheme or course of conduct.

Number two, the defendant, Andres Antonio Torres, did murder Ann Emery while engaged in the commission of the crime or act of criminal sexual conduct.

Number three, the defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the

commission of the crime or act of robbery while armed with a deadly weapon.

Number four, the defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the commission of the crime of, or act of larceny with the use

of a deadly weapon.

Number five, the defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery for the purpose of receiving money or a thing of monetary value.

And number six, that the defendant, Andres Antonio Torres, did murder Charles Ray Emery and Ann Emery while in the commission or the act of burglary.

Now, let me emphasize to you that there, there are only, these are only circumstances that you may consider -- these are the only circumstances that you may consider as aggravating circumstances. Should you find, and it must be a unanimous finding, a finding that the State has proven, beyond a reasonable doubt, the existence of one or more of the circumstances listed on this sheet, then you would be authorized, which is to say to be permitted, to consider recommending, recommending to this Court that the defendant be sentenced to death.

Now, what do I mean by proof beyond, proven beyond a reasonable doubt?

Proof beyond a reasonable doubt is proof that leaves

you firmly convinced of the evidence, existence of or one of the aggravating circumstances. Now, there are few things in this world that can be proven to absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that an aggravating circumstance existed, then you would be authorized, that is

to say permitted, to consider recommending to this Court that the defendant be sentenced to death. If, on the other hand, you think there's a real possibility that the aggravating circumstances did not exist, you must give the defendant the benefit of the doubt and in such case would make no recommendation of sentence.

If you find that no statutory aggravating circumstances exist, you will fill out a form and that one is entitled Form A and stop deliberations and would sentence the defendant under the law. I'll explain to you that there are three forms that I have included as a group. The sheet on top of that says complete only one of the following three forms that have to do with your findings concerning the aggravating circumstance.

The first one is Form A. Form A says we, the jury, unanimously agree that no aggravating circumstances exist in this case. If that is the finding of the jury unanimously, then the, Mr. Foreman, would sign the form. That form

indicates that then you would stop deliberations and not make a recommendation of sentence.

Now, if you're unable to unanimously agree as to the existence of any aggravating circumstances, you would fill out Form B, and that simply says we, the jury, are unable to unanimously agree to the existence of aggravating circumstances. Again, signed by the foreman, and that form indicates that if you make that finding, then you would stop deliberations and not make a recommendation at that point.

However, if you do find the existence of aggravating circumstances, the ones that I just listed, and they will be shown to you on, again, the statutory instructions that I will give you in writing, then the final form, Form C, says we, the jury, in the above entitled case find, beyond a reasonable doubt, the following statutory aggravating circumstances. There's, again, several lines for you to file in those circumstances which you are able to unanimously agree upon. And again, that must be signed by all 12 jurors.

So, as to the three forms as to the findings of aggravating circumstances, you must fill out one of them and one of them only. And it would have to do as to whether or not you are able to, whether or not you find no aggravating circumstances, whether you're unable to agree as to the aggravating circumstances, or that you do find aggravating

circumstances and you list them on that particular form.

Now, please pay particular attention to this. You are never required to recommend the death penalty even if you find that a statutory aggravating circumstance existed at the time the offense occurred.

Now, as to those aggravating circumstances that I went over with you, again, just to be sure that we're clear on this, I'm going to go with you, explain what is meant by those particular crimes that were alleged in the aggravating circumstances. The first one, one of them is, has to do with armed robbery.

Now, in that case, in this case, the defendant is charged with the aggravating circumstance of armed robbery, and armed robbery is the taking of personal property from the person or presence of a person and the carrying away of the property with the intent to permanently deprive the owner of the use of the property and to keep the property for one's own use. The taking away or carrying away of the property must be done with violence or by putting the owner of the property in fear of violence.

Finally, a person may be, must be armed with a deadly weapon during the robbery and a deadly weapon is any article or substance which is likely to cause death or great bodily harm, and whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

One of the other aggravating circumstances, circumstances has to do with whether the murders were committed during the act of burglary, and, therefore, the defendant has been charged with the aggravating circumstance of first degree, or of burglary.

Burglary involves the entering of a dwelling without consent, intending to commit a crime, either a felony or a misdemeanor, at the time of the entry. Intent may be shown by acts or conduct of the defendant and other circumstances from which you could naturally or reasonably infer intent.

Now, we also have discussed the fact that these have to occur in connection with a murder, and, therefore, part of the aggravating circumstances is a determination of the

offense of murder, and in one of the aggravating circumstances has to do with, that the defendant is charged with the aggravating circumstance of murder of two or more persons by one act or pursuant to one scheme or course of conduct, and then there was also the aggravating circumstance that a murder was committed, committed for money or for monetary gain.

Now, as to murder, murder is the killing of another person with malice aforethought. Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under

circumstances that the law will infer evil intent.

Malice aforethought does not require that the malice exist for any particular time before the act is committed. But malice must exist in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of evil intent and the act.

Malice aforethought can be expressed or inferred. Expressed or inferred does not mean different kinds of malice. Just the manner in which they may have been shown to have existed. That is by direct evidence, evidence or by inference from the facts and the circumstances.

Express malice is shown when a person speaks words which express ill will or hatred for another person or when the person prepares beforehand to do the act which was later

accomplished.

Malice can be inferred from conduct showing a total disregard for human life and it may be inferred and also arise when the deed is done with a deadly weapon. I've already defined for you what a deadly weapon is. Again, any article or instrument or substance which is likely to cause death or great bodily harm. Whether the instrument has been used as a deadly weapon depends on the circumstances of each case.

Finally, the defendant is charged with the aggravating

circumstance of committing the murder of the victims while in the act of criminal sexual conduct in any degree. Criminal sexual conduct is the engaging in a sexual battery with a victim. Sexual battery is sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body except when the intrusion is accomplished for a medically recognized treatment.

Now, I've, I've instructed you and I will tell you that should you find that the State has not proven, that such circumstances existed, that is to say that you still have a reasonable doubt as to the existence of the circumstances, then you would use one of the forms I've already shown you in the grouping and you would not make a recommendation concerning sentence and the Court would sentence the defendant under the law.

Now, should you find, beyond a reasonable doubt, that one or more of the aggravating circumstances listed on the statutory instructions existed at the time of the murder or during the commission of the crime of murder, and should you then decide, after considering the elements, in favor of a recommendation of life imprisonment, about which I will instruct you later, that if you then find that the recommendation of the jury is that the defendant be

sentenced to death, then it would be your duty, Mr. Foreman, to write, to write on the recommendation of this sentence form, and that, again, is the form that I've shown you earlier for the recommendation of the death penalty. Then each and every juror would sign your names in the places provided during, for that purpose.

Again, I will tell you that other facts about the defendant's background and record have been introduced by the State, and I charge you that the evidence of these crimes or other crimes should be considered as substantive evidence of, should not be considered as substantive, substantive evidence of aggravating circumstance. But if you are convinced that the defendant committed those other crimes or any of them, you may consider them as evidence of his character. These may be considered along with other evidence and you may give them whatever weight you deem proper under the circumstances under the case.

However, under no circumstances may you consider those facts of other crimes, even if proven, as evidence of proof

of the statutory aggravating circumstances. Those other facts, if proven, may be only considered as evidence of the defendant's character and given such significance as you determine they have the right to receive. They are not, that is the proof of former crimes, are not proof of statutory aggravating circumstances and can not be

considered as such.

Now, the other sentencing recommendation sheet that you can enter, if you decide to recommend a life sentence, is the recommendation of the sentence for life imprisonment, and that's the form that I hold in my hand at this time, and I will read to you the text of that recommendation.

We, the jury, in the above entitled case recommend to the Court that the defendant, Andres Antonio Torres, be sentenced to life imprisonment. Now, please note that although you must unanimously agree before this form can be completed by the foreman, only the foreman is required to sign this recommendation form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence, beyond a reasonable doubt, of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty. There are three conditions which you should consider in reaching your decision.

First, whether the existence of a statutory mitigating circumstance was supported by the evidence.

Second, whether the existence of any other mitigating circumstance was supported by the evidence.

And third, whether, for any reason you can think of, or for no reason at all, the defendant should be sentenced to

life imprisonment.

Now, I'll talk to you now about what are referred to as statutory mitigating circumstance. You may ask yourself just what is meant by that phrase. It's a fact, it's an incident, a detail, or an occurrence which the General Assembly has decided or declared, by statute, would reduce the severity of the offense of murder. In other words, it is circumstances recognized by statute as one, which in fairness and mercy, may be considered in evaluating or reducing the degree or moral culpability of the commission of the act of murder.

A mitigating circumstance is neither a justification nor an excuse for the murder. It simply lessens the degree of one's guilt. That is, makes him less blameworthy or less culpable.

What statutory mitigating circumstances should you consider in this case?

Well, again, I'll refer to the statutory instructions sheet that I'm going to give you to take into the jury room and immediately below the listing of the statutory aggravating circumstances, I will, I will read to you as follows:

You may also consider the following mitigating

circumstances.

Number one, the defendant has no significant history of

prior criminal conviction involving the use of violence against another person.

Number two, the murder was committed while the defendant was under the influence of mental or emotional disturbance.

Number three, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Number four, the mentality of the defendant or the age of the defendant at the time of the crime.

In addition to the statutory mitigating circumstances, I have, it says on the form you may also consider any non-statutory mitigating circumstances such as evidence or character of the defendant, of the defendant's background, evidence of the defendant's prison, prison adaptability.

Now, a non-statutory mitigating circumstance is one which is not provided for by the statute, but is one which the defendant claims serves the same purpose. That is to reduce the degree of his moral culpability or blame of the offense. While there must be some evidence which supports a finding by you that a statutory or non-statutory mitigating circumstance exist, you need not find the existence of such circumstances beyond a reasonable doubt.

You may consider any mitigating circumstance supported

by the evidence submitted and you must determine whether the evidence exists and the significance to be given to that evidence. In reaching your decision as to which sentence to recommend, you will consider the aggravating and the mitigating circumstances. While a statutory aggravating circumstance must be found before you can consider recommending the death penalty, once you, once such a finding is made beyond a reasonable doubt, you may recommend the death sentence even though you find the existence of a statutory mitigating circumstance.

In other words, the existence of an alleged statutory mitigating circumstance or an alleged non-mitigating, mitigating circumstance or both is not a bar to the imposition of the death penalty.

The third element you may consider, if you should conclude that a statutory aggravating circumstance exist, is whether the defendant should be sentenced to life imprisonment for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy. And you, and should such be your decision, you would so indicate by returning to the Court the recommendation of life imprisonment form, which is signed, again, by the foreman alone.

In other words, you may choose to recommend life imprisonment even if you find a statutory or a non-statutory

mitigating circumstance or you may choose to recommend life imprisonment as an act of mercy. In any instance, you should choose to recommend, should you choose to recommend life imprisonment, your decision, again, must be a unanimous one, but the foreman alone is required to sign that form.

Now, I'll summarize what I have told you. You will have in the jury room with you a, several sets of forms. The first set of forms, number one, is the statutory instructions. Statutory instructions, again, have listed on them the statutory aggravating circumstances, the statutory mitigating circumstances, as well as the non-mitigating circumstances that have been presented by evidence.

The second form that you will have will be two forms. One is a recommendation of the sentence of death. The other is a recommendation of the sentence of life imprisonment. The third set of forms is the findings concerning aggravating circumstances and you will complete one of those forms in reaching your verdict.

Now, the statutory instructions state only the aggravating circumstances which you shall consider in this case. And again, should you fail to find, beyond a reasonable doubt, that one of these circumstances existed at the time the murder was committed, then you would go no further. You would make no recommendation and the Court would sentence the defendant accordingly.

Should you find, beyond a reasonable doubt, the existence of an aggravating circumstance or circumstances, then you would be authorized to consider recommending the death penalty. In your deliberations, you will consider any statutory or nonstatutory mitigating circumstances which are supported by the evidence. You will consider the aggravating circumstances or, or circumstance you found, and the mitigating circumstances, and then you will decide whether to recommend the death penalty or life imprisonment.

You may also consider any other factor in mitigation of the offense, and you can recommend a sentence of life imprisonment for no reason at all. If you decide to recommend the death penalty, then you will complete the proper form. You must write out the aggravating circumstances that you found and all 12 jurors must sign that recommendation.

Should you decide to recommend life imprisonment, only the foreman will, must sign that recommendation and no reason has to be given for that decision. Whatever your recommendation is, it must be a unanimous one if you make a recommendation. That must, means each and every juror must agree to the sentencing recommendation, and the recommendation will be followed by the Court.

In considering whether to recommend, whether the defendant is to be sentenced to death or life imprisonment,

I charge you that, as jurors, you must decide the issue

involved in this proceeding without bias and without prejudice to any party. You can't allow yourselves to be governed by sympathy, by prejudice, by passion, by public opinion, or any other arbitrary factor. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case, and that you will follow the law as I have explained it to you.

Now, at this point in time I need to go over some matters with the attorneys before I give the case to you for your deliberation. I'm going to ask you one more time to step back into the courtroom, not to begin any discussions until I have brought you out into the courtroom, and given you your final instructions.

At this time you may retire to the jury room.

Everyone remain seated while the jury retires.

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

THE COURT: Any exceptions to the charge from the State?

SOLICITOR GOWDY: No exceptions, no objections.

THE COURT: Any exceptions, objections or exception from the defense?

MR. ALLEN: No, Your Honor.

THE COURT: All right. I will ask you again to review the evidence that has been presented. There's some additional evidence that's come in to be sure that only the

proper evidence is considered by the jury.

We'll take a brief recess for, while that takes place.

(Pause.)

THE COURT: All right. Do we have an agreement as to the exhibits by the State?

SOLICITOR BARNETTE: We do, Your Honor. Just one note, note. There's two purses that had items inside the purses that was entered as that exhibit as purses. Just making sure it's clear on the record.

THE COURT: All right. And defense agree with the exhibits as they have been segregated?

MR. ALLEN: Yes, Your Honor.

THE COURT: All right. Anything further before I bring the jury back for final instructions.

SOLICITOR GOWDY: No, sir, Your Honor.

THE COURT: Anything further from defense?

MR. ALLEN: No, Your Honor.

THE COURT: Bring the jury in.

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

THE COURT: All right. The record will reflect the defense, the jury is back in the courtroom.

Mr. Foreman, and ladies and gentlemen of the jury, at this time I'm going to instruct you to begin your deliberations.

Mr. Humphries, if you'll pass these documents to the foreman for me.

(Bailiff complies.)

THE COURT: Foreman Williams, that's the documents I have gone over with you during the charge. If you'll look, the one at the top, I'll let you get your glasses on, is the statutory instructions that I referred to indicating the possible aggravating circumstances, and indicating also thereafter the mitigating circumstances. Below that would be the three forms that you would complete as to the findings concerning aggravating circumstances and behind those forms, those are all stapled together, are the two recommendations either for the life sentence or for the death penalty. So, those are the documents I've gone over with you.

The exhibits have been agreed to by counsel, and will again be submitted to you. That's the exhibits from the, the first phase of the trial as well as the second. Those will be available to you in the jury room for your consideration.

Again, there are some items that require playment on a computer. If, for any reason, the jury would like to review

those items, please let us know and we'll make arrangements for that to occur.

Mr. Pappas, you are the alternate and if you'll now, at this point in time, step down and go with Mr. Humphries.

Thank you, sir.

JUROR: Thank you, Your Honor.

THE COURT: And at this time I will instruct the jury

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

ANDRES ANTONIO TORRES,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

C.A. NO.: 2011-CP-42-1851

CERTIFICATE OF SERVICE

I hereby certify that I caused the Applicant's Memorandum in Support of Motion for Summary Judgment in the above-captioned case, to be served on March 21, 2014, by U.S. Mail, postage prepaid, on all counsel of record as follows:

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Dated: March 21, 2014

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In The Matter Of:

Andres Antonio Torres vs

State of South Carolina

H Wayne Tobin, MD

April 2, 2014



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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS

ANDRES ANTONIO TORRES,
Applicant,
vs.
STATE OF SOUTH CAROLINA,
Respondent.

CASE NO. 2011-CP-42-1851

DEPOSITION OF: H. WAYNE TOBIN, M.D.
DATE: April 2, 2014
TIME: 2:56 p.m.
LOCATION: Carolina Outreach
911 Hay Street, Suite 201
Fayetteville, NC
TAKEN BY: Counsel for the Applicant
REPORTED BY: LISA A. WHEELER, RPR, CRR

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(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 2:56 p.m.)

* * * * * * * * * * *

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * * * * * * * *

H. WAYNE TOBIN, M.D.

being first duly sworn, testified as follows:

EXAMINATION

BY MR. EHLIES:

Q. Dr. Tobin, I need a little bit of your background. If -- if you would give us please your educational history.

A. I have a Bachelor's degree from Bard College in New York, a medical degree from Stanford University School of Medicine. I did an internship at KU, University of Kansas Medical Center, and residency and I was chief resident at KU Medical Center as well in the past so I have -- and I'm

board certified in psychiatry.

Q. All right. And do you have any other particular field of interest, neurology or anything like that, or are you limited in your training and experience to the field of psychiatry?

A. Basically I'm a psychiatrist.

Q. Okay. Have you had any exposure to -- or training for forensics in psychiatry?

A. No.

Q. Okay. Tell me a little bit then -- are you currently practicing? You're 75, I know that. Are you --

A. Yeah.

Q. Okay. Are you practicing full time?

A. Yes.

Q. And is that in the area of psychiatry?

A. Yes.

Q. And we are physically here located at Outreach --

A. Carolina Outreach.

Q. -- Carolina Outreach, 911 Hay, H-a-y, Street?

A. Right, here in Fayetteville.

Q. In Fayetteville, North Carolina?

A. Right. I'm a staff psychiatrist for

them.

Q. Okay. Do you still maintain medical privileges in South Carolina?

A. No.

Q. All right. You're currently then licensed in North Carolina?

A. Yes.

Q. Do you have privileges in any other state?

A. Yes.

Q. Okay. What states would those be?

A. Maine --

Q. All right.

A. -- California, Nebraska, Kansas and Minnesota.

Q. And why not South Carolina?

A. Because the rule -- when I was down there at Patrick Harris you had to have had so many years before they would reciprocate, if it went beyond ten years from your licensure so I had a license that was given to me by South Carolina as long as I worked at the state hospital.

Q. Okay.

A. So it was a provisional license to practice as long as I was at the state hospital.

Q. Okay. And have you ever had your license suspended or revoked?

A. No.

Q. Okay. Are you eligible to return and apply in South Carolina?

A. Yeah, as far as I know. Yeah.

Q. Okay. Now as far as your employment history is concerned, can you give us a little summary of what you've done by way of employment in the field of medicine.

A. I was in the Navy for two years. Then I was the medical director in Kansas City, Kansas, at the Wyandot Mental Health Center. And then I was in Maine for 20 years as the medical director at the Kennebec Valley Mental Health Center and I was on staff at Mid Maine Medical Center and there for ten years and then to South Carolina. I was at Harris hospital eight or nine years and then up here to what -- came to work for a place called ACTS. This was A-C-T-S until the middle of last year when they sold out to Carolina Outreach. I'm on staff -- active medical staff -- psychiatric staff at Cape Fear Valley Hospital.

Q. All right. And you --

A. I'm also on active psychiatric --

active staff at New Ulm Medical Center in New Ulm, Minnesota as well.

Q. Okay. Now when you were at Patrick B. Harris psychiatric facility, what roles did you play for them or -- or hold for them I guess would be the term?

A. Well, as medical director I -- I did regular psychiatry which is how I happened to see this person. I was on call when he came obviously for admission and I did the admission note --

Q. And --

A. -- on him.

Q. I think we're -- this person being Andres Torres --

A. Yes.

Q. -- T-o-r-r-e-s?

A. Yes.

Q. Okay. For -- for convenience sake, we'll kind of call him Tony if that's all right, Tony Torres?

A. That's fine with me.

Q. Okay. And as the medical director then, were you sort of wearing two hats; you were administrating the operation and the medical component --

A. Yes.

Q. -- of the hospital and its services to patients?

A. Right. I was the head of the medical staff as well as doing staff --

Q. Okay.

A. -- stuff --

Q. So you had --

A. -- like regular psychiatry.

Q. Right. You had a clinical practice then while you were there as well as the administrative --

A. Well, the clinical practice was part of being on the active medical -- I was on the active medical staff so I would cover wards and things like that.

Q. Okay.

MR. EHLIES: Brendan -- Mr. McDonald, we would tender Mr. -- Dr. Tobin as an expert in psychiatry.

MR. McDONALD: No objection.

(TOBIN EXHIBIT 1, Medical Records, was marked for identification.)

BY MR. EHLIES:

Q. Okay. Dr. Tobin, I've handed you

what's been marked as an exhibit to your deposition as Applicant's Number 1 and it is the Patrick B. Harris records, part of which actually I believe were dictated and -- and I'm going to ask you to take a look at the pages. I believe there are four of them and they're on a date -- date of admission of October 23rd, '94 and my records show that there are four pages.

A. That's correct.

Q. On the last page is a signature line. It says -- it's typed in H. Wayne Tobin, M.D. --

A. Right.

Q. -- psychiatrist and then it has a funny mark above that. I don't know what that mark is but do you --

A. That's me. That's my mark.

Q. Is that your mark? You recognize that as your signature?

A. That's my signature.

Q. Okay. And I believe you've had these records for some period of time, correct, since I sent them to you more than once? I don't remember --

A. Yes. Well, a year -- about a year ago, I think, and then most recently in the last few

months.

Q. Okay. So you've had records and particularly this four-page set of records for enough time to -- to read it over?

A. Yes.

Q. And --

A. This and other records that came with it.

Q. And -- and to be familiar with what was dictated and --

A. Yes.

Q. -- you signed?

A. Yes.

Q. Okay. All right. I want to ask you some questions about the dictation itself but first let me ask you, before I contacted you about a year ago, whenever that was, maybe a little more than that, had anybody else contacted you in the matter of Tony Torres?

A. No.

Q. Okay. Is it to the best of your recollection after Tony was discharged -- which I see on the fifth page as November 2nd, 1994 on the signature of Steven Cro -- Croley?

A. Croley.

Q. C-r-o-l-e-y. Had -- did you -- do you have any independent recollection of seeing or dealing with Tony Torres's condition after that?

A. After my admission note?

Q. After that discharge and admission note.

A. No.

Q. Okay. So then the next time you would have heard anything to do with Tony Torres would have been the time that you --

A. You gave me --

Q. -- heard from me?

A. -- a phone call, right.

Q. Okay. Okay. All right. Now your summary -- do you recognize it as consistent with your pattern and practice of dictation on admissions for patients?

A. Yes.

Q. Okay. And does it appear to be intact and what you would have dictated on an admission history?

A. Yes.

Q. Having read a few myself, I found it to be pretty thorough. Is it -- is it your practice to be that much in detail with an admission note or

did this case present some curiosities to you on admission?

A. It's a very thorough note. Whether it's more thorough, I like to think not.

Q. Yes.

A. But it's a very thorough note and I'm -- it -- it certainly reflects my kind of language and -- and structure of my kind of dictation.

Q. Okay, sir. Do you have -- having reviewed these notes and the associated documents, do you have an independent recollection of the case of Tony Torres?

A. No.

Q. All right. So everything you would know then would be contained within the documents we've provided to you?

A. Yes.

Q. Okay. In the very beginning on Page 1 there's pretty standard language here about the criteria for admission. Can you tell us how he came to be in that program? And I'm looking particularly under the history of present illness.

A. Well, on the admission he was admitted on an involuntary dangerous to self or property and

the referral was from a Dr. Greg at Greenville Mental Health Center emergency room.

Q. Do you know what that means when -- when you say danger to himself or others, what -- is that a term of art or what does that mean to you when you are writing that?

A. The person normally would have exhibited either threatening ideation or behavior so as to cause fear in a normal individual that they may well be at -- at risk of harm from that individual.

Q. Or that that individual's at risk for harm from himself?

A. Oh, yeah. Self or -- self or others, right. Yes.

Q. Okay. And I mention that because I think the narrative contains some reference to suicidal ideation, whether it existed or not.

A. Yes. There are -- I remember something in there about alleged history of some suicidality in -- in my note --

Q. Okay.

A. -- which I either got from the patient or from a record I had at the time.

Q. All right. Now having read the record,

do you have an impression -- a current impression as to whether or not any portion of your dictation suggests that you had access to other records pertaining to Tony Torres?

A. It's hard to tell from my writing whether I had records in front of me. Some of the data considering his age and looking at the -- you know, the -- the completeness of it I doubt came just from him so it's likely that I had some records from Harris at the time and some kind of a referral perhaps that came with him from the ER --

Q. Okay.

A. -- that referred him from Spartanburg, I guess, that -- or Greenville that came to us.

Q. Okay. And I'm looking at the first sentence in your history and -- and it -- it notes that -- it was an involuntary admission and that it was his fifth at HPH. Is that correct, in hos -- why would it be H -- HPH?

A. That's what it was called. Patrick B. Harris -- well, Harris Psychiatric Hospital, HPH.

Q. Oh, Harris --

A. Harris --

Q. -- Psychiatric Hospital.

A. -- Psychiatric Hospital. Yeah, Patrick

was the --

THE REPORTER: One at a time.

A. The -- the hospital is Patrick B. Harris hospital but it's -- it's con -- it's referred to as HPH or Harris Psychiatric Hospital just as a shorthand.

Q. Very good. Okay.

A. And there was some mention in there about -- in terms of -- I just looked at it where he did have some talk about overdosing and hurting himself so at risk to self or others was the reason why he was sent.

Q. Okay. All right, sir. And in there we have in the next -- after this significant history of violence we have a current medications paragraph. And would you tell us what you found at that time and dictated concerning his current -- then-current medications.

A. He was on Depakote which apparently he'd taken an overdose of according to my note and he was supposed to take 250 milligrams four times a day. And that's the only thing in his record that I have in terms of current medications was the Depakote from MIP, Marshall Pick -- must be Marshall Pickens.

Q. Marshall I. Pickens.
A. Marshall I. Pickens, yes. That's MIP, yeah. So that's what he was on. That was -- he was in current treatment apparently with somebody --
Q. Okay.
A. -- other than the emergency room visit that sent him in and that was Depakote. That's all I can tell you.
Q. All right, sir. The next paragraph has to do with his past psychiatric history. And reading this would you have an impression as to whether you got that from the patient Tony Torres or other independent records that may have been available to you at the time?
A. I -- the hospital -- I might have -- probably had some records from here, from Harris, of the first four. The rest of it sounds like it's just referring to things from there, that he's been at Hall Institute and -- and that kind of thing because I'm vague about it, I think the last time in '91. So there's nothing specific in it as to when exactly he was at those other facilities. But I think must have had something probably from here. He's also been in Charleston and was at the DJJ

which is a criminal facility in Columbia five or six months ago. That's stuff I must have seen in front of me. In other words, he wouldn't have told me that. I mean, I can't say I can swear that it was in front of me, but obviously a 14-year-old kid isn't going to tell me he was at DJJ in Charleston. So that -- yeah, I would assume I had some records either from the ER and the past psych stuff from Harris and some other stuff when I did this.

Q. And would it be fair to say that those records would have included more than a literal placement history but also contained medical history?

A. Likely they would have. There would be -- yes.

Q. And would you then be able to use that information with other information you were garnering on the admission to render opinions that you later rendered on Page 4?

A. That would be the normal procedure.

Q. Okay. Now let's proceed then through. I want to focus a little bit on the paragraph on -- I'm on Page 2 in the middle of the page, developmental, education, occupation and legal history and ask you if you could flesh that out for

us based upon -- on these notes.

A. Let's see. He was born in Spartanburg, raised in upstate South Carolina, went through the ninth grade but not much through the public school system. I think he was at York. There was some other place associated -- some specialized educational facility that I remember in the past written down somewhere in here. He lived in institution most of his infancy and adolescence. That went back to early childhood stuff where there was reports of violence even as early as the age of 17 months. My use of the word infancy is kind of peculiar and there -- there would be a reason why I would have used that word infancy because the age obviously was somehow presented to me either through the literature that I had in front of me that this started at a very, very young age as having difficulties. And he was currently facing assault charges and -- and to appear in court.

Q. All right, sir. The very, very young age portion of your answer, did you find the onset of medical records and history of treatments starting at age 17 months to be somewhat unusual based on your practice at that time?

A. Based on people that I've seen and kids

and -- you know, and -- though I see mostly adults, but 17 months is a very young age for -- for someone to be brought to psychiatric attention.

Q. Very good. On the mental status exam, would you -- and that's in the bottom, last paragraph --

A. Yeah.

Q. -- Page 2.

A. Yeah.

Q. The history that is given there is significant I think for some of the physical appearance of the patient. For instance, on the first line of the mental status examination there are some references to his physical appearance.

A. Right. Short statured, markedly obese, mustached.

Q. All right. And I think that plays into -- to some physical examination observation.

A. That was mentioned later in the physical exam where it's more descriptive --

Q. Okay, sir.

A. -- of it at that time, yeah.

Q. And reading over the mental status examination paragraph on to Page 3 which is pretty long, I want you to take a minute and -- and see if

you find anything in there that you want -- you think is remarkable at this time for purposes of this deposition.

A. Pretty self-explanatory in terms of the behavior he exhibited in front of me and the behavior for which he was referred in the past and at the present admission when I saw him in terms of -- I -- I mention that cognitively intelligencewise he appeared to be in the normal range but on the other hand he did -- he was cooperative most of the interview but he became irritable and labile during the interview as well, labile meaning very changeable, that he could be calm one moment and then excitable the next. Labile simply means changeable within a period of -- a short period of time.

Q. Okay. Embedded within that paragraph of psychiatric observations and exam about two-thirds of the way down on Page 3 is an observation, his appearance is somewhat striking, if you see that, based upon his obesity.

A. Oh, his appearance is somewhat striking based on the obesity. He is short statured, mustached, large breasts and a kind of infantile -- that should be hair. The word hair is missing

there.

Q. Okay.

A. But that's what probably would have been the word. Hair distribution. Insight is fair to poor. Yeah. He just looked different than your average kid within normal parameters and obviously I commented on those things such as his physiognomy.

Q. Okay. And -- and so within this paragraph itself, which is labeled mental status exam, you were making observations that pertained really to his physical stature?

A. Absolutely. Any good mental status exam should say something. Normally I would put in something about the person's appearance, their clothing or stuff like that even as -- as part of the mental status.

Q. Okay. Okay.

A. Hygiene, et cetera.

Q. Okay. The -- close to the last sentence, probably the third from the last in that paragraph there's a statement that there's no evidence of psychosis in terms of thought, form, content or streams. Is that --

A. Yes. That should be -- that should be

stream. No S. There's no S on streams.

Q. Okay. I was thinking streams of thought.

A. That's what I was referring to, the stream of thought, the content of thought and the form of thought.

Q. Okay. Now in that regard, were you -- was -- is that a present sense assessment of no psychosis or is that by history?

A. No evidence of psychosis in terms of thought, form, content or stream. That's at the time I see him.

Q. Present sense?

A. Those are observations I make of his verbal behaviors or -- verbal is a behavior too --

Q. Okay.

A. -- and that's -- his behavior showed no evidence of a disorder of thought, form, content or stream, no -- no flight of ideas or looseness of associations or delusions or hallucinations, nothing like that.

Q. And I believe that his date of birth is [redacted] so you would have been seeing him at 14 years of age at this point when you made the observations about his genitalia and his remarkable

stature. Do -- were you making those ob -- observations then comparing him to what you considered to be within the range of normal for age 14?

A. Consider -- what I would consider normal body habitus.

Q. Correct.

A. He had a body habitus that did not appear normal to me based on those peculiarities --

Q. Okay.

A. -- that made it stand out.

Q. All right. Let's go then to the physical examination paragraph which is the last part of Page 3. And I'm asking -- I'm sorry. That wasn't a question, was it? Going to that --

A. Oh, yeah. Yeah.

Q. -- I'm asking to take you a look at that and see if you -- in the context --

A. Oh, I'm sorry.

Q. -- of our deposition --

A. There was no question. What was it?

Q. In the context of this deposition having reviewed the physical examination portions --

A. Yeah.

Q. -- do you find anything particularly outstanding now as you look back on the case?

A. Well, just -- I just more amp -- some -- more amplified on the things that I noted earlier, protuberant with heavy adipose layering, you know, again, referring to his being overweight, prominent breasts, fatty tissue. You know, that's all -- symmetrical breasts, that kind of thing, as well as the normal parts --

Q. Right.

A. -- that -- that I commented on as well and also he had some kind of a injury which was healing from an iron apparently and about his pubic hair, small scrotal sac, small testicle in there. So these are abnormalities that I remark on. Scrotal sac was normal but, no, in his case it was remarkable rather than unremarkable.

Q. And was it singular testicle?

A. That's what it says, yeah.

Q. Okay.

A. One small testicle in there.

Q. Okay. Let's take a look at Page 4 and the neurological examination.

MR. EHLIES: And I'll note for the record we have an excellent court reporter who

stopped me from interrupting you.
BY MR. EHLIES:
Q. Seeing that paragraph is there anything that currently gives rise to a -- a particular significance for you when we get down to Axis III in particular?
A. Only -- no. The reflexes, his muscle strength, he had fair -- mild clumsiness. He wasn't well coordinated in an athletic sense and -- but his gait and most of the other stuff was pretty much within normal limits except he was mildly hyporeflexic in his upper extremities, which that doesn't mean much, but it's notable just because it was there. But coordination was fair with mild clumsiness so he was -- he was not a particularly lithe individual in terms of his movements.
Q. Coordinated -- he wasn't a basketball player?
A. No.
Q. Okay. And li -- labilities -- is that liabilities or lability?
A. Liabilities.
Q. All right, sir. And what -- what is the significance of that paragraph?
A. You try -- in assessing a person you

assess their assets or strengths. Here I use the word strengths. That could have been assets. What are some of the positive things about him in terms of prognosis for him and what are the liabilities. What are the things working against his having a good course of treatment --

Q. I see.

A. -- and recovery.

Q. Okay, sir. Now I want to take a minute and ask you -- I see on my right is the DSM-5 and at this time in 1994 it would have been the DSM-IV --

A. I don't know.

Q. -- maybe not revised?

A. I guess. I can't -- you know, probably 4, but I can't say for sure.

Q. Okay. And the --

A. It wasn't 5. It was either 3 -- late 3 or early 4.

Q. Okay. And 4 went through a revision, did it not?

A. Yes, DSM-IV-R.

Q. R. And then to T -- T?

A. That one's 5. And then became 5 --

Q. Okay.

A. -- which just came out in May.

Q. Okay. The provisional diagnosis references Axis I, II and III and I'd ask you to walk us through that if you would.

A. Well, my Axis I was -- the primary suspicion was explosive conduct disorder and that's based upon several things, his past history for a significant degree. That's how you make a diagnosis of a conduct disorder, a behavioral disorder and explosiveness based upon the history -- long history of chronic and recurrent severe violent behaviors so that's where explosive conduct disorder comes out. Axis II is confined to none which means he was neither mentally retarded or had a personality -- he's too young actually to have a personality disorder diagnosis. And Axis 3 was Klinefelters -- rule out Klinefelter syndrome and rule out chromosomal abnormalities. That should be hypogonadism, by the way. It says hyper.

Q. Yes.

A. That should be an O.

Q. Okay. Now as regards the rule out explosive conduct disorder, is it possible that the records that you might have had in front of you were speaking in terms of explosive conduct

disorder?

A. Likely.

Q. Okay, sir. Likely suggests to me more than 50 percent. Would that be consistent?

A. Yes.

Q. Okay. So by -- and it would have been by history in some of the records that you had?

A. Yes.

Q. Okay. You say rule out. What -- what does that mean when you say I want to rule out explosive conduct disorder?

A. Rule out probably shouldn't exist there.

Q. Okay.

A. Normally it would be -- a primary diagnosis would be like explosive conduct disorder, rule out something else. So I sort of chiseled --

Q. Okay.

A. -- on that to some degree because I had some real questions I think. I couldn't make a definitive diagnosis of explosive conduct disorder because of some of these other things that made me concerned as to whether we're dealing with purely a behavioral disorder or something with an organic basis to it --

Q. Okay.
A. -- so I fudged.
Q. All right. And so Axis I deals with more of the behavioral disorders that we would --
A. Yes.
Q. -- see in a person's be -- constitution?
A. Yes.
Q. Okay. And Axis III, would I be correct in saying that that's more medical?
A. Entirely. Medical -- only a medical diagnosis goes on Axis III, diabetes, cancer, arthritis, Klinefelter syndrome. Those are the kind of things that would -- would occur.
Q. Okay. So would I be safe and correct basically in also saying it would be medical in the sense of physiology and genetics and chromosomal disorders, those sorts of things?
A. It could be infectious, neoplastic, genetic, any number of things which would come under a normal, quote, medical diagnosis.
Q. And what is Klinefelters?
A. That's a genetic disorder which is characterized by males having an extra X of the female chromosome so it's an XXY and they have 47

instead of 46. And it was basically his body habitus that made me think seriously about him because of the things that I described in -- in examining him which I described earlier which was his obesity, his small gonads, whole just abnormality of his hair distribution, just that kind of adiposity and the peculiarity of his appearance lean -- leaned me towards what I -- if I'd ever seen probably Klinefelters or seen pictures of it, he fit the picture --

Q. Okay.

A. -- of a Klinefelter from my initial interview with him and that's why I thought it needed to be looked after.

Q. Okay. And did you mention Klinefelter in the sense that you thought specifically Klinefelter or were you just using that as a global reference to those types of disorders?

A. I can't remember back then. I obviously was thinking specifically about it, but I said chromosomal studies. I didn't limit it to just chromosomal studies for Klinefelters. I meant if you're -- this guy needs his chromosomes looked at as well as hormonal balance and -- and a bunch of other things which could account for it.

Q. And would -- if that study had been done and reported back positive, would that aid in understanding his medical condition?

A. In understanding his psychiatric you mean?

Q. Yeah, his -- well, it would aid in understanding his medical condition?

A. Well, that would be the -- yes. Yes, if he came back with that chromosomal abnormality, that would tell me, yeah, this guy does have Klinefelters.

Q. And that would bolster your Axis III assessment?

A. That would be the -- that's -- absolutely. That would confirmatory -- that would be confirmatory of an Axis III diagnosis of Klinefelter.

Q. And would that confirmation of Axis III genetic abnormality play into an assessment of Axis I in his abilities to control thought patterns and behavior patterns and that sort of thing?

A. Yes. Certainly if you turned up an abnormality in a physical sense, you also have to look at the possible complications, quotes, or extensions of the physical to the person's mental

functioning and physio -- phys -- and psychological functioning.

Q. So it would -- it's very -- it's possible then that an Axis III -- a firm Axis III diagnosis can, in fact, cause an Axis I event?

A. Absolutely.

Q. Okay. Now you have a tentative discharge plan and then an initial treatment plan. Can you take a look at that?

A. I have a what?

Q. On the last part of Page 4.

A. Initial treatment plan.

Q. Yes.

A. Would be to assess his behavioral controls, frustration, tolerance, the kind of stuff that got him sent in in terms of symptoms. Also consider the medications that have been used in the past with him with the recommendation to continue with at least the Depakote for now because of mood instability and consider again -- again, a differential diagnosis is -- would be the next sentence as hormonal/chromosomal studies.

Q. All right, sir.

A. And then dynamic issues like relationship with his mother because there was

something earlier about him having a lot of conflictual feelings or something there that he brought up as well as thyroid disorder.

Q. Do you know whether the recommendation -- treat -- initial treatment plan to consider hormonal/chromosomal studies was ever done?

A. Don't know.

Q. And I think there's another page on Oct -- on November the 2nd --

A. Where?

Q. -- of 1994. And it is on -- looking at the page following which is signed actually by Steven Croley, again, C-r-o-l-e-y.

A. That was, when, on discharge?

Q. On discharge from the admission that you --

A. Oh, yeah. Okay. Well, that's different. That's somebody's else's stuff.

Q. Correct.

A. All right.

Q. I'm asking you to look at that --

A. Oh, okay.

Q. -- and determine whether or not your treatment plan was followed to the extent you

requested chromosomal studies -- hormonal/chromosomal studies.

A. The only reference there is there was a question of Klinefelters syndrome that was mentioned by the admitting physician, me, but evaluation by the treating pediatrician felt that he did not have Klinefelters syndrome. However, if there's any further questions, this can be evaluated as an outpatient. Did not require the patient to remain in the hospital any longer. And lab studies do not include anything having to do with genetic or hormonal studies and that's about it. Now I don't know what that pediatrician based his disagreement -- or his rule-out. He essentially did a rule-out of it --

Q. Okay, sir.

A. -- whoever that was.

MR. EHLIES: And, Dr. Tobin, I want to thank you for your patience and cooperation with us, and I believe that the State through their lawyers, Mr. McDonald, will have some questions for you.

THE WITNESS: Okay.

MR. EHLIES: Thank you, Mr. McDonald.

EXAMINATION

BY MR. McDONALD:

Q. Dr. Tobin, I wanted to start -- throughout the report you mention Depakote. And why was Mr. Torres on Depakote?

A. I didn't put him on Depakote. In other words, he was put on Depakote from Marshall Pickens hospital, and I don't have any of the records from Marshall Pickens. Why would someone put him on Depakote at that age would probably have to do with what they would regard as mood instability, possible bipolar disorder as a mood stabilizer. That would be the only reason that he would be on it. It was mentioned for depression and it can be used -- it's not specifically an antidepressant.

Q. So one of Depakote's --

A. I didn't put him on it. He came on it.

THE REPORTER: I didn't hear your question.

BY MR. McDONALD:

Q. So one of Depakote's therapeutic purposes would be to treat mania perhaps?

A. Yes, it is used to treat mania.

Q. Are you familiar with some of Depakote's side effects?

A. Yes.

Q. Is weight gain one of them?
A. Yes.
Q. What about swelling of the breasts?
A. I've never seen that but it could happen.
Q. Okay. Suicidal ideation?
A. On Depakote? I mean, I suppose --
Q. Yes.
A. -- it can occur, but I -- again, that's -- you normally would use Depakote to avoid someone developing -- for the prophylaxis of suicidal ideation in terms of stabilizing a mood.
Q. But it could be a potential side effect if --
A. You may be right. I don't have a --
THE REPORTER: I'm sorry.
THE WITNESS: My -- I'm sorry.
THE REPORTER: I didn't hear the end of your question.
MR. McDONALD: Don't -- don't worry about it. We -- we can move on.
BY MR. McDONALD:
Q. Are there any aspects of Klinefelters that could be consistent with weight gain --
A. Yes.

Q. -- in someone Mr. Torres's age at that time?

A. Well, that was part of it was that obesity and the distribution -- the distribution of his adipose tissue may be suspicious of Klinefelter.

Q. Okay. And going forward, the treatment plan regarding lithium and Mellaril, what would those be used to treat?

A. I'm sorry. What was the last part of that? What --

Q. In the initial treatment plan on Page 4 of your -- your report --

A. Yeah.

Q. -- I see lithium and Mellaril. What therapeutic purposes do those two drugs serve?

A. Lithium is used primarily in bipolar disorder and Mellaril actually is an antipsychotic and was one of the drugs frequently used then in psychosis of many causes, could be schizophrenia. Anything with a -- with a psychotic diagnosis, Mellaril was to be part of consideration along with Thorazine and drugs of similar ilk. It's an antipsychotic. It's neither a mood stabilizer --

Q. Okay.

A. -- nor an antidepressant.
Q. And so it would work in -- let me put this a different way.
It would be used to treat some of the same things that something like a mood stabilizer such as Depakote would be used, is that right?
A. One -- actually, no. They're -- they're two different ballparks. You wouldn't use Depakote for psychosis primarily as an anti -- somebody that has hallucinations or delusions, misinterpretations of reality. That you would -- you would not use Depakote as a primary treatment. Whereas, if -- if they had that, Mellaril would be a primary use.
Q. So, in other words, the basis for treating someone with Mellaril would be different than treating someone with just a mood stabilizer such as Depakote --
A. Yes.
Q. -- is that right?
A. That's correct.
Q. Just a moment.
MR. McDONALD: No further questions.
MR. EHLIES: Thank you very much, Mr. McDonald, and I'll do the four-and-a-half hour

ride back at this point. We'll close the deposition.

(WHEREUPON, the deposition was concluded at 3:34 p.m.)

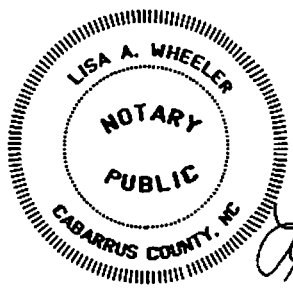
(The witness, after having been advised of his right to read and sign this transcript, waives that right.)

CERTIFICATE OF REPORTER

I, Lisa A. Wheeler, Registered Professional Reporter and Notary Public for the State of North Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 9th day of April, 2014 at Wake County, North Carolina.



Lisa A. Wheeler, RPR, CRR
My Commission expires
June 7, 2018

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

ANDRES ANTONIO TORRES,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

C.A. NO.: 2011-CP-42-1851

APPLICANT'S MEMORANDUM IN SUPPORT OF HIS APPLICATION FOR POST-CONVICTION RELIEF

The applicant submits this memorandum as a merits hearing brief. Although the Final Amended Application designates multiple trial counsel errors -- none of which are abandoned -- to simplify analysis, the applicant groups those errors into three major categories for review.

This case derives from the applicant having been convicted of the murders of Ray and Ann Emery and his subsequent sentences of death for each of the two murders. Although there were numerous evidentiary events that were improper and went unchallenged, and many forensic issues that were not investigated or questioned by defense counsel, the thrust and core cause of prejudice[1] results from the deficient performance of trial counsel in three succinct and discrete areas.

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The first area of deficient performance was in counsels' failure to object to a clearly erroneous jury charge given by the judge at the opening of the sentencing phase of the case. The charge has been declared improper and reversible in and of itself in *State v Davis*, 306 SC 246

[1] The applicant believes each issue meets the *Strickland* standard for prejudice independent of the others. However, he also relies upon "cumulative prejudice" which, in South Carolina jurisprudence, is sometimes referred to as "combined" or "collective" prejudice. See *State v Joseph Freeman*, 319 SC 110, 459 SE2d 867 (1995) and *State v Mose Peterman*, 287 SC 244, 335 SE2d 800 (1985), *State v Iver Norman Johnson*, 334 SC 78, 512 SE2d 795 (1999).

(1991) and *State v. Plemmons*, 296 SC 76 (1988) and violates the specific mandate announced in *Caldwell v Mississippi*, 427 US 320 (1985): Namely, that nothing be done to suggest to a sentencing jury that the ultimate authority for determining the sentence rests elsewhere. At the beginning of the sentencing phase of the trial, the judge undertook to define the jurors' role as simply to make a "recommendation" to the court. While doing so, he never informed the jurors that the sentence they returned would be the sentence the court was required to impose.

The second area of deficient performance was counsels' failure to investigate, develop and present mitigation evidence concerning the applicant's genetic and chromosomal abnormalities. Had that been done, counsel would not have presented a mitigation case featuring "behavioral" episodes and "voluntary" drug intoxication as "choices," but would instead have accurately portrayed these episodes as the logical consequence of genetic abnormalities, entirely separate and apart from the volitional choices of the applicant. The abnormalities include Prader-Willi Syndrome as well as a 22q11 Deletion Syndrome (caused by a significant deletion on chromosome 22, overlapping portions of two genes), all resulting in specific consequential cognitive limitations upon impulse control, executive function and behavior management. Applicant also suffers from deficient activity within his CYP2C19 drug metabolizing system, resulting in his inability to effectively metabolize certain drugs which were administered to him as a child for their therapeutic benefits but, because of his genetic condition, could not be metabolized to the applicant's expected advantage but instead resulted in hypertoxicity to the applicant.[2]

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[2] Defense expert Marti Loring best stated trial counsel's failure to pick up on her lead when she testified in response to questions presented by the State on cross-examination: "My opinion is that having done a family history on Mr. Torres, that I think that he was not properly and consistently diagnosed with the proper diagnosis thereby leading to his not being medicated

The third area of deficient performance was trial counsels' failure to investigate, develop and present evidence that the applicant's role in the offense was not as presented by the State in its case and that indeed, there was evidence that the applicant probably did not act alone in committing the offense, probably was not the actual murderer,[3] and that he had no material motive for the killings. Had trial counsel pursued the evidence, which more accurately defined the applicant's role in the offense, they would have had both reason and a factual basis to request the statutory mitigator designated as *SC Code Ann.*, § 16-3-20(C)(b)(4).[4]

STANDARD OF REVIEW

An applicant for post-conviction relief must first meet defined criteria. Those criteria are set forth in the case of *Strickland v Washington*, 466 US 668 (1984). The *Strickland* standard requires that the applicant prove that trial counsel's performance was deficient as measured against an objective standard of reasonableness under prevailing professional norms. Second, that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668 at 688. The touchstone for

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properly nor getting the proper kind of therapy and treatment making even worse an already difficult situation." Trial Trans. P. 2693.

[3] "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not." *Earl Enmund v Florida*, 458 US 782 at 797 (1982).

[4] Since the only evidence that the applicant was the actual murderer was that he was "alone" in the house, had the jury been informed that there was evidence to the contrary, then: "…there is a reasonable probability that at least one juror would have struck a different balance." *Kevin Wiggins v Sewall Smith*, 539 US 510 at 537 (2003).

determining prejudice is whether the errors undermine confidence in the outcome. *Herman Henry "Bud" Von Dohlen v South Carolina*, 360 SC 598 at 603; 602 SE2d 738 (2004).[5]

THE TRIAL JUDGE'S INITIAL JURY CHARGE, GIVEN AT THE BEGINNING OF THE SENTENCING PHASE, THAT THE JURY'S ROLE WAS TO "RECOMMEND" TO THE COURT A SENTENCE OF DEATH OR LIFE WAS CLEARLY ERRONEOUS. THAT ERROR WAS NOT CURED WHEN, DAYS LATER, THE COURT TWICE MENTIONED, TOWARD THE END OF ITS TWENTY TWO PAGE ORAL CHARGE, THAT IT WOULD FOLLOW THE JURY'S "RECOMMENDATION."

The first specification of error relates to the trial judge's jury charge, **given at the beginning of the sentencing phase** of the trial, wherein he instructs that the jurors' role in sentencing is limited to making a "recommendation" to "the court" concerning whether the applicant should be sentenced to death or whether he should be sentenced to life. This ground for relief is abbreviated here because it has already been thoroughly briefed with the applicant's pending Motion for Summary Judgment. The initial jury charge, which provided the framework within which the jurors received and processed all of the sentencing evidence, violated both State and Federal law as announced in the following cases: *State v Lee Bellamy*, 293 SC 103, 359 SE2d 63 (1987); *State v Frank Middleton*, 295 SC 318, 368 SE2d 457 (1988); *State v Jerry Plemmons*, 296 SC 76, 370 SE2d 871 (1988); *State v Richard Johnson*, 306 SC 119, 410 SE2d 547 (1991); *State v Wilbert Davis*, 306 SC 246, 411 SE2d 220 (1991); and *Caldwell v*

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[5] "In order to prove counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Von Dohlen* 360 SC at 603. Commenting further, the *Von Dohlen* Court quoted: "The Supreme Court held the defendant had proven prejudice because there is a reasonable probability at least one juror would have struck a different balance and returned with a different sentence had the jury been confronted with the considerable mitigating evidence. *Wiggins*, 539 US at 536, 123 S. Ct. at 2543, 156 L. Ed. 2d at 495; see also *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)." *Von Dohlen v South Carolina*, 360 SC at 607.

Mississippi, 472 US 320 (1985). The law requires that, contemporaneous with the court charging the jury concerning the jurors' role in the capital sentencing process, the judge must "clearly convey" that sentencing is in the jurors' hands, and that the sentence they return will be the sentence the court is required to impose. This mandate must be sufficiently clear throughout the charge to insure that the jury is not at any time "led to believe that the responsibility for the sentence rests elsewhere." *Caldwell v Mississippi*, 472 US 320 at 328-29. After all sentencing evidence was received, the trial judge continued to convey to the jury that it was simply making a "recommendation" to the court, using that word or a derivative thereof some 61 times; he gave them a written charge to use in their deliberations which perpetuated the error multiple more times; and he gave them verdict forms that also perpetuated the error, referring only to sentence "recommendations." The only question presented is whether, late in the oral charge **given days after the original charge**, and after the receipt of all sentencing evidence, the court's two isolated and off-hand remarks that the jurors' recommendation would be followed, operated to cure the overwhelming and pernicious error imbedded within the charge as a whole. The Supreme Court of South Carolina clearly stated in *State v Sims*, 304 SC 246, 411 SE2d 220 (1991) that a jury charge must be considered as a whole; and the whole will not be condemned by an isolated error. Likewise, an erroneous charge as a whole is not cured by an isolated gratuitous remark.

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Trial counsel was Constitutionally ineffective on this issue when they 1) failed to request a copy of the court's jury charges prior to jury selection; 2) failed to prevent the error from occurring by raising a challenge to the use of the word "recommendation" before the court announced the charge; 3) failed to object to the omission of a contemporaneous charge that the court was required to follow the recommendation of the jury and impose the sentence the jury

returned; and 4) failed to offer an objection to either the written charge provided to the jury for its use during deliberations or to the written verdict forms provided to the jury -- both of which specified the jury was providing a "recommendation" as to sentence, and neither of which made any clarification that the "recommendation" was instead the actual sentence that the court was required to impose. Trial counsel's performance in these particulars was deficient as measured against an objective standard of reasonableness under prevailing professional norms.

TRIAL COUNSELS' PERFORMANCE WAS DEFICIENT TO THE PREJUDICE OF THE APPLICANT WHEN THEY FAILED TO INVESTIGATE, DEVELOP, AND PRESENT EVIDENCE THAT THE APPLICANT DID NOT COMMIT THE CRIME WITHOUT AN ACCOMPLICE. PRESENTING EXISTING EVIDENCE THAT AN ACCOMPLICE WAS INVOLVED WOULD HAVE BETTER DEFINED THE APPLICANT'S ROLE IN THE OFFENSE AND WOULD HAVE SUPPORTED THE ADDITIONAL STATUTORY MITIGATING CIRCUMSTANCE CONTAINED IN SC CODE ANN., 16-3-20(C)(b)(4).

During a pre-trial hearing on the State's motion to exclude "evidence of third party guilt," trial counsel for the applicant offered proof that the victim's son, Chuck Emery, had the motive, means and opportunity to commit the murders of both his father Ray Emery and his step-mother Ann Emery. In addition, the evidence offered by the applicant's trial counsel established:

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1. That Chuck Emery was in the Emery's home at or about the time of death as represented to the jury by the medical examiner;
2. That Chuck Emery was seen exiting the victims' home when the bodies of Ray and Ann Emery were still in the bedroom;
3. That, when Chuck Emery and a companion were seen exiting the victims' home while the bodies of Ray and Ann Emery were still inside, they appeared to be wet as though recently showered;
4. That Chuck Emery was the sole heir to his father's estate as his sister had renounced her inheritance;
5. That Chuck Emery had remarked before the murders that if Ray Emery died before Ann Emery that Chuck Emery would not get what was coming to him;
6. That Chuck Emery did not care for and was openly hostile to and about his stepmother Ann Emery;

7. That, had the crime been committed as the State proposed in its theory to the jury, there was no way Chuck Emery could have been at and exiting the house when seen and not have noticed;
    a. The intense smell of accelerants poured over the entire house;
    b. That the house had been "ransacked," including a chair overturned in the living room area (Trial Trans. P. 1601);
    c. That the kitchen stove and oven were on and set to maximum heat;
    d. That the house was in complete disarray and shambles throughout;
8. That Chuck Emery left the scene without calling the police to report what he must have seen;
9. That Chuck Emery was called by a neighbor, Tammy Hughey, approximately two hours after Chuck Emery left the murder scene without calling the police, and that Ms. Hughey informed Chuck Emery that the police were at the Emery residence and he should return;
10. That Chuck Emery did return to the murder scene within a matter of five to ten minutes, jumped from the car and, before he ever entered the house to see what was going on inside, announced he knew who had committed the murders; that it was the applicant;
11. That Chuck Emery was not informed by any law enforcement or other official personnel on the scene that a murder had been committed before he announced that fact himself.[6]
12. That Chuck Emery was not subjected to a *Schmerber v California,* 384 US 757 (1966) search to compare his DNA to known evidence samples on the alleged murder weapon, a hammer, and;
13. That the DNA retrieved from the alleged murder weapon did not "match" that of the applicant's known DNA.[7]

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[6] It is well settled in South Carolina that circumstantial evidence alone can serve as the sole evidentiary basis for a capital murder conviction. "As previously addressed, the following circumstantial evidence existed from which the jury could conclude that Williams had the motive, means, and opportunity to perform the homicides..." *State of South Carolina v Luke Williams*, 321 SC 327 at 337, 468 SE2d 626 (1991) (emphasis added). In the Luke Williams capital case, the defendant was convicted of murdering his wife and stepson based entirely upon circumstantial evidence. The defendant offered evidence that others had motive and opportunity to commit the murders. The Court affirmed the exclusion of the evidence on the basis that the defendant failed to offer any evidence that the motive and opportunity of others had any connection to the homicides that were the subject of the trial. In the Torres case, however, Chuck Emery's motive, means and opportunity connect directly to the crime itself and he is squarely placed in the home while the bodies of Ray and Ann Emery were still there and while the house reeked of "gasoline" so much so that the first officers on the scene later that morning were afraid to enter the premises without calling for an arson team, the kitchen stove was on at high heat, and the house was "ransacked." Despite all this, Chuck Emery never called the police.

After the trial court ruled that the proffered testimony was not admissible in the guilt phase of trial (Trial Trans p. 1579), the record does not indicate that the applicant's trial counsel ever attempted to raise the third party guilt issue at any other time. At no time during the proffer did trial counsel attempt to argue that the evidence was offered to establish the applicant's role in the offense. If the evidence had been viewed in that light, then an *Ellis Franklin v Gary Maynard, Director SCDC,* 356 SC 276, 588 SE2d 604 (2003) type hearing could have resulted in an *Earl Enmund v Florida, infra.,* categorical defense that the applicant was ineligible for a sentence of death.

In addition, had trial counsel investigated, developed and presented evidence concerning "third party guilt" that existed at the time of trial they would have discovered the following additional points:

1. Chuck Emery, a female and possibly three other individuals were seen at 6:45 AM on the morning of the crimes standing around a small fire in the Emery yard by the neighbor who lives directly across the street from the Emery residence.
2. Before the police arrived at the scene Chuck Emery removed Ray Emery's safe/lockbox for underneath his bed.
3. Within several days of the crimes Chuck Emery as Kevin Biggerstaff for a ride to Wal-Mart so that Chuck Emery could purchase a cutting torch.
4. Chuck Emery purchased the torch with a credit card.
5. Chuck Emery and Roger Kirby used the torch to open the safe/lockbox Chuck Emery removed from under Ray Kirby's bed and then disposed of the safe in a nearby creek.
6. Kevin Biggerstaff called Detective Lindsey to report that Biggerstaff was with Chuck Emery when Emery used victim Ray Emery's credit card to pay for the torch.
7. Victim Ann Emery's daughter Crystal Harling, now Crystal Williamson, expressed her concerns to Trey Gowdy that Chuck Emery was involved in the murders and that her mother was known to be afraid that Chuck Emery would hurt Ann Emery.
8. In the days prior to her death Ann Emery told Crystal Williamson and Phyllis White that she feared violence from Chuck Emery directed against Ann Emery.

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[7] These representations are taken from the proffer hearing which appear in the trial transcript from pages 1444 through 1487; evidence that formed the basis of the State's opening statement to the jury pages 1569-1575; 1598-1605.

Having received information that the applicant's trial counsel intended to show that Chuck Emery was the individual who had the motive, means and opportunity to murder his stepmother and father, the State filed a motion to exclude this "third party guilt" evidence on the grounds that it did not conform to case authorities. The State's motion was heard (Trial Trans. pps. 1444-1447) and was ruled upon by the trial judge who announced that the proffer "does not rise to the level provided for by our Courts for introduction, and, therefore, I'll be excluding that evidence." (Trial transcript p. 1579). The judge offered no case authority for his ruling. Thereafter the matter is not heard from again.

Although the law regarding third party guilt in South Carolina was significantly altered with the decision of *Bobby Lee Holmes v South Carolina*, 547 US 319 (2006), where the Court ruled that a defendant was entitled to present a complete defense without regard to the strength of the state's case, the fundamental principle of third party guilt remained unchanged in South Carolina; essentially, acknowledging the Supreme Court's ruling in *Holmes*, the Supreme Court of South Carolina announced a post-*Holmes* rule that evidence of third party guilt would be "limited to such facts as are inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence." *Bruce Randall Miller v South Carolina*, 379 SC 108; 665 SE2d 596 (2008) at 379 SC 114. In *Miller*, the Court went on to grant relief and a new trial on the ground that the trial court impermissibly limited the introduction of evidence regarding third party guilt.

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Trial counsel were ineffective in failing to articulate and to perceive that the value of the evidence proffered, which would have included the facts as later developed by collateral investigation, was not that the applicant was innocent, but rather that his role in the offense was

to aid and abet Chuck Emery in the commission of the crime.[8] Those facts would have assisted the sentencer in understanding the defendant's role in the offense and those facts were clearly admissible under *SC Code Ann.*, § 16-3-20(C)(b)(4) which is a statutory mitigator entitling the applicant to a specific jury charge by the court. The Supreme Court of South Carolina has stated that: "States cannot limit the sentencer's consideration of any relevant circumstance which could cause the jury to decline to impose the death penalty" *South Carolina v Luke A. Williams,* 321 SC 327 at 337; 468 SE2d 626 (1996). A co-defendant's conduct in the crime, whether that individual is or is not indicted, is relevant to a sentencer to determine the applicant's role in the offense. See *South Carolina v James Charping,* 333 SC 124; 508 SE2d 851 (1998) which holds that "In a capital sentencing trial, the jury's function is to determine the appropriate punishment based upon the circumstances of the crime and the characteristics of the defendant" *South Carolina v Joseph Ernest Atkins*, 303 SC 214 at 220; 399 SE2d 760 (1990).

The facts as related to the jury by the State were that the applicant was seen in Union at approximately 7:00 AM, a few minutes after the time Chuck Emery himself was seen at the victims' house in Spartanburg. It is less than 26 miles from the scene of the murders to the point where the applicant crashed in the Emery's van. The timing suggests that Chuck Emery and the applicant were or certainly could have been at the scene of the murders at the same time. The Union police called the Spartanburg City Police to ask for a "welfare" check on the Emerys'

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[8] It is important to note here that had the jury heard the evidence of Chuck Emery's motive, means, and opportunity to commit the crimes they may have concluded that the applicant was an accomplice and not the sole moving force. In that event, the applicant would have been ineligible for a death sentence as *Earl Enmund v Florida,* 458 US 782 (1982) clearly established that one who aids and abets a crime but does not specifically kill or intend to kill is not subject to the death penalty. In addition, the Court should have conducted a *Franklin v Maynard* type hearing prior to jury qualification to determine whether the applicant could demonstrate by a preponderance of the evidence that he was an accomplice and did not kill or intend the deaths of the victims bringing him within the holding in the *Earl Enmund* case.

residence based upon the fact that the van was registered to them. The following statement is from the trial transcript and describes the circumstances and conditions of the van and the crime scene:

1. The van was loaded with all kinds of the Emerys' personal belongings including purses, wallets, other people's driver's licenses, computers, stacks of clothes, food and Ann Emery's daughter testified that her mother would not have left the van in the state it was found in by the Union police (1599);
2. The Emerys' entire house was ransacked;
3. Two people had been bludgeoned while together in the same room;
4. The house had gasoline poured throughout as an accelerant;
5. Ann Emery was thought to have been sexually assaulted; and
6. There was no forced entry into the residence (Trial Trans pps. 1601; 2125-2136; 2799-2820).

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In its opening statement to the jury in the guilt phase of trial, the State disclosed the theory of its case: "all the forensic evidence points to only one person" committing this crime; the applicant. This opening statement should have prompted the applicant's trial counsel to move to admit the third party guilty as evidence now relevant to disprove the State's theory of the case after it opened the door by making the suggestion that the entire crime was the work of the applicant. It is inconceivable that one person in a short period of time could have accomplished all that was done at this crime scene – killing two people with a hammer; ransacking the home; pouring accelerants throughout the house and turning the kitchen stove on all burners; and loading a van full of household items from the home, all during the very early morning hours, and all without detection by any neighbors or passers-by. The evidence suggests multiple persons

as perpetrators; the State never called Chuck Emery as the heir and son of the victim. Chuck Emery was the logical choice for the State to present victim impact testimony as he was the son of the victim Ray Emery. Had it done so, however, Chuck Emery would have been open to cross-examination. As a result, the jury probably would have compromised its sentence based upon the *Enmund* charge that was never requested: namely that, should the jury believe the applicant was not alone and perhaps not the immediate killer, then he would be ineligible for a sentence of death.

Trial counsel's error was that they failed to understand that the value of the readily available evidence concerning Chuck Emery and associates was not as "third party guilt" but rather as evidence of the applicant's role in aiding and abetting the crimes to be offered as mitigation during the sentencing phase of the trial.

TRIAL COUNSELS' PERFORMANCE WAS DEFICIENT TO THE PREJUDICE OF THE APPLICANT WHEN THEY FAILED TO INVESTIGATE, DEVELOP, AND PRESENT EVIDENCE THAT THE APPLICANT SUFFERS FROM GENETIC DELETIONS WHICH ARE KNOWN TO COMPROMISE A PERSON'S IMPULSE CONTROL, COGNITIVE AND EXECUTIVE FUNCTION, AND ABILITY TO METABOLIZE CERTAIN PRESCRIPTION DRUGS INTENDED FOR HIS THERAPEUTIC BENEFIT BUT WHICH ACTUALLY COMPLICATE HIS DEVELOPMENT.

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As the United States Supreme Court explained in *Kevin Wiggins v Sewall Smith*, "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." 539 U.S. 510. 532, 123 S. Ct. 2527, 2541, 156 L. Ed. 2d 471, 492 (quoting *Strickland, supra*) (citations omitted). In *Wiggins*, as here, trial counsel limited their investigation of the petitioner's history and background to that information that was readily available, without digging deeper

into the petitioner's background to uncover factors that likely contributed to his conduct and without presenting those facts to the jury that sentenced him to death. "With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' 'personal history noting his 'misery as a youth,' quoting his description of his own background as 'disgusting,' and observing that he spent most of his life in foster care. Counsel also 'tracked down' records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. In describing the scope of counsel's investigation into petitioner's life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information. *Wiggins,* 539 U.S. at 523 (2003). Petitioner's PCR counsel uncovered the facts that contributed to the 'misery of his youth,' including the "severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents," facts that were never discovered by trial counsel or presented to the jury. *Id.* at 516. Given the evidence that trial counsel did have, the Supreme Court found that their failure to uncover and present these facts in mitigation was unreasonable and constituted ineffective assistance of counsel. Given this applicant's history and characteristics, the failure of his counsel to thoroughly investigate his background and genetic and medical conditions was similarly unreasonable.

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The applicant's case is also analogous to *Herman Henry Von Dohlen v South Carolina*, 360 S.C. 598 (2004), in which the South Carolina Supreme Court vacated the petitioner's death sentence and remanded for resentencing because his trial counsel failed to uncover and present evidence regarding the extent of the petitioner's mental illness. The *Von Dohlen* Court found that *Kevin Wiggins v Sewall Smith, 539 U.S. 510 at 532, 123 S. Ct. at 2541, 156 L. Ed. 2d at 492* (quoting *Strickland, supra*). "While the attorneys exerted some effort, according to the

testimony of Lampkin and DeWitt at the PCR hearing, it was insufficient. The absence of crucial medical records and related information which existed at the time of Petitioner's trial prevented Lampkin from conveying an accurate diagnosis and explanation of Petitioner's mental condition to the sentencing jury." *Herman Henry Von Dohlen v South Carolina*, 360 SC 598 at 608; 602 SE2d 738 (2004).

Wiggins and *Von Dohlen* make clear that a failure to adequately investigate a defendant's medical condition and social background is unreasonable where there is glaring evidence of severe issues that should, in all fairness, be presented to a jury charged with determining whether the defendant will live or die. In this case, trial counsel failed to uncover significant mitigating evidence related to both the applicant's background and his genetic and medical issues. Counsel cannot reasonably make a "strategic decision" to cut off their investigation when the facts they had thus far discovered created more questions than answers. The investigation conducted failed to produce records and secure testimony that would have allowed the sentencer to consider the unique characteristics of the defendant. Counsels were deficient when they made strategic decisions based upon an inadequate investigation. In *Wiggins* and *Von Dohlen*, and in *Ronald Rompilla v Jeffrey Beard*, 545 US 374 (2005), the Court's admonition has consistently been that strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation (see *Strickland, 466 U.S., at 690-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052*).

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The same considerations apply to developing a theory of the mitigation case. See the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Pentlty Cases (2003) (hereafter Guidelines) 10.10.1. The purpose of the investigation is to garner facts which will then lead to answers. In the applicant's case, there existed facts in trial counsel's possession

which should have lead to an investigation designed to obtain answers necessary to developing an informed theory to present to the jury for its consider while deliberating and arriving at a reasoned moral judgment. "Moreover, the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory. This point was also plain in *Williams:* "Whether or not . . . omissions [in the investigation] were sufficiently prejudicial to have affected the outcome of sentencing," they may nevertheless demonstrate deficiency. *529 U.S., at 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389.*

Trial counsel settled on a theory of the mitigation case which provided the sentencing jury with the following information about the applicant:

1. He was severely emotionally disturbed (2381)
2. He had received treatment "over and over and over again (2381);
3. He was admitted into a program as a resident at a school for the "deaf and blind" when he was neither deaf nor blind and was 10 years old (2383);
4. He was lashing out and the program directors attempted to de-escalate his anger (2384);
5. His violence required specially trained people to forcibly restrain upon him when he was 10 years old (2385);
6. He was had multiple diagnoses (intermittent explosive disorder, depression, bipolar disorder) as well as subjected to multiple medications (2387-88);
7. He had a mother who was afraid of him and who would not "consistent[ly] participating in the sessions (2391);
8. He would have intermittent episodes of "huge rage" where he would throw desks and it would require several staff to restrain him (2394);
9. He often could not recall the incidents after they were over; in essence that the applicant was very dangerous and required several well trained staff to restrain him (2395-2396);
10. He had developed problem solving skills which enabled him, at times, to cope with situations without resorting to physical violence, had sometimes he had positive peer relations (2407-10);
11. His mother could not control him even while the two were in the doctor's office and at 14 months he tore his crib apart, (2434-42);
12. He had to be removed from the first grade because the school authorities believed the other children were at risk for injuries (2443);

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13. He was involuntarily admitted to the Medical University Psychiatric Hospital at age 7 (2445);
14. He was involuntarily admitted to the Patrick Harris Psychiatric Hospital four different times because he was violent, acting out, and cursing (2447-50);
15. He was uncontrollable and-- it was the same thing [behavior] over and over -- the verbal, the throwing things, not calming himself down (2450);
16. He lived in, and was subjected to a very unstable home environment (2453-57);
17. He was always on medications (2461);
18. He had brutalized a family pet dog (2471-72);
19. He was using three illicit drugs at the time of the crimes methamphetamine, alcohol and clonopin (2491);
20. He was nonresponsive to medications (2494);
21. He was voluntarily intoxicated and developed "the disease of addiction" (2495; 2510-11);
22. His addictions enhanced and "produced impulsivity and aggressiveness" (2496);
23. He had eight residential placements as a result of violence by age 17 (2501);
24. He had a biological illness -- manic depressive illness (2501);
25. He was being treated for tantrums, head banging, irritability, threatening behavior, crying, kicking, screaming, cursing, impulsivity, attacking relatives, caregivers, and others (2502);
26. He was prescribed Ritalin at age three, tegretol age four, lithium age eight, clonopin age eight, depicot age fourteen and these did not work (2503-04);
27. He was "not treated adequately…not given enough medicine to respond…bottom line is he's got an untreated psychiatric disorder or disorder symptoms" (2527);[9]
28. He has been non-compliant concerning medications while in custody and that limits the ability to control his behavior (2541);
29. He had abnormal EEG studies at age two (2565);
30. He had abnormal adrenal gland function as it related to a hormone (2566);[10]
31. He has a lot of different diagnosis, different medications and some doctors thought he was simply "misbehaving" (2567);
32. He has a normal IQ and has been diagnosed with intermittent explosive disorder, impulsive control disorder, attention deficit disorder (2567-68);

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[9] This is the first expert witness presented by the defense and this witness expresses his expert opinion that the applicant did not receive appropriate medical care including medications. Had trial counsel interviewed this witness prior to presenting him as a witness those remarks would have spawned the mandated mitigation investigation into why the treatment was inadequate, why the drugs were not working, what piece of the applicant's physiology was not being understood.

[10] This is the second reference by a defense expert witness to genetic/hormonal questions concerning the applicant's physiological condition. Had trial counsel interviewed this witness prior to trial they would have had reason to investigate the genetic/hormonal questions further.

33. He had a family history of mental illness and those illnesses usually have a genetic component (2571);[11]
34. He had a mental health history that distinguishes him from others and that is: "the age of onset of his mental illness was very young. I've, I've not seen anybody else with a younger age of, of onset of mental illness and being prescribed psychiatric meds. I've not seen anyone that young (2572);[12]
35. He was not compliant with team physician request to repeat EEG studies (2578-79);
36. He has bipolar and hashad anxiety and an antisocial personality according to the defense expert witness (2583);
37. He knew what he was doing at the times of the murders and he was not psychotic (2591);
38. He has always known right from wrong and can conform his conduct and appreciate the wrongfulness of his conduct, he chooses to do wrong (2598-02);
39. He belongs in a subset of patients who are acutely more dangerous than others (2605);
40. He is aggressive, sometimes by choice (2606);
41. He is deceitful, disregards feelings of others, will "con" others, is a malinger, lacks empathy and is callous, cynical and contemptuous of others (2613-14);
42. He has a family history for mental illnesses (2623-26);[13]
43. He may not be making choices and he may not be able to control his behavior (2675-80);[14]
44. He may explode in an episode of violence if touched by law enforcement personnel (2703-06).

In essence, the mitigation case was simply that the applicant was violent from birth, his mother was afraid of him, medical and residential authorities could not control him, he was nonresponsive to treatment and medications, he was in control of his behavior, appreciated the

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[11] This is the third defense expert witness who speaks about a "genetic" component to the applicant's medical history. Serious investigative consideration of the genetic/hormonal underpinning for the applicant's conditions was virtually screaming at the applicant's defense team.

[12] This is the fourth reference by an expert to an unusual circumstance in the applicant's history which indicates further investigation was necessary, specifically, whether his condition was caused by a genetic/chromosomal abnormality.

[13] This is the fifth time an expert witness for the defense speaks of what are issues concerning the applicant's genetic/chromosomal condition. Further investigation is clearly indicated as a consequence of this familial history.

[14] Here the same expert directly implicates underlying physiology as the cause of symptoms that are not subject to the patient's control and such symptoms are not "choices." Yet trial counsel do not expand the investigation to answer what is at work in this person. Even after their own witness alters them to a failed history as regards understanding the client's medical condition, the investigation does not expand to uncover the core problems.

wrongfulness of his conduct, he would choose to behave in a violent manner, he had many episodes of voluntary intoxication utilizing illicit street drugs, that he was a lying sociopath, that he would con anyone who would listen, and that he would act out violently against corrections officers in a prison setting during a pat-down (a routine and common occurrence in a prison setting).

This need not have been the mitigation case. If trial counsel had undertaken an investigation to develop and present genetic/chromosomal evidence they would have had physiological explanations for a life time of misdiagnosed and maltreated condition that actually harmed the applicant making his adjustment impossible. A thorough investigation into the applicant's physiology would have revealed genetic/chromosomal deletions and conditions which very predictably caused the patterns that makeup the applicant's global persona. His deficits are not volitional and wilful, he does not have the ability to metabolize certain medications. He has indeed received the wrong diagnosis, the wrong treatment and the wrong drugs all of which generated a person whose ability to appreciate and manage his conduct as it relates to himself, his peers, his family and others with whom he comes into contact are substantially compromised comparable to those who are intellectually disabled.

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The evidence that will be presented at the merits hearing will demonstrate that trial counsel were ineffective and deficient to the prejudice of the applicant by failing to investigate, develop and present meaningful biological information to the sentencer. The mitigation case presented at trial was of an individual who "acted out," who had repeated episodes of violent "behavior" from age 17 months, who was "voluntarily intoxicated" on a frequent basis, and who made "bad choices" even though he "knew better." Trial counsel presented one of the applicant's counselors from one of the institutions where he stayed during a three to four year period when

the applicant was around 10-13 years of age. This witness was not a licensed social worker or psychologist, and gave a small snapshot of the applicant's behavior in one of several institutional settings he was in for most of his childhood. Trial counsel also presented a psychiatrist who admitted that "most of my work is with adults," and that she had never before seen a patient diagnosed with the onset of mental illness and prescribed psychiatric medication at such a young age. The psychiatrist provided testimony concerning her diagnosis of anti-social personality disorder and about periods when the applicant "chooses not to obey the law," along with lengthy testimony about the applicant's voluntary drug abuse. However, because the psychiatrist had no information about the genetic disorders of the applicant, she could not present evidence to counter the prosecution's arguments that applicant knew the difference between right and wrong and was not acting under irresistible impulses at the time of the offenses.

In fact, had trial counsel conducted even a cursory investigation of the materials in their own file, they would have discovered the key to unlocking what had been to that point, a mystery. That the applicant, their client, was genetically impaired and suffered from both Prader-Willi Syndrome and 22q11 Deletion Syndrome, had serious physiological conditions that substantially compromised or eliminated his ability to understand and process information, to learn from experience, to engage in logical reasoning, to control impulses, and to structure responses to external stimuli which aggravated his underlying biological condition. That the applicant is, as a genetic matter, a poor metabolizer of imipramine, meaning he is incapable of metabolizing certain anti-depressant drugs which could have been used therapeutically to treat the mood disorders with which he was diagnosed from a very young age. As a result, the attempted treatment for the applicant's mood disorder with an antidepressant he was genetically incapable of processing led to a severe adverse reaction caused by toxicity, and resulted in the

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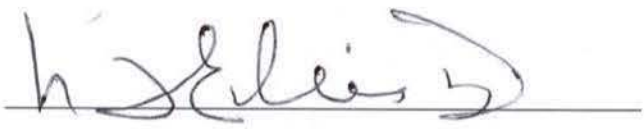
abandonment of any effort to treat his mood disorder therapeutically at a young age. Instead, the doctors place the applicant on dangerous anti-psychotic drugs as a chemical control, and he remained on those drugs for several years from the age of 19 months to 10 years.

Further, that applicant was not only treated incorrectly from a pharmacological perspective, but he was also treated incorrectly from the psychological perspective, in that he was often separated from his mother at a very young age for in-patient psychiatric institutionalizations, and rather than attempting to treat mother and child together, staff often taught applicant's mother ways to abandon or control the applicant as a young child instead of addressing the emotional attachment issues from which he suffered.

Trial defense counsel had sufficient information before them to discover all this, but never dug into it to solve the mystery that was alluded to by the clinical sociologist that trial defense counsel called to the stand, but who was not asked to elicit this opinion until the prosecution asked her to present it, and she said "I think he [the applicant] was not properly diagnosed with the proper diagnosis thereby leading to his not being medicated properly nor getting the proper kind of therapy and treatment making even worse an already difficult situation."

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Respectfully Submitted:



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Case No. 2011-CP-42-1851

Andres Antonio Torres SCDC #6018,

Applicant,

vs

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by electronic mail to agmbrown@scag.gov and by mailing first class mail, postage pre-paid to the following:

PERSON(S) SERVED: Melody Brown
SC Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211

DOCUMENT(S) SERVED: Applicant's Memorandum in Support of His Application for Post-Conviction Relief

DATE SERVED: April 10, 2014

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

ANDRES ANTONIO TORRES,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

C.A. NO.: 2011-CP-42-1851

APPLICANT'S MEMORANDUM REGARDING DR. MERLIN G. BUTLER

The Applicant submits this memorandum in support of his claim that Merlin G. Butler, M.D., Ph.D., is a consulting expert for the applicant and thus cannot be contacted, deposed, or retained by the State in this case.

FACTS

Applicant presented several expert witnesses during his PCR hearing during the weeks of April 14, April 21, and with a final day on April 30. Those experts included Dr. Jack Rary, who testified that Applicant has certain genetic defects, including Prader-Willi Syndrome and 22q11 Deletion Syndrome, which have contributed to a wide range of mental and emotional problems that began manifesting themselves when Applicant was less than two years old. These genetic defects were never presented to the sentencing jury for consideration in mitigation of sentence at Applicant's trial in 2008. At the close of Applicant's case in the PCR hearing, the State requested that the Court leave the record open and give the State 30 days to secure its own genetic expert to offer in its case in chief, as a rebuttal to Dr. Rary's testimony. Applicant did not oppose the request, but specifically reserved his right to offer additional evidence in reply to

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any witness the State might call in its case, if Applicant deemed a reply necessary based on whatever case the State might choose to present.

In light of the State's stated intent to present a rebuttal case on genetics, Applicant immediately began preparing for the possibility that a reply to a genetics expert offered by the State might be necessary. Applicant's genetic expert, Dr. Rary, recommended Dr. Merlin G. Butler, a geneticist (M.D. and Ph.D.) and a professor of psychiatry in behavioral sciences and pediatrics at the University of Kansas. Applicant's counsel, Troy Tessier, contacted Dr. Butler in the afternoon on May 1, 2014 and requested a telephone conference to discuss Applicant's case. Dr. Butler called Mr. Tessier back before 11:00 on Monday, May 5, and discussed Applicant's case with Mr. Tessier. During the course of the conversation, Dr. Butler indicated to Mr. Tessier that the state had contacted him to request a telephone conference later that day to discuss the case as well.

Counsel for the Applicant and counsel for the State exchanged email correspondence about Dr. Butler on the morning of May 5. The State agreed that it was not able to speak with Dr. Butler under the circumstances, and indicated that it would let Dr. Butler know the same. A copy of this email chain is attached hereto as Exhibit A. Counsel for the Applicant has spoken in detail with Dr. Butler about the substance of the Applicant's case as a consulting expert, in anticipation of the possible need for a reply witness depending on whether the State presents a genetics expert and depending on the substance of the testimony that may be provided by such an expert by the State.

ANALYSIS

South Carolina Rule of Civil Procedure 26(b)(4)(B) protects the knowledge and opinions of a party's consulting expert from discovery:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

It appears that both sides have made efforts to communicate with Dr. Butler. However, unless the State has had conversations with Dr. Butler which it has not disclosed, it was the Applicant's attorneys who first contacted Dr. Butler, provided him with substantive information about their case and client, and asked him to serve as a consulting expert. Counsel for the State represented to the Court that the State did not engage in substantive discussions with Dr. Butler, and this is confirmed in the email correspondence attached as Exhibit A. However, the Applicant's legal team has engaged in substantive discussions with Dr. Butler in anticipation of using him as a consulting expert, with the possibility that Dr. Butler may be used as a testifying expert if and only if the State presents a rebuttal case that Applicant believes merits a response.

The fact that Dr. Butler has not yet been paid by the Applicant is not dispositive of whether he has been "retained" or "specially employed." Given the fact that the State was supposed to have secured its expert testimony within 30 days, the Applicant did not have time to procrastinate in preparing to rebut the State's case, and Applicant's counsel acted reasonably in reaching out to Dr. Butler promptly after learning that the State intended to present its own case on the issue of genetics.

The South Carolina Supreme Court's ruling in *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580 (2009), a death penalty case involving the State's use of a defendant's consulting expert, is instructive. In *Jones*, the Court considered whether, on a retrial of the defendant's case, the trial court erred in allowing the State to subpoena the testimony of an expert consulted by the defense. The Jones Court held that "[i]f the State seeks to compel a defendant's non-testifying consultative expert to testify on its behalf, the State must prove that it has a 'substantial need' for the expert and that its inability to compel the expert to testify will present 'undue hardship.'" 83 S.C. at 547, 681 S.E.2d at 586. This standard mirrors SCRCP 26(b)(4)(B)'s requirement that a party wishing to discover facts from a consulting expert for the opposing party must make a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

As the *Jones* Court cautioned, "there is undoubtedly a potential for abuse by the prosecution to compel a non-testifying, consultative defense agent to testify. If the prosecution is permitted to do this, defense counsel may be hampered in preparing a defense in that counsel may fear an unfavorable opinion by a defense agent will be utilized by the prosecution." 383 S.C. at 546, 681 S.E.2d at 585-86. Moreover, the Court observed that "if the prosecution can 'pilfer' the experts retained by the defense, the defense will inevitably be put at a trial disadvantage in that it will lose its expert witnesses. Furthermore, because defense counsel will be placed in the posture of cross-examining the expert witness, we believe counsel may be reticent in pursuing certain lines of questioning in the event the responses of the witness may 'open the door' to privileged information." 383 S.C. at 546, 681 S.E.2d at 585-86.

These precise concerns are implicated here. Applicant has the right to use his consulting witness to advise him in making decisions about how to best rebut the State's case, including

whether or not to call additional witnesses or simply cross-examine the State's witnesses and rest. Treating Dr. Butler like a "joint" expert that either side can examine and allowing the State to call Dr. Butler in its case-in-chief changes the order of questioning in a way that deprives Applicant of strategic decisions he would otherwise be entitled to make. Dr. Butler can hardly advise Applicant's counsel on how to best cross-examine Dr. Butler or on whether there are additional facts that should be presented in rebuttal.

The *Jones* Court ultimately upheld that trial court's decision to allow the state to subpoena the defendant's consulting expert to testify in an *in camera* hearing regarding the admissibility of evidence, but noted that the case presented an "*extremely rare* factual scenario where the State's actions were permissible." 383 S.C. at 546, 681 S.E.2d at 586 (emphasis added). The rationale for the Court's admittedly unusual ruling perfectly illustrates why this Court should not permit the State to retain or subpoena Dr. Butler. The Court explained that the exception allowing a party to subpoena a witness consulted by the opposing party was intended to "alleviate any concern that either side could potentially 'scoop up' or contract all available experts." This concern was very real in *Jones*, where the expert at issue was "one of *two* internationally renowned experts" on the relevant subject.

While the State has suggested that it has had a hard time finding an expert, a cursory online search suggests no reason why this should be the case. The State's insistence on questioning Dr. Butler is especially odd given Applicant's willingness to forego any objections to the State's efforts to retain an expert from the Greenwood Genetics Practice, for example, a South Carolina-based group that has **at least sixteen** geneticists identified on its website as "Clinical Faculty" or "Senior Genetics Scholars," so long as the State does not attempt to

communicate with the two geneticists on Greenwood Genetics' staff with whom Applicant's attorneys consulted (Dr. Rogers and Dr. Lyons).

Even if the State declines to retain one of the more than a dozen available geneticists available from the Greenwood Genetics clinic, it has offered no explanation of why it cannot locate and retain one of the numerous other medical geneticists with expertise on Prader-Willi Syndrome throughout the country. In the United States, there are currently **47 accredited residency programs specifically dedicated to medical genetics**, with **36 additional programs** in "Molecular genetic pathology" and **12 more programs** in "Medical biochemical genetics."[1] CurityMD (https://www.spesohealth.com/howto/index.html) offers an online search tool to help patients locate specialists with expertise in treating rare conditions. A search of CurityMD suggests that among the top 50 leading medical centers that treat Prader-Willi Syndrome, there are hundreds of specialists with expertise in this condition.[2]

Of the hundreds of experts listed, the State's attorneys have yet to explain why they are unable to consult with or retain any of them other than the very few that have been involved as consulting or testifying experts for the Applicant. The State has not set forth facts demonstrating that it has a "substantial need" to retain or depose Dr. Butler, nor has it demonstrated that preventing it from questioning or retaining Dr. Butler in particular creates any undue hardship. Likewise, it has not shown "exceptional circumstances under which it is impracticable" for it "to obtain facts or opinions on the same subject by other means."

---

[1] *See* https://www.acgme.org/ads/Public/Reports/ReportRun?ReportId=3&CurrentYear=2013&AcademicYearId=2013

[2] *See* https://www.spesohealth.com/search?conditionName=Prader-Willi+syndrome&city=&state=

Applicant is not seeking to prevent the State from obtaining an expert, but he strongly objects to the state retaining an expert with whom his team has had significant substantive discussions. For the foregoing reasons, Applicant requests that the Court rule that the State may not contact, communicate with, or depose any of the consulting experts on the Applicant's "team," including Dr. Merlin Butler.

Respectfully Submitted:



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Attorneys for Applicant Andres Antonio Torres

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EXHIBIT A

Troy A. Tessier

From: Melody Brown [MBrown@scag.gov]
Sent: Monday, May 05, 2014 11:14 AM
To: Troy A. Tessier
Subject: RE: Dr. Merlon Butler

Okay, we will wait for confirmation for the discussion. Can you tell us if you have any other consulting experts, or possible reply witnesses, we should avoid. As you know, we are working in a 30 day time frame, and we have attempted contact for several different doctors.

From: Troy A. Tessier [mailto:ttessier@wyche.com]
Sent: Monday, May 05, 2014 11:12 AM
To: Melody Brown; Don Zelenka; Kaycie Timmons
Cc: hank ehlies; Chris Schoen; Cathy Bryant
Subject: RE: Dr. Merlon Butler

For me it would work better starting any time at 11:00 or later, but hopefully Hank is available also. Let's see what Hank offers.

Troy A. Tessier | Wyche
44 East Camperdown Way | Greenville, SC 29601-3512
Phone: (864) 242-8219 | Fax: (864) 298-3999
ttessier@wyche.com | www.wyche.com/ttessier | vCard
A Lex Mundi Member Firm

From: Melody Brown [mailto:MBrown@scag.gov]
Sent: Monday, May 05, 2014 11:10 AM
To: Troy A. Tessier; Don Zelenka; Kaycie Timmons
Cc: hank ehlies; Chris Schoen; Cathy Bryant
Subject: RE: Dr. Merlon Butler

If 10:00 Wednesday morning will work for you, I think that would be good time for us.

From: Troy A. Tessier [mailto:ttessier@wyche.com]
Sent: Monday, May 05, 2014 11:08 AM
To: Melody Brown; Don Zelenka; Kaycie Timmons
Cc: hank ehlies; Chris Schoen; Cathy Bryant
Subject: RE: Dr. Merlon Butler

Thank you for your courtesy in this regard. We can set up a conference call this week if you would like to discuss. I think Hank is on the road today, so perhaps tomorrow would be better, but that depends on your schedule.

Troy A. Tessier | Wyche
44 East Camperdown Way | Greenville, SC 29601-3512
Phone: (864) 242-8219 | Fax: (864) 298-3999
ttessier@wyche.com | www.wyche.com/ttessier | vCard
A Lex Mundi Member Firm

From: Melody Brown [mailto:MBrown@scag.gov]
Sent: Monday, May 05, 2014 11:06 AM
To: Troy A. Tessier; Don Zelenka; Kaycie Timmons

Cc: hank ehlies; Chris Schoen; Cathy Bryant
Subject: RE: Dr. Merlon Butler

Dear Troy:

Thank you for your message. We will call Dr. Butler and explain we are not able to speak with him at this time and are speaking with opposing counsel. We will get back with you shortly.

Melody

From: Troy A. Tessier [mailto:ttessier@wyche.com]
Sent: Monday, May 05, 2014 10:53 AM
To: Don Zelenka; Melody Brown; Kaycie Timmons
Cc: hank ehlies; Chris Schoen; Cathy Bryant
Subject: Dr. Merlon Butler
Importance: High

Don, Melody, and Kaycie:

Hank and I were made aware (by Dr. Butler) that you all may be trying to contact him today about the Torres case. Be advised that Dr. Butler consulted with Dr. Rary and we take the position that Dr. Butler is an expert who will be used by the Torres team in reply, if necessary. We do not think it is appropriate for the AG's office to talk with Dr. Butler about this matter.

Please call us if you would like to discuss this further.

Sincerely,

Troy A. Tessier | Wyche
44 East Camperdown Way | Greenville, SC 29601-3512
Phone: (864) 242-8219 | Fax: (864) 298-3999
ttessier@wyche.com | www.wyche.com/ttessier | vCard
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No privilege is waived by inadvertent transmission.
Thank you.

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No privilege is waived by inadvertent transmission.
Thank you.

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

Case No. 2011-CP-42-1851

Andres Antonio Torres SCDC #6018,

Applicant,

vs

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the following documents to be served upon the person designated herein by mailing first class mail, postage pre-paid to the following:

PERSON(S) SERVED: Melody Brown
SC Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211

DOCUMENT(S) SERVED: Applicant's Memorandum Regarding
Dr. Merlin' G. Butler

DATE SERVED: June 9, 2014

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M. HOPE BLACKLEY

WILLIAM H. EHLIES
ATTORNEY FOR ~~THE~~ APPLICANT
310 Mills Avenue, Suite 201
Greenville, South Carolina, 29605
(864) 232-3503

Q Understanding the fact that there's gonna be two separate parts of this trial, if it gets there, if there's a conviction of murder. Now, Judge Couch has talked to you about the fact that he wants you to put yourself in the future as if, in fact, you have already received a conviction. You sat on a jury, you found a person guilty of murder, and understanding murder is the willful killing of another individual unlawfully, right?

A Correct.

Q So, you're coming back out from that jury room, will you have the ability to set aside what you've just heard, making that determination from that murder conviction, knowing that you got to come back out for a second phase, totally separate trial, can you be fair, can you be impartial when you're coming out in that second part of that phase?

A Yes, sir.

Q And the important part of that second phase is that the State's gonna present to you, if you're in that situation, aggravating circumstances. Circumstances that are gonna heighten it. Make it worse.

Understanding that?

A Correct.

Q Hearing that -- then also the defense is gonna have an opportunity to present to you mitigating circumstances where

we feel it lessens the situation.

Taking those both into consideration, will you have an opportunity to give a fair and impartial second trial to an individual if it gets there?

A Yes, sir.

Q All right. And understanding that there's two options in this second phase, it's either a sentence of death or life imprisonment, some without the possibility of parole, once you come to a decision with the facts of the case as it's presented to you when we get there, if we get there, would you be able to hold on to your opinion, either way, for the fact of being vote for death or vote for life?

A Yes, sir.

Q Understanding that you're gonna go back into the jury room and there's gonna be 11 other people deliberating with you---

A Uh-huh. (Affirmative).

Q ---and it probably might get, I've never been back there, but I can only imagine it might get hectic, it might get, you know, boisterous. It's a very very serious case.

A Correct.

Q If, in fact, you have a certain position and you feel steadfast about it, could you be able to hold on to it even though there is a certain form of maybe intimidation, coercion to having to change your mind?