STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001008

RECORD ON APPEAL

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travel arrangements for those individuals?
A I would assume so, yes.
Q Certainly a department of that size has the ability to do such things, correct?
A I would assume so, yes.
Q So, a large amount of these items were collected, like you said, by Mississippi law enforcement. And has everything been tested by SLED already?
A There is a few outstanding items.
Q You mentioned that. What are the few outstanding items?
A I know some of them were some items that recently came up during evidence review. One is a bag from the autopsy, a pair of panties, and a couple, I have got a list. It is, I think it is close to 130 items, we have got three or four items that are still outstanding in the DNA lab.
Q So the majority of things have already been tested by SLED. A report has been issued by SLED, correct?
A That is correct.
Q And you had testified and the Solicitor had asked about parentage. That already has actually been done by SLED with a buccal swab already provided?
A Yes, based on the buccal swab from Mississippi.
Q Other than those three or four items, are you aware

of any other items that need to be tested?
A I am not at this time but it, as broad as this case is, I am sure something will come up.
Q As far as the items that SLED has already received, are you aware of any problems with those items?
A I am not.
Q Aware of any problems with the collection of those items?
A No, I am not.
Q Aware of any problems with tampering of those items?
A I am not.
Q Any problems with the contamination of those items?
A I am not.
Q And if I understand correctly, those items would be items that were received or brought back from the crime scene?
A Some of them from the crime scene and some of them from the vehicle after it was recovered.
Q The vehicle?
A And some from the house in Lexington as well. Very few items of note, I think, were retrieved from the house.
Q And you have a chain-of-custody already established on all of those items?
A We do.
Q How much will it cost SLED to retest those items with

a new buccal swab?
A It won't cost, there will be no cost to our agency, running those through the State lab or whatever it cost the State lab, I couldn't testify to.
Q Well, I guess that gets back, your affidavit says that it was unduly burdensome because of expenses of travel, scheduling arrangements and accommodations. But you have no idea what the cost is going to be for SLED to have to retest stuff?
A No, I don't.
Q Because everything you are asking for has already been done?
A That is correct.
Q And no concern on your behalf or law enforcements behalf that some of these items might have been collected by individuals from the Smith County sheriffs Office that have been charged with raping inmates?
A It is the first I have heard of that.
Q So you are not aware that the people that stopped him on the side of the road at their checkpoint have been arrested for raping inmates in the Smith County Detention Center and have been arrested?
A This is the first time I have heard that.
Q Okay. Would it surprise you to know that one of those is on the search warrant?

A It would certainly surprise me.
Q You had also placed in your affidavit about that it was a lawful stop. Are you aware if those two deputies had advertised that stop, is required by the Federal or Mississippi law?
A That I don't know. I just know that they were operating a checkpoint that night.
Q Do you know if they put it in a, they had a valid reason for putting it in a particular area?
A I don't know.
Q Do you know if they have an internal policy that dealt with checkpoints?
A I don't know.
Q So you have an idea of whether they used a neutral formula, in other words if they had a specific plan for how vehicles are stopped?
A I don't know any of the details regarding their policy or procedures regarding traffic stops of checkpoints.
Q Do despite in putting in your affidavit you are not sure about the lawfulness of the stop, correct? You are assuming it was a lawful stop?
A Yes, I am assuming--
Q --but you don't know any of the background?
A Yeah, I mean it was just a DL checkpoint so he is

going through that checkpoint, I would assume them stopping him would have been a lawful stop. I hadn't been given no information to assume otherwise.

Q And so you placed in your affidavit then the reasoning, the reasoning was because of judicial economy; because of the unduly burdensome expense of travel; scheduling arrangements and accommodations, correct?

A That is correct.

Q But you don't know any of those figures, what that ends up costing?

A No, I do not.

MR. MADSEN: I beg the Court's indulgence. That's all I have.

MR. YOUNG: Your Honor, I will now ask about the notes, the handwriting notes.

THE COURT: Sure, the handwriting exemplars?

MR. YOUNG: Yes, sir.

THE COURT: All right.

CROSS-EXAMINATION

By Mr. Young:

Q I apologize, is it Sergeant Creech or was it Detective Creech?

A Either one is correct, I was recently promoted to Sergeant.

Q Okay.

A That's okay.
Q Congratulations. Sergeant Creech, let me ask you questions about the handwriting stuff that was found in the car, okay?
A Okay.
Q Your affidavit indicates that there was a clipboard that had some papers on it. Is that correct?
A That's correct.
Q And there was a number of other writings in the car as well?
A That's correct.
Q There was a notebook that had Russian on the front of it?
A I believe so.
Q A red spiral notebook?
A Quite a few documents and notebooks that had different languages written in them.
Q Right. And they are written in a foreign language like Hebrew or Russian and the English translation next to them?
A That seems to be accurate.
Q And those were all, all in the car?
A Yes.
Q And there has been no request for a cross comparison of those documents to see if they were all written by the

same person?
A No, there has not.
Q There was a Bible in the car that had Mr. Jones' name on it?
A That's correct.
Q And it was heavily annotated?
A That is, I haven't reviewed the book, Bible with any, extensively. But I have seen the Bible.
Q We looked at the Bible together?
A Yes.
Q Right and we looked through it?
A Yes, I just don't want to say it is extensively annotated because I didn't make any specific recollection of that.
Q Sure. And if we have been provided some 500 pages of the Bible that have handwritten notes on them and the Bible itself is close to 1,000 pages, that would be heavily annotated?
A Yes.
Q Okay. There were other documents in the car that had other handwriting stuff on them that appeared to be work related?
A Yes.
Q Some certificates?
A There were.

Q There were some masonry work book like to become a Mason.

A I think there were grocery lists and meal schedules.

Q Grocery lists and meal schedules?

A Household lists of various sorts.

Q Okay. And there has been no request to have any of that stuff compared to see if it was written by the same person?

A There has not.

Q That is all the questions that I have for Sergeant Creech. Thank you, sir.

REDIRECT EXAMINATION

By Ms. Mayes:

Q And the items that Mr. Young was asking you about, do they contain a text such as melt the bodies or sand the bones?

A They do.

Q The Bible, for example, that he is asking you about, do they contain that exact text?

A No, the Bible, not to my knowledge. But as I said, I haven't reviewed the annotations in the Bible.

MS. MAYES: Your Honor, may I approach?

THE COURT: You may.

Q Let me show you a photocopy of that item and ask you how you recognize that?

A This would be a photo that was taken from one of the pages from a clipboard that was found in the vehicle.
Q Is that the item that was submitted to the State Law Enforcement Division for analysis?
A It is.
Q Is this a different writing sample than the Bible that Mr. Young mentioned?
A Again, I couldn't say because I haven't, I can't say I have seen the writing in the Bible and made any particular note of it.
Q So, let me clarify, this was found where?
A In the suspect's vehicle.
Q On a clipboard?
A It was.
Q The Bible, to your knowledge, was found where?
A In the suspect's vehicle as well.
Q And then he also mentioned some foreign languages?
A Yes.
Q Where were those items found?
A They were also found in the car.
Q And to clarify, those foreign language items and the Bible, are they the same or separate from this document?
A They are separate from this particular document.
Q That document that you are holding is the one that has been submitted to the State Law Enforcement Division

for analysis?
A It is.
Q How, if at all, does this document relate to the murders of the children?
THE COURT: Before we continue--
MS. MAYES: I have a copy for the Defense and we will also mark as a Court exhibit, Your Honor.
THE COURT: We are just trying to follow along.
Q Can you tell us whether or not this is the same document?
A It is.
Q And that is a photo copy of the item that has been submitted to the State Law Enforcement Division for handwriting analysis?
A It is a copy.
MS. MAYES: We will mark as Court's exhibit 2, Your Honor. If I may approach.
THE COURT: You may.
(Whereupon, Court's Exhibit 2 was marked for identification only.)
A Just to clarify, this is actually a digital picture that was taken.
Q The original would be in evidence?
A It would be.
Q Now, I want to go back to the matter of the buccal

swab was collected in the State of Mississippi. And just to clarify, you mentioned the involvement of MBI, the Mississippi Bureau of Investigation. What was their involvement in actually processing the vehicle?

A Smith County Sheriffs Department is a very, very small rural law enforcement agency. Any matters of theirs that require significant crime scene processing, they are always going to rely on the local State investigators to help them accomplish that because they don't have their own crime scene investigators and the technical means of training to perform that kind of analysis on something like that.

Q So they were actually involved in processing the vehicle, is that correct?

A That is correct.

Q And then the vehicle, once processed was taken into custody and moved to Lexington County, is that correct?

A That is correct.

Q And you mentioned a CSI officer by the name of Glenn Ross, he was an employee of Lexington County?

A He was.

Q And he was involved in them moving the vehicle back to Lexington County, is that correct?

A Keith Sprinkle would have been the officer responsible for escorting the vehicle back.

Q Now, was the Defendant's buccal swab obtained at the same time that the vehicle was being processed or was that done by different officers?
A If I can review the search warrant for that I can answer that question.
Q I am going to show you a document and ask whether or not you recognize it?
A Yes, I do recognize this.
Q What is the name of the county in Mississippi in which the Defendant was originally detained?
A Smith County, Mississippi.
Q Were there local law enforcement also involved in the initial stop?
A There were.
Q In addition to the officer who conducted the initial stop, do you know whether or not he later was assisted by other officers with the Smith County Sheriffs Department?
A I can. Looking at this, this warrant was sworn by Jamie McClelland and Charles Johnson. Charles Johnson would have been one of the two officers who was originally on the DL checkpoint. Jamie McClelland was not. I believe he is one of their investigators.
Q And then this, the search warrant was sworn before a Judge, being Judge Jerry Baldwin. Is he involved in the case in any other aspect other than having this search

warrant presented to him?
A He is not. I don't believe Jamie McClelland is as well.
Q Now, were you consulted, Sergeant Creech, by the Smith County Sheriffs Department in preparing the language for this search warrant?
A I was not.
Q Were you consulted about the procedure to be used?
A I was not.
Q Were you consulted about including certain aspects that might be consistent with South Carolina case law?
A I was not.
Q And were you present to observe whether or not any oral testimony may have supplemented the actual written document with the search warrant?
A I was not present for that.
Q And ultimately were you present for the drawing of that swab?
A I was not.
Q Or to see where it went at the Smith County Sheriffs Department after it was collected?
A I was not.
Q Or how it was maintained as evidence?
A I was not.
Q Or who ultimately transferred onto the State Law

Enforcement Division in the State of South Carolina?
A I was not.
Q Do you know of any involvement that Jamie McClelland would have in the case, other than being involved in applying and receiving the search warrant?
A I do believe, this is Jamie McClelland's only significant involvement in the case.
Q And other than this item of evidence, are you aware of any other evidence item that the Smith County Sheriffs Department was involved in collecting and maintaining as evidence?
A It would have been the narcotics evidence.
Q The narcotics evidence being the items that you mentioned in the affidavit?
A Yes, the associated paraphernalia.
Q Those would have been collected pursuant to the traffic stop, correct?
A That is correct.
Q And I believe that you mentioned that Charles Johnson was the officer on the traffic stop?
A He was one of the two officers, yes.
Q That item was ultimately submitted to a testing lab, is that correct?
A That's correct.
Q In the State of Mississippi?

A I believe it was initially submitted to a lab in the State of Mississippi.
Q So, from Mississippi, if I understand your testimony correctly, there would be potential officers from the Mississippi Bureau of Investigation that processed the vehicle?
A That is correct.
Q And then also potential individuals from a lab that processed the control substances that were seized?
A That is correct. And just to clarify it would have been CSI, Stacy Jones with the Mississippi Bureau of Investigation who handled all of the vehicle evidence.
Q That handled what?
A All of the evidence regarding the vehicle itself.
Q All right. And then in addition to that, Deputy McClelland, Charles Johnson went before the Justice Court Judge, Judge Baldwin and obtained a search warrant to get the buccal swab from Mr. Jones?
A That is correct.
Q And that buccal swab was ultimately collected by Smith County Sheriffs Department?
A That is correct.
Q And maintained as evidence therein?
A That would be my understanding.
Q Now, about the affidavit in this case, Sergeant

Creech, were you given the opportunity to make any changes or additions?

A I was.

Q Or corrections to that affidavit?

A I was.

Q Is the affidavit submitted today and made a Court's exhibit true and accurate to the best of your knowledge?

A It is.

Q You've traveled to Mississippi?

A Multiple times.

Q In regards to this case?

A That is correct.

Q And was that a trip that you were able to make for less than $100.00 dollars?

A No, I believe it is well over that, gas alone to make that trip.

Q Was lodging associated with your trip?

A It was.

Q And was lodging accomplished by less than $100.00 dollars?

A No, it was not.

MS. MAYES: I beg the Court's indulgence.

Q The search warrant that you have in your hands, is that something that you submitted as part of your case file?

A It was.
Q And that has been turned over pursuant to discovery?
A It was and I would like to make one, one quick correction. Actually it is my recollection, I don't want to misspeak and say that Mr. McClelland is with the Smith County Sheriffs Department, I believe he is actually one of their MBI investigators.
Q All right.
A This was his only significant involvement. So I just wanted to clarify that he was one of their deputies, so I would assume that they just, the MBI would have been working with them at this point in the investigation.
Q All right. And that particular document was turned over pursuant to discovery?
A It was.
Q And you received that directly from authorities in the State of Mississippi?
A I did.
MS. MAYES: And, Your Honor, we will mark the search warrant as a Court's exhibit as well, that would be Court's exhibit 3.
THE COURT: All right.
(Whereupon, Court's Exhibit 3 was marked for identification only.)
Q Anywhere in that search warrant, Sergeant Creech,

does it contain the language about the buccal swab collection being safe and reliable?

A It does not.

Q Were you consulted in any way prior to that search warrant being obtained?

A I was not.

Q Nothing further.

THE COURT: Anything else?

RECROSS-EXAMINATION

By Mr. Madsen:

Q You don't know if the buccal swab that is in the chain-of custody is just one person or two persons, correct?

A Without actually pulling the chain-of-custody from the file I couldn't tell you.

Q And I think Ms. Mayes asked you, you testified just one person would cost a couple of hundred bucks to bring them back to South Carolina?

A I would say at a minimum, depending on how long they are being brought up for.

Q Hundred dollars mileage, a hundred dollars for hotel, so a couple of hundred dollars?

A Potentially.

Q That is all the questions.

THE COURT: Anything from you, Mr. Young?

MR. YOUNG: No, Your Honor.

MS. MAYES: Your Honor, we are ready for our next witness.

THE COURT: All right. You may step down.

MS. MAYES: The State calls Gaile Heath.

Gaile Heath, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Ms. Mayes:

Q Good morning, Agent Heath, where are you employed?

A The South Carolina Law Enforcement Division commonly known as SLED.

Q And specifically what division do you work at there?

A In the question document section.

Q How long have you been doing that?

A 33 years.

Q And, Agent Heath, have you been qualified previously as an expert in the field of handwriting analysis?

A Yes, I have.

Q Is it possible to estimate how much, such times you have been qualified as an expert?

A 192.

Q And this is something that you receive regular training and education regarding?

A That is correct.

Q In the handwriting field, Agent Heath, why may it be important to obtain an exact text sample?

A Handwriting is like, you want to compare apples to apples and oranges to oranges. If you have got apples to compare to oranges you may have some features or some letters or letter combinations or words that you don't have presence enough to examine. So we always ask for an exact text standard.

Q There has been a document that has been marked for purposes of today's exhibit as State's exhibit 2. Let me show you, let me show you this document and ask you whether or not you recognize it?

A Yes, I do.

Q Was that item submitted to you for handwriting analysis?

A I may have had the original, I will have to look back at my records but yes. This is a rendition of what I have, was submitted to me.

Q And ultimately what request have you made of law enforcement in order for you to complete your analysis?

A I requested exact text standards to be taken from Mr. Jones.

Q And why is that?

A So that I had ample and adequate handwriting to compare to the questioned document.

Q So, for example, just have other items that he has written, foreign languages and things of that nature, is that of the same quality of value potentially as an exact text sample?
A Probably not.
Q And can you tell us whether or not obtaining an exact text sample from the Defendant would aid you in including or excluding him as a possible author of that handwritten item?
A Yes ma'am, it should aid me in either including or excluding him.
Q And you are trained in the process of obtaining these samples?
A Yes ma'am, I am.
Q And then using such samples for comparison analysis?
A Yes, ma'am.
Q And ultimately in using such samples to include or exclude a subject?
A That is correct.
Q Can you tell us whether it is medically safe and reliable?
A It is medically safe and is reliable, yes ma'am.
Q Is it invasive at all, would it result in some kind of an injury to his person?
A No, it would not.

Q Nothing further, Your Honor.

CROSS-EXAMINATION

By Mr. Young:

Q Agent Heath, I think I talked to you about this earlier this morning but you have, the lab is certified and you have brought a copy of the current certification of the lab?

A That is correct.

Q And there are protocols to obtaining handwriting examplars or comparison of handwriting examplars that are maintained by the lab?

A That's correct.

Q And you saw the copy that I have but you think that it probably has been updated since I obtained my copy?

A Yes sir, I believe so.

Q And you don't have an objection to providing us with a new copy of the current protocols for handwriting comparison?

A No, sir.

Q Handwriting comparison, in addition to that you undergo proficiency testing, annual proficiency testing with an outside certification agency?

A That is correct.

Q And I don't have a copy of your proficiency testing since 2014 but you have undergone more additional testing

since then?
A Yes sir, biannually, twice a year. And now I think they have gone to once a year.
Q Okay. And in your proficiency testing there was a problem with the 2009 test?
A I believe so.
Q Can you tell the Court about that problem?
A I don't really recall, I think I neglected to include an aspect of it. I have taken so many tests since then I don't recall exactly. I would have to go back and look to see. I think I neglected to include an aspect of the examination of an insertion or something to that nature.
Q You were deemed to have not passed that proficiency test, is that right?
A Correct, yes.
Q And the other examiner, there is another examiner at SLED that took it with you was also deemed to have not passed that proficiency testing or do you recall?
A I would have to go back and look.
Q Okay. And SLED doesn't do blind proficiency testing, like you know when you are taking a test that counts?
A We did previously, we have not done it in the last probably six years or so.
Q And that is one of the things that SLED talks on its accreditation protocol is that they don't participate in

blind proficiency testing?
A I am not aware of anything that happens with not participating in blind proficiencies.
Q Okay. Going back to handwriting comparisons. You can take documents that you know a person wrote and compare those with a suspected handwriting?
A That is correct.
Q Versus having somebody perform a test, right?
A Actually give standards?
Q Yes.
A Yes sir, that is correct.
Q Exact test?
A Yes sir, that is correct.
Q You have not been provided with any of the other handwriting in this case?
A That is correct.
Q And you have heard testimony here today that it is voluminous?
A Yes sir, according to the testimony I heard today, yes sir.
Q And you haven't looked at any of that to see whether or not the same words are in both documents?
A That is correct, I have not seen them.
Q The only thing that you have seen is this one page on the clipboard?

A I believe I was submitted like seven pages, another page had some, well several pages had no writing. It was just printed information. One page was blank and then another page had several dates on it.
Q And they are sort of front and back?
A That is correct.
Q One looks like a workout schedule and then the photograph that was submitted by the State, the back of one of those workout schedule papers?
A Yes, sir.
Q One of the things that examiners worry about when asking people to perform exact text standard, the person may try to disguise their handwriting?
A That is correct.
Q And in that case it would be preferable to have other known handwriting to do the comparison?
A That is correct.
Q Other things that can affect somebody's handwriting are stuff like medication?
A That is correct.
Q And or do you know whether or not Mr. Jones is on medication?
A I have no knowledge of that, no sir.
Q Or how much medication or what or anything like that?
A No, sir.

Q That is all the questions I have. Thank you very much.

REDIRECT EXAMINATION

By Ms. Mayes:

Q Agent Heath, the other items that you were being questioned about, other potential items collected as evidence in this case, did you observe Mr. Jones make any of those writings?

A No, I did not.

Q Regarding a Bible for example, do you know who made each and every notation or entry?

A No, I do not.

Q Regarding some type of foreign language notes, would you have knowledge as to who made those notes?

A No, I do not.

Q How important is it for you to have known standard where you are actually witnessing the person create the sample?

A Well, it is very important to have the standard validated, in the case of a Bible there could be several family members that might write in a Bible. But it is very important to actually know the author and that there is only one author that is contributed to that known standard.

Q And when you are collecting samples are you then able

to validate or verify who the author is?
A If I am observing them or if a police officer has taken the standards and has observed the individual, yes ma'am.
Q And, again, if you could clarify why exact text standards may be more beneficial or have greater evidentiary value than a suspected sample that is retrieved from a residence or a vehicle?
A That is because you would have like words and letters and letter combinations that are important in the comparison process.
Q In this particular case can you tell us whether or not you consider an exact text standard critical or crucial in your analysis of the handwriting of that particular item, Court's exhibit?
A Based on what I have seen so far I think it could be of value and it could be critical, yes ma'am.
Q And did you specifically make that request to law enforcement in your report?
A Yes, I did.
Q Were you able to even reach any type of conclusion based on the information you currently have?
A No, I was not able to.
Q Nothing further.
THE COURT: Anything else.

RECROSS-EXAMINATION

By Mr. Young:

Q One follow-up question. You are not concerned with content, what the words are?

A Not, well, I am to the extent of combination of letters. Say, you know, an M and an E, what if we only have, you know, S's or an S and a T and I am looking for an M and an E. So I am looking for letters and letter combinations. Sometimes it doesn't have to be the same word but it helps if it is the same word. Sometimes people have a habit of maybe capitalize or maybe not capitalizing certain letters that should be capitalized. So some of that does play into part if I do have exact text standards.

Q And I understand but you are not concerned with the content of the sentence. The sentence says I killed them?

A No.

Q You are worried about the K and the I and the LL, right?

A Correct.

Q And there is another method for obtaining examplars where you have the person write out the alphabet and you just shoot for that?

A Well, there is the London letter that contains all of the letters of the alphabet. Again, you don't have the

person writing them in combination. You have got all the letter forms but you don't have the letter forms in the order in which they are written. If somebody is connecting an M to an E or an M to an A, you may not have that if you do the London letter.

Q That is an option?

A It could be an option, yes.

Q Thank you.

THE COURT: You may step down. Is that all of your witnesses on these two issues, Ms. Mayes?

MS. MAYES: Yes sir, Your Honor.

THE COURT: Let's take a short break. I want to step in the back and use the restroom.

(Whereupon, a short break was taken.)

THE COURT: All right, y'all want to summarize the two issues?

MS. MAYES: Yes sir, Your Honor. If I can, I am going to go ahead and submit several cases in support of the State's position. Regarding the buccal swab, Your Honor, State versus Baccus. State versus Frasier, as to the handwriting analysis. And then in addition to that, Your Honor, there is Gilbert versus California which is upheld the collection of handwriting samples. Schmerber v. California dealing with oral swabs. I will submit all of these together, Your Honor.

THE COURT: Okay.

MS. MAYES: Schmerber, Baccus. And what is essential about the Baccus Case, Your Honor, that is a South Carolina case from 2006 which established that the affiant on the search warrant has to actually provide sworn affidavit or oral testimony before a Judge when obtaining a swab. And in this particular case what we know is that two officers went before a Judge with a search warrant. However the search warrant was deficient to the extent that it did leave out the information about it being safe and reliable and noninvasive. Those are the factors included in Schmerber v. California and State v. Baccus as necessary language. Now, that doesn't mean that it wasn't discussed. That density means that it wasn't provided by oral supplementation to the Judge. However, at trial the only way to establish that would be to produce both officers and the Judge, they would be required to come pretrial obviously. And then if the swab is determined to be admissible because the search warrant was sufficient they would then testify again for, potentially at least one of those officers involved in the search warrant, and then ultimately the collection of that swab would testify in front of a jury. So it is not a matter of just coming to Lexington and then they testify and go home and leave. We would be talking about a pretrial proceeding and then

additional testimony in front of a jury at trial. And we know that at least one of these officers wouldn't be involved in any other format in this case other than obtaining the search warrant and then the Judge, of course, this would be his only involvement and we would seat him as a potential witness pretrial. And then on top of all of that, Your Honor, for purposes of judicial economy, it just makes sense to take another swab, that we have established probable cause for because we know items were taken from the vehicle where Mr. Jones needs to be either included or excluded as a contributor, whether to the sole source of the blood or to a mixture. And then it is also important to the State to potentially determine parentage of the victims because of their levels of decomposition. So, your Honor, that is the State's position concerning the collection of the swab pursuant to Baccus and pursuant to Schmerber v. California. Again, I do believe just looking at State's exhibit 3, how that search warrant was prepared and presented is a different procedure down there in how they collect these items. Apparently it is not necessarily consistent with South Carolina laws or South Carolina procedures. Although we do occasionally get search warrants, it is normally done pursuant to a Schmerber hearing or by consent. And when we do obtain search warrants then Baccus controls and

Baccus is very strick about what may or may not be presented to a Magistrate and what must be shown as having been presented to a Magistrate in order for it to be determined sufficient. It doesn't mean it wasn't necessarily sufficient in accordance with Mississippi law and Mississippi standards.

Your Honor, as to the handwriting samples, we have State versus Frasier; that is a South Carolina case from 2000 as well as Gilbert v. California. Again, upholding the, the right of the State to obtain handwriting examplars from the Defendant is that it does not violate his Fifth Amendment right against self-incrimination. And that is going to be State versus Frasier and Gilbert v. California. If I may approach.

THE COURT: Okay.

MS. MAYES: Your Honor, on the matter of the exact text that is requested by the State, pursuant to Agent Heath's request where she actually issued a report for an exact text standard. What is different about the exact text as opposed to the alphabet, for example, is that it would show the combination of letters together, the full context of a word. In State's exhibit 2 as the Court may have noted, it appears that he is using both traditional writing and cursive writing at points. And some words are kind of a combination of both, sort of half cursive and

half handwritten. And those are the type unique identifiable traits that a handwriting expert would need the exact text to do an analysis. Just having the alphabet wouldn't give her that context of whether it is partially cursive or just from the traditional handwritten format.

On the matter of the swab, Your Honor, pursuant to Baccus. I will just add that, when that case came out in 2006, certainly since that time it has been very, very limited number of occasions in which we would, or we would advise law enforcement to seek a swab pursuant to a search warrant or that we would be involved in actually getting a search warrant for a swab. And that is because Baccus, certainly in the case that the Court must make a specific finding, that all of the factors were met, not only that there is probable cause where you could include or exclude. But also that it is noninvasive and that is safe and medically reliable. And there is no way to ever know if this particular occasion, if the Judge made those findings without the Judge himself and then ultimately without oral testimony that supplemented that search warrant. For all of those reasons, Your Honor, we are seeking to get the swab by clean measures that is pursuant to State law, pursuant to Baccus, pursuant to Schmerber, without any question that probable cause was met.

MR. YOUNG: I will address the DNA, do you have a copy of Gibson, Gibson was the California case.

THE COURT: Gilbert.

MR. YOUNG: Gilbert.

THE COURT: Gilbert v. California is what it is called.

MR. YOUNG: Yes, sir.

MS. MAYES: Gilbert v. California is 388 U.S. 263, 1967.

MR. YOUNG: Thank you.

THE COURT: All right, Mr. Madsen, on the DNA.

MR. MADSEN: Judge, we are three years in here. And they are deciding that they think that maybe they have a problem. But you heard the testimony, we don't know who collected it, whose in the chain, how many people. They want to say it is noninvasive. I suspect if I come up there and tell Your Honor I am going to stick my finger in your mouth that you are going to politely decline, maybe not politely decline. But I suspect that you are going to decline. They have access to all of this information, they have already done the testing. Obviously every person has a reasonable expectation of privacy in his or her body and intrusions into the human body certainly implicate the most personal and deeply rooted expectations of privacy. It was their motion, Your Honor. Detective

Creech or Sergeant Creech's affidavit asked for this to be done because of judicial economy and because it creates an unduly burdensome expense of travel, scheduling arrangements and accommodations. But from his own testimony, him going back and forth, we are talking about a couple of hundred dollars potentially for those people. I ask questions from him so we know he is the affiant on the search warrant. You know, I have tried a lot of cases and I can't think of any time where I have had the Judge to come back on a search warrant although I suspect that there are potential times. But that is certainly unusual. They have one of the fellow's who initiated, it wasn't a traffic stop, it was at a, basically a road block or a checkpoint, that they are going to have to bring back. So there was no testimony and we have no idea of any of the items, whether these people are going to have to come back anyway. You know, Sergeant Creech didn't, was not aware of any of that so he couldn't tell us who collected the sample, who is the chain-of-custody. It might just be one or two people. Your Honor knows from a previous Capital case, they certainly have the ability and have in the past for people from Texas, Washington State, they are certainly going to need to be, bring people back who collect the evidence for this case. The question ends up becoming, you know, do our Constitutional rights kind of

have a price tag on them. In other words, you know, do we ignore the Fourth Amendment if it is $10.00 dollars, $100.00 dollars, $10,000.00 dollars. You know, when does it become burdensome for the State. Your Honor hasn't heard any testimony as to that except for, hey, we want to change this. This is a death penalty case. Obviously death is different and so what they are saying is, hey, we want to put him to death, we just want to make sure we do economically. That is kind of sounds pretty ridiculous. Now, we can certainly help with that. We are willing to consent to that if they want to try it non-Capital and we can save them that money. But we are dealing with Constitutional rights, specifically Fourth Amendment rights. They certainly should not have a price tag attached to them. Like I said, we suspect that they are basically trying to sanitize their case because they have got the two officers from Smith County that conducted the checkpoint stop that were by themselves initially. Both of them have been arrested for raping jail inmates in Smith County and both of them have been fired. So we think they are just basically trying to sanitize that case. Like I said, we have no idea, the people that they are talking about in this chain aren't going to be having to come back anyway because of evidence. Your Honor heard no testimony about that. They have already done all of

the testing. Your Honor has heard that there was, I guess, over one-hundred or so items, that there is three or four that they have already done the parentage testing, they have already done the analysis of the crime scene, the vehicle, the autopsy. And so there is no reason that they certainly couldn't do the three or four items that they have left. I think they are just trying to get around the Constitution. And Your Honor hasn't heard any testimony based on Detective Creech's affidavit about how it is judicial economy or unduly burdensome expense or traveling. And this is a death penalty case. They have certain requirements that they need to follow on that. Death cases are certainly different and we would ask Your Honor to deny their motion.

THE COURT: Let me ask you this. The two officers that are allegedly misconducted themselves in Mississippi, you going to have testimony in their involvement, potentially they may be involved in the collection of the evidence or transporting or obtaining the evidence of either the DNA sample or perhaps other collected evidence. That problem is already there. How is it prejudicial to Mr. Jones if, as I understand it, a DNA sample was collected by a swab, submitted into analysis and it appears, generates some sort of DNA tag, for lack of a better word, and it matches the prior DNA tag generated

from the first standpoint. And it saves everyone from calling out a single police officer driving from Mississippi to South Carolina for two or three nights. That is a huge money expense. How is that not helpful to everyone, from that man coming up and saying the sample I took is the same sample. If that is not the case I understand. I am certain I wasn't presented testimony that the two officers who are now not working are singularly involved in only the chain-of-custody, the DNA buccal swab. I didn't hear anything like that, is that right?

MR. MADSEN: They were the officers that conducted the initial stop. So they are going to have to bring them back.

THE COURT: They have got to come anyway.

MR. MADSEN: And that was kind of my point. And like I said, I asked to come up and put my finger in your mouth, I think I have a feeling you are going to decline. They want to say, it is easy, we sticking in your mouth and we are in and out, we have already done that before. They are just simply trying to sanitize that process and per their own affidavit and per their own motion, it was because of judicial economy, being or unduly burdensomely, expense of travel and scheduling arrangements. But they got the testimony that it is a couple of hundred bucks.

THE COURT: I know. But what I am saying is this, it eliminates of the calling of one officer who is in that chain for the buccal swab. He doesn't have to come, isn't that kind of helping you in your case on both sides.

MR. MADSEN: But we don't even know if there is anyone in the chain, we don't know if the person who collected it would be the same person that is going to come already. We don't know that. Your Honor didn't hear any testimony for that, they weren't prepared for that. So that is just speculation. It might just be one person, the person that collected it might also, Smith County is not a large sheriffs department. It might be the same person who collects it is also the evidence custodian who put it in and can bring it back. It might just be one person, we don't know. It is certainly their motion.

MS. MAYES: And, Judge, this is the first, when Mr. Madsen made that statement a few minutes ago about individual people arrested, I have no knowledge of that. Our investigator, Matt Martin had no knowledge of that either. Certainly may be the case. But our concern here is about bringing witnesses, about how this swab was collected and then maintain, not to mention the whole process of getting the search warrant to begin with and the Judge's approval of that search warrant which is missing some information that we would ordinarily use here

in South Carolina. It is all unnecessary and burdensome when we can just as easily obtain that swab, the lawful valid means here in our court.

MR. MADSEN: Judge, there is just not enough factors under Schmerber, to do it as cheap as we can. My knowledge of Schmerber, that is not one of them. And they have got everything that they already need. And this is three years ago.

MS. MAYES: Is there consent by the Defense that the search warrant was obtained by lawful means and that all of the requirements of Baccus and Schmerber were met. I guess that is the question.

THE COURT: They did not agree to that.

MR. MADSEN: We are not at that point yet.

THE COURT: Yeah. They didn't take that.

MR. MADSEN: Numerous motions that are going to happen in collection of evidence. We are not at that point yet. We are still waiting to get all of the discovery before we start analyzing it and finalizing those type of motions.

MS. MAYES: If there is no consent that the search warrant was obtained by valid and lawful means and there is no stipulation as to chain-of-custody then certainly we must proceed with this swab.

THE COURT: Let me hear about the handwriting, Mr.

Young.

MR. YOUNG: Judge, as to the handwriting, a couple of things. The cases that the State has passed up are both Fifth Amendment cases for content, which I want to make the record clear, that is not what they are examining the handwriting examplar for. And we are not objecting under a Fifth Amendment right concerning the right to self-incrimination due to the content of the writing. In no court in South Carolina, I am sure trial courts have dealt with it a number of times on the admissibility of opinions about handwriting comparisons. And we are certainly not conceding under 702 or Jones or Council that opinion testimony concerning handwriting comparisons is valid and admissible in South Carolina courts. So, going to specifically the taking of an exact text, this is different than a buccal swab or showing of a tattoo or checking for a gold tooth. This is requiring a Defendant to sit down and perform tasks which are materially different. And it should be only done as a last resort. The State is in possessions of hundreds, I would venture to say thousands of pages of handwriting much of which is known to be Mr. Jones. These include not only his Bible, not only notebooks written in Russian and Hebrew with English translations, it includes stuff like his application to medical school which includes essays. The

State should first be required to examine the known documents that they have to see if a comparison could be made before a last resort of requiring the Defendant to perform exact standard text. Second, there are options other than writing the exact text standard such as and I forget the name, the later thing where people write out the alphabet. You could request, if you need to look at this A, E combination or this O, D combination or this I, E, S combination you can have that written out without having to do an exact text standard. Third, the request that the State has made is akin to a custodial show up, (phonetic). If I sit there and have the question document and ask you to write out a copy of the question document that is a show up, show up, (phonetic). That is not an actual comparison. And if Your Honor was going to require the Defendant to engage in an exact text standard we believe that Your Honor should have another agent to do the collection of the standard and that standard should be collected along with a number of other people's handwritings and they should all be submitted for comparison to prevent the disfavor that South Carolina courts show, to show up typed comparison evidence. And to prevent comparison bias which an Agent would have if they watched the Defendant perform the exact text show up, the exact text standard. That is what I have to say about

taking the exact text standard, Your Honor. I have a couple of additional requests in the event that the Court does decide to require the Defendant to perform an exact text standard. And because of the Fifth Amendment applications, you know, I did not mention that the Court does have evidence in its possession of a number of medications that Mr. Jones was on. And those are powerful antipsychotic with known side effects that would cause tremors, medications for the side affects and medications for the side effects from the side affects. I know that he is on Alexan, Geodon, Remeron, Paroxetine, Benadryl, Diatrol, (phonetic). We know that those could affect handwriting comparison ability. We would request that no member of the State's prosecution be allowed to be present for the taking of the examplars if they are ordered. And that any law enforcement personnel present for the taking of examplars be instructed that they are not to discuss the Defendant's behavior or if he says something or if he has a facial expression or anything about that that would have a Fifth Amendment context to them, those being presented from being relayed to the prosecution.

MS. MAYES: The State does not want or need to be present, Your Honor, other than Agent Heath would be collecting the items. And, of course, I believe there would be at least one security officer present.

Lieutenant Blackman may be able to handle him alone but other than, other than a security person and Agent Heath we don't expect that anyone else would want or need to be present. Your Honor, the Frasier case did deal specifically with the State's request for specific words and phrases. So that is different than a case where they just want samples, general samples. Frasier dealt specifically with the request for specific words and phrases which is the same as the exact text request that Agent Heath has submitted. And in the Frasier opinion the Court held that it is a unique or physical characteristic, it is not testimonial and it is not self-incrimination, but because that, those specific words amount to a physical characteristic that is unique in his writing the State was entitled to it and it is the same scenario here.

THE COURT: All right, so I understand, Mr. Madsen, your argument on the DNA buccal swab. Your concern is, he has already provided a sample, they have already collected the evidence to use that sample to compare against and have done 95 out of 100, I am using words y'all used, I don't have any idea how many, a high percentage has already been analyzed. There are a few left. A new sample, if collected, would not be, once you get the DNA analyzed and you have the DNA tag that I call, whatever that tag is, computer generated signature that DNA

provides, there is a word--

MR. MADSEN: Profile.

THE COURT: Profile. Once a profile is established it becomes the baseline against other evidential standards. That profile is basically a computer file, isn't it, isn't it like a piece of paper or a copy, a barcode. A profile is a profile no matter when it gets collected. If they collect a secondary sample today of the DNA and it eliminates the need to bring one officer from Mississippi that is in the chain-of-custody, but the profile is identical to the first profile, does that take your Client's constitutional rights away by having a second profile generated? I am having trouble finding where it does. I mean, there is no requirement under Schmerber to save money. But if one person comes from Mississippi, say, yep, I carried that buccal swab from this point to that point for analysis and it cost the State $500.00 dollars and got three days away from home. I mean, just to inconvenience him. But it is the same profile. Is that taking away any of your client's constitutional rights?

MR. MADSEN: Well, certainly making him do it a second time because of his expectation of privacy and his Fourth Amendment rights, we would submit to the Court that it certainly does because they have already done all of

that testing, Your Honor. And on top of that, you know, their affidavit, their motion when based on judicial economy, unduly burdensome, having their expense of travel and accommodations, Your Honor, there was a lack of testimony by the State of any of those things. You know, and certainly Detective Creech testified and it was even a couple of hundred dollars, maybe.

THE COURT: We will all agree that Detective Creech did not pay his own way going there and back. The County of Lexington paid that.

MR. MADSEN: And obviously the intrusion in someone's body is obviously different. We are three years past it. They coordinated and they were there very early on in the front end. If they wanted, you know, to get, and I hesitate to say anything, to address their argument about--

THE COURT: I know, but here is my thing. Your client's fingerprints have been taken. They want a second card done.

MR. MADSEN: That is different.

THE COURT: Why is that different?

MR. MADSEN: Your Honor, not intruding into someone's body on a fingerprint.

THE COURT: I mean, all the cases, I thought on the DNA and collection of a sample originally came from taking

blood samples, put a needle into someone's arm and retrieve it, blood sample, then create a DNA profile. A swab in a cheek is to me less, I will say painful, there is no pain to have your fingerprints taken. It doesn't seem to be very much pain if someone is swabbing the inside of your cheek with a QTip. I don't see either one of them being very invasive. Because the form of invasive with a needle going in your arm to get a blood sample, that is different than realizing your hand and provide a fingerprint sample a second time.

MR. MADSEN: They have got that, they have got that. They took four vials of blood from him also.

THE COURT: All right.

MR. MADSEN: They took blood, hair and a buccal swab that was taken there in Mississippi and they could have followed other protocols. And I hate to address that because that is not what the Detective put in his affidavit. It was all on judicial economy, making it cheaper so I hesitate to address something that wasn't part of their motion even though it was some other argument now.

THE COURT: That is why I am asking you. If providing a second sample, which I don't believe is very invasive on a QTip on the inside of the cheek, that retrievable of the sample is what they have asked for, not

another vial of blood. Totally different. But it can save the retrieval or summoning of one witness from Mississippi or Alabama, at whatever expense--

MR. MADSEN: And I guess that is kind of my point. Do we get to a point where we are putting a value on Fourth Amendment rights, a value on the Constitution. And I would hope not. I would hope, you know, hey, if it is $10.00 dollars--

THE COURT: This is what I am saying. If his profile is identical both times, the first time and the second time what is the prejudice to your client for not sending up the custodial person. Now, the one that collected the evidence, this is the profile, this is the evidence, he has got to come. And his problems, whatever they are, they have got to come. I guess what I am, no, they haven't said a gentleman by the name of Steve Smith was a, all he did was courier QTip to the evidence custodian. We would like to alleviate having to call him. They have not said that, I agree with you. But what if that is the case and then Steve Smith has got to come up here and sit around for a couple of days in South Carolina whenever this trial is, be away from his family, away from his job, certainly that is an imposition on him. What is the prejudice to your client having a second sample if that is eliminated potentially.

MR. MADSEN: Potentially, I mean it is all speculation because we don't know if the people they are talking about are going to have to come up here anyway.

THE COURT: Right.

MR. MADSEN: But, I mean when you are dealing and like I said, and I kind of use the example--

THE COURT: What about this. That we issue a conditional order saying they can have a sample and generate a second profile if they can identify a person who is a custodial--

MR. MADSEN: We are just troubled by the fact that it is basically, they are trying to put a value on Constitutional rights. They have already done all of this, they already have it all done. As you heard from the Detective and some of my questions are there any problems, any contamination, anything that you are worried about. No, no, no. So they have got a valid sample that there is no problem with. I suspect if someone came in and Your Honor's example as far as fingerprints and they said, hey, we just want to do another set, the first set is perfect but we just don't want to call that person as a witness.

THE COURT: I mean, taking the DNA as many times as you want, it ain't going to change. I don't see how it is prejudicing your client.

MR. MADSEN: And obviously this is different also because this is a death penalty case. I mean, they want to kill him. And death is different, I mean all the case law talks about death being different. And like I said, if they want to take death off the table we will consent. If that is what they want to do we certainly, but a death penalty case is different. And it is not something that, you know, that we think that the Court should ever take into account, is it economical.

THE COURT: I am going to study on that. Let's just, I don't see the prejudice. I see the issues of obtaining custody of all the evidence and whatever issues those will create. Those are going to be with us all the way through the trial. This doesn't cure any of that.

MR. MADSEN: And obviously, Judge, when we are protecting his rights our job is not to make it easy for the State. I mean, the adversarial nature of the proceeding is to not to be, easy as it can be for them.

THE COURT: Well, you know, this is an example, but all of the discovery being exchanged, we don't have thus and such, we have given that to you already twice. I see it all the time from where I am sitting. Anyway, I am going to study on both of those but I think what I want to do, let's go on to the next issue.

MS. MAYES: And, Judge, I will add that in the Baccus

case, second to last page. There is a specific requirement that the Judge must balance the necessity for the safeguards that are going to be used for the collection, the lack of bodily intrusion, all of those things. There must be a specific finding by the Judge on those factors. And we don't have any evidence of that in this case without actually calling the Judge who issued or signed and approved the search warrant. And that is a requirement of Baccus that we can't get around. So we know at least the Judge would have to offer testimony pretrial, Your Honor. He is not involved in this case in any other way, or at least we wouldn't expect him to be testifying in this case for any other reason other than to substantiated that the requirements of Baccus were met because it is not on the search warrant.

MR. MADSEN: They certainly could have coordinated in Mississippi and tried to get an order. As you heard from his testimony that the Detective was involved extremely early on traveling to Mississippi.

MR. GRAHAM: Judge, the only thing that I would add is that Baccus requires the Court order to show those things. Our Court order is a search warrant, it does not address South Carolina statute of law about those extra requirements. So even if the matters were there who talked about it, it is not in the Court order. Now, as

far as us coordinating with them, the fact, assuming we made a mistake, assuming that Detective, now Sergeant Creech said, get one or whoever the supervisors were, the fact that law enforcement didn't tell them to do like Baccus says, is that going to stop us from fixing the problem at all. And that is really where it is. They, it is, are they going to say, no, you can't get another one, you can only get one, if you got it wrong. And somehow prevent Your Honor from going back and saying, regardless of what was done before, I am looking at it now, the State is asking for a sample now they can use in the courtroom at trial and it meets the requirements of Baccus. What they are trying to do, I believe, is say, no, the State can't get another one. The one they got, there is the one and only chance which there is no law that says that. And then at trial time they are going to say it is not admissible.

THE COURT: Because Baccus wasn't met.

MS. MAYES: We would have to have the Judge to prove that Baccus was met.

THE COURT: Okay. Let's move on, I am going to think about it a minute. It is y'all's motion now, right?

MR. YOUNG: Yes, sir.

THE COURT: All right.

MR. YOUNG: Your Honor, that would leave us with

fourteen motions filed by the Defense back in September the 25th, 2014. Some of these have been already addressed in court. So, I think we can go through them fairly quickly. Motion number one, motion, the State has been very gracious and compliant in allowing us access to evidence in their possession. We have, I believe we have viewed all of the physical evidence. We still need, we are in the process of going through the electronic evidence. I picked up the four terabyte hard drive on the way back to Columbia last week. We have sent it off to get analyzed. We don't have anything back yet on that. I know that we need some time with the Bible again and there are, there is a taped series, the Godly home, I think it is a cassette tape series on how to raise kids, how to raise a family, how to conduct yourself in marriage that we don't have yet. I don't know, we worked out on getting copies of those. Anyway, the State has been complying and we will continue to work on those issues and let Your Honor know if there is a problem.

THE COURT: That is a commercial book?

MR. YOUNG: It is. It is a publication by a particular pastor, yes sir. And there are certainly sections of it that are on Youtube but I don't have copies of the tapes to make sure they say the same thing or have been updated or changed or anything like that.

Your Honor, motion number two is just a notice that Mr. Jones revokes any prior consents or waivers that he has made regarding his Fourth Amendment and Fifth Amendment rights. I mean,--

THE COURT: They understand that. They can't do anything with him without coming into court with y'all. Is that what you are asking?

MR. YOUNG: Yes, sir.

THE COURT: Absolutely. We have got that.

MR. GRAHAM: If I can. Your Honor, is taking the Schmerber under advisement and will you rule today?

THE COURT: I will try to rule today but I am not ruling immediately. Let me go ahead and let her go, that will take the pressure off of me. I don't want to have a person sitting here waiting on me. So she may go and when we get it done we will coordinate how to retrieve the examplars.

MR. GRAHAM: Okay. So we are on defense motion number two, I think.

MR. YOUNG: Yes, sir.

MR. GRAHAM: I just want to respond correctly to what he is asking for.

MR. YOUNG: There is a section in the motion that talks about consent to search jail cells and prison cells. Mr. Jones is, of course, housed at a State Correctional

Institution. And they certainly have the right to perform their regular security options. But what they don't have the right is to go through and read his legal paperwork, just like they would have to get a search warrant to do that anyway. He has unlimited expectation of privacy. I know they are recording his phone calls. I understand they are recorded for security purpose and we will talk about that when and if the State intends to introduce any of this. It is just a notification, any prior consent, any prior waiver that Mr. Jones has made with regard to any court, Fifth Amendment rights.

THE COURT: Let's talk about the phone calls. I don't know the system out there. But we have had cases where, a person uses the phone, there is an advisement of rights on every phone call that you hereby understand this conversation is not private, it will be recorded. Do you want to try to revoke that every phone call?

MR. YOUNG: I understand that.

THE COURT: Okay.

MR. YOUNG: And the reaction, well, we can't let him use the phone.

THE COURT: That is a solution, yes. Don't use the phone unless you want it repeated.

MR. YOUNG: In the three years I think he has made 12, maybe 15 phone calls, 8 of which the State has

provided us in discovery.

THE COURT: Okay. You understand what he is asking in number two?

MR. GRAHAM: The only thing that I don't know is, and like I said, we have SCDC here, I don't know when they, I don't know the requirements and what they do as far as when they search his cell and why and when. I don't know whether they ask for consent before they go in and search anyway, even if they believe they have a cause. So, I don't know whether we need to find out the answer to those questions. I mean, I understand what they are saying is, that they are, I believe they are saying is, if he said in the past, you can search my cell whenever you want. He takes it back.

MR. YOUNG: For instance he said you can search my vehicle. He withdraws that. But the vehicle is in State custody so it really doesn't matter.

THE COURT: Okay. What about the jail, he is in his cell at Lee, he is writing notes. He is answering questions that y'all have talked about. The Department of Corrections decides his cell needs to be searched and they seize his writings. You don't want that turned over to the Solicitor's office.

MR. YOUNG: Absolutely not.

THE COURT: That is what Mr. Graham is asking is, why

not. I understand why not.

MR. GRAHAM: Legally why.

THE COURT: Right.

MR. YOUNG: They are privileged. His notes to ask me questions--

THE COURT: What are we talking about that you think is not privileged. Why wouldn't his belongings, whatever they are, I expect privacy of anything I place in writing.

MR. GRAHAM: If he is keeping a diary and he is writing things about what happened and why things happened. That is not priveledged. If they are looking in the cell for contraband for some other reason because they believe it is there because regularly they check once a month. And they find something and somebody is flipping through it looking for whatever they have a right to look for and they see something that has been official to the prosecution it is not privileged. We would get it and it would be in plain view and they would see it.

THE COURT: That is a pretty good example.

MR. YOUNG: No sir, if he is keeping, I mean obviously--

THE COURT: That is a good example of what he thinks he is entitled to.

MR. YOUNG: Yes, sir. But law enforcement is not, allowed to examine for content. I mean if he is drawing

up escape plans that is contraband. And that is different if he has contraband or drugs or cell phone or something that that, that stuff is not allowed to have and they should immediately seize it. But to go through and read whatever he has written to determine whether or not it would be beneficial to the State, no sir, not allowed. We have discussed with Mr. Jones, obviously, what happened before, what happened in your life. As a death penalty case his life is on trial. That is, we talk about childhood, mom, dad, siblings, everything. To the extent that he has made notes to remind himself or keep a diary on how his medication is affecting him, what is going on today, when was the last time you saw the doctor. All of those things, all of those notes are privileged and part of his defense in a death penalty prosecution.

THE COURT: Wouldn't the solution be if something was seized, from this point forward, now that you have made a motion for protection, it would then be argued on whether or not it is discoverable and if it is not discoverable then it is not to be used.

MR. YOUNG: Yes sir, it should be sealed and sent to the Court if it has arguable evidentiary value that we could then argue.

THE COURT: Okay. It still has to come through the State.

MR. GRAHAM: Otherwise we are not going to know what it is.

MR. YOUNG: Well, Your Honor could notify the State, I have received a package from Lee, it contains writings, we need to have a hearing about whether or not it is priveledged, Your Honor.

MR. GRAHAM: To be clear, Your Honor, we are not asking, we are not asking to go toss his cell or find a valid reason to toss his cell and go look for something for our case. To me it seems like the most practical thing would be is, because what we will do is we will continue to check with SCDC, have you all, I mean we will ask them, we won't ask them to do it but in the courser of getting records and updating records, if we find that they searched his cell and they seized something we are going to want a copy of whatever they seized. My thought would be at that time we would get it from them, provide it in discovery and then would make a motion to suppress. But I want to be clear that we are not actively asking SCDC to go pull information for us.

MR. YOUNG: Right.

THE COURT: What I don't understand is how, if whatever seized is provided to the Court, this is really good stuff but it is really not important. Well, I don't need to make that determination, that is y'all's

determination. If y'all can't see it how can you make your argument. Y'all know what these papers say. And I got into that position in a prior trial. Anyway. I think it is going to have to be done, y'all have anything seized is not fair game and you are going to want a suppression hearing on it, if anything is seized in this point forward.

MR. YOUNG: Yes, sir.

THE COURT: I agree with that. I don't know how we can't disclose to both sides for the suppression hearing and the Court make that determination. If it is given to me, all right, I have got some stuff that may or may not be important. Judge, I can't argue unless I know what it is. Stuff in here that makes it rattle, I want to know what it is. You got to know what it is, either side to make your argument. I am going to grant your motion to the extent if there is anything seized from his possession, he believes an expectation of privacy, if it is seized at that time, either party has a motion to say, we would like to use it, or, Judge, we would like to suppress that. Fair enough?

MR. YOUNG: Yes, sir.

MR. GRAHAM: Your Honor, part of the motion that he has and I just want to make sure I understand the Court's ruling is. Part of the, the last thing on their second

motion, we are responsible for notifying all relevant law enforcement. Which I am assuming SCDC as far as your ruling. I just want to make sure, SCDC is here, we are, basically as we continue to check records and what they have done. If they see something they are going to be able to provide it to us, we will provide it to the defense. And there will be a motion to suppress. Is that how we are dealing with it?

MR. YOUNG: Yes, sir.

THE COURT: I think that is the most efficient way.

MR. YOUNG: And it will carry into other institutions, if the State chooses not to continue to house him as a safe keeper in Lexington or some other facility, the same rules will apply.

THE COURT: Absolutely. Whatever is seized from him while in custody is subject to a suppression hearing.

MR. YOUNG: Yes, sir.

THE COURT: All right, motion granted.

MR. YOUNG: Your Honor, number there, just a notice pleading of Mr. Jones reassertion, Fifth and Sixth Amendment rights, is not consenting to any questioning. He is in custody, he needs to have a lawyer present.

THE COURT: That is granted.

MR. GRAHAM: The only argument the State would have is obviously if he wants to talk to somebody that is his

right. So, at a later point he decides he wants to talk to a jail guard or another inmate or whatever that is his choice at that time.

MR. YOUNG: Yes, if he initiates, but this is not custodial interrogation but law enforcement or an agent.

THE COURT: I agree both ways. You can't interrogate him but if he starts a conversation with somebody that creates a whole another issue.

MR. YOUNG: Yes, sir.

MR. GRAHAM: Also, I guess I would say, that is why I asked a representative from SCDC to be here. They have to talk to them. Law enforcement transporting has to have conversations with them. I agree that they shouldn't be interrogated, there is no question about that. If he makes statements that are non-responsive to things they say or somehow exceeds, they didn't mean to ask him, you know, I am assuming that SCDC and their medical staff and their jail staff because of the previous suicide attempt, I would assume that they ask general questions like how are you doing today. If he responds and starts talking about, I am depressed today because and he goes on. I don't think, I think that those statements would be broadly disclosed and we go in front of Your Honor.

THE COURT: If it arises like that we will discuss the suppression of the statement or not. Y'all are not to

initiate custodial interrogation. But if you have to communicate with him that is allowed. Any statements other than welfare, transportation, non-case related, the response comes out you have a concern about they have to report those and we will deal with it. So, if you have got to communicate with him, I am certain y'all advise him not to answer questions. We will go forward, if something happens we will deal with it. Y'all are not going to issue any custodial interrogations. The health, welfare and wellbeing and safety of Mr. Jones is involved, you have got to communicate with him.

MR. GRAHAM: And, again, per their motion they ask that we notify the appropriate agencies and I just tell the Court that SCDC representative is here and law enforcement is here as well. And we can say that we have satisfied that.

THE COURT: Fair enough.

MR. GRAHAM: If you don't have any questions for Christy Bigelow from the Department of Corrections I am going to ask her to leave.

MR. YOUNG: Yes, sir.

THE COURT: Off the record.

(Whereupon, a conversation with attorneys off the record.)

THE COURT: Back on the record. Number four.

MR. YOUNG: Number four. Mr. Jones just reserves his right to be present at all of the hearings.

THE COURT: Other than the status conferences we will make it happen.

MR. YOUNG: Yes, sir. A lot of times I can go see Mr. Jones and say, we are going to have a status conference about this issue. You want to get transported or not. It is not only a burden to law enforcement, it is a burden to him to get shackled and transported and go through all of those things. He may choose to waive his presence at some status conferences.

THE COURT: My preference or belief would be this. I will be back in Lexington a lot. I think I am outside the circuit three or four weeks for the entire six months. And those three or four weeks I am either in Laurens or Newberry. I am not going to be very far away. I am not going anywhere outside the Eighth Circuit or Eleventh Circuit for the next six months. That is the schedule. Being in Lexington County, we can have status conferences there at the Lexington County Court House, in my chambers, big conference room, the jury room if it is empty. We can put it on the record, find a courtroom and find us a court reporter. Any of those, if you want Mr. Jones there we will do what we can to make it happen. That won't be a problem. I don't have any issue or reservation about him

at all if he wants to be there. It is not a problem.

MR. YOUNG: Thank you. Your Honor, number five is a little bit tricky. Obviously this motion was filed in advance of Mr. Jones' being indicted. He has since been indicted. My request for the record would be to ask the Court to quash the current indictments, order that the State provide witnesses that have actual knowledge of the case, provide any favorable information to Mr. Jones at that hearing and have a court reporter present for the Grand Jury.

THE COURT: When was he indicted.

MS. MAYES: There is no precedent of that, Your Honor, that we are aware of. He has been indicted on five counts of murder and the ordinary Grand Jury proceedings were complied with. Grand Jury proceedings are secret, it is not something that, that ordinarily Mr. Young or that a court reporter would be present for that.

THE COURT: When was he indicted though, do you know? To the extent, for my knowledge, I would like to know when was he indicted during that Grand Jury meeting. Secondarily, the witnesses on the indictment, the Grand Jury Foreperson to be notified, would be allowed to be summoned if necessary. I would like to know when that was. The Grand Jury has the right to see the witnesses, generally listed on the back on the indictment or the face

of the indictment, whichever way you want to call it. But on the indictment itself there is generally a list of several witnesses. And the Grand Jury Foreperson can have those witnesses come in and testify if they so choose. So I would like to see a copy of the indictment before I rule on your motion.

MR. YOUNG: Thank you, Your Honor.

THE COURT: I am looking for those things on the indictment.

MS. MAYES: Your Honor, Sergeant Creech was the witness at that Grand Jury proceedings.

THE COURT: Okay.

MR. YOUNG: Your Honor, the Court, I believe it was Judge Russo has issued a gag order in the case satisfying Defense motion number six.

THE COURT: That has been dealt with except the amendment which I signed because I was then assigned the case, I believe.

MR. YOUNG: Yes, sir.

THE COURT: The amended copy of a cell phone or something, some hard drive on a cell phone provided to the mother of the children for some other proceedings, those recordings would not be used and published without permission of the other presiding Judge. To my knowledge nothing has happened yet, I think we will be okay on that.

MR. YOUNG: Yes, sir. Just to let the Court know, there was one incident where the acting Sheriffs at the time had made some statements to the press and we did file a motion under rule to show cause regarding those statements as being in violation of the gag order. They were dealt with and told not to have any further statements. And, of course, there was the much more recent interview with Amber Jones, obviously the State can't control her, she is her own person. But, you know, I know that Mr. Hubbard was interviewed, her attorney was interviewed. We did not make a motion with regard to any of those statements. But to the extent possible everybody has been doing a good job.

THE COURT: Everybody has complied with the gag order very well thus far and I hope everybody would continue to exhibit that type of behavior.

MR. YOUNG: Yes, sir. Your Honor, motion number seven I think we have dealt with this. Going to allow Mr. Jones to dress for court proceedings.

THE COURT: Thank y'all for bringing the clothes.

MR. YOUNG: Your Honor, number eight, we have dealt with. We are going to try to and I have talked to Mr. Jones about this, and not have him shackled unless it becomes necessary.

THE COURT: And I think Lieutenant Blackman and the

Captain are agreeable to that and they are generally going to be at most of the hearings. But the management of the belt is safe for everyone. It has been apparent to me that has been a very reasonable way to do that. And as long as the belt device is available we will attempt to make that happen.

MS. MAYES: Your Honor, Captain Joiner and Lieutenant Blackman are present. I do think that we needed to clarify where the motion for public shackling, certainly we are in the courtroom or occasion to be exhibited to jurors, that will be complied with. But he will be shackled coming in and out of the court house. Now there is a private elevator at the sally port, that is how he will be brought to our court house. And that sally port, that is of course is a private entrance. So we don't expect there to be any issues there but Lieutenant Blackman can address that further. And I think that the device he wears in the courtroom is--

THE COURT: I have seen a belt and a vest but a device of that type. Now, should we have another hearing in Newberry, there is not a private elevator. There is a rear door that comes in the walkout basement and an elevator. I observed Mr. Jones in the security detail walking upstairs. There has been no press here today. You can have another hearing here. I don't want to say,

until he can get prepared for the courtroom inside the court house, that would be difficult to comply with if that happened again.

MR. YOUNG: To the extent that there, there already are pictures of him in shackles and in jail guard being transported from Mississippi back to Lexington, from Lexington into the detention center. Those images exist. To the extent that any further images come to light, we would just request an opportunity to be able to voir dire on those issues at the appropriate time.

THE COURT: Fair, I think we are on the same page.

MR. YOUNG: Your Honor, motion number nine, I don't know why I keep doing this. It is duplicative of two and three.

THE COURT: So same thing, we are on the same page again.

MR. YOUNG: Yes, sir. I need to get that out of my inventory. Number ten is not to do any sort of destructive testing. The State has already done testing on both the spice and the DNA. These are fungible items that can be used up in testing.

THE COURT: Let me ask the State this because I don't know the quantity. Is there any evidence, Ms. Mayes, that you know of that could be used up in testing or is there ample samples remaining, or whatever else you intend to

use.

MS. MAYES: I am not aware of any but I can ask Jennifer, she may be able to apply more information in that regard. Normally there is still some small amount left that the Defense can use and certainly is available for them for testing if they choose to do that.

THE COURT: How about this. For purposes of getting by this motion, can you identify any evidence that could be potentially used up before it is retested. Look at what it is and discuss it, who is going to test it or it needs to be tested. So, if you can identify something that the test you are about to perform will exhaust the sample, that needs to be brought to the Court's attention first. Fair enough?

MR. YOUNG: Yes, sir.

MS. MAYES: Yes sir, Your honor.

MR. YOUNG: And for the State's concern, our concern is mainly the spice or the substances, those types of substances.

THE COURT: Okay.

MR. YOUNG: Motion number eleven is a motion to require the investigating agencies to preserve their notes and if notes have been destroyed we would request an opportunity to have a hearing to try and create those notes and find out what was in them.

MR. GRAHAM: For clarification, what are you asking.

MR. YOUNG: Order law enforcement to not throw away any of their notes.

MR. GRAHAM: In case law the defense is not entitled to their notes. They are entitled to Brady and Rule 5. I don't know, we haven't requested in this case, as far as I know, I have not requested them to turn over their notes or to not destroy them.

THE COURT: I guess his request is, just tell any potential witnesses not to destroy their notes. Not discoverable, you are right, but he is asking they be preserved.

MR. YOUNG: They can be evaluated for potential Brady and mitigation, the nature of death penalty prosecutions.

MR. GRAHAM: The concern I have is, I can send a letter to the command staff at the sheriffs department which is the investigating agency here. We can send one to Alabama and Mississippi and where ever else. But to try to identify each and every potential officer, I don't know how to do that. If they want anything more than that I would ask that they identify who they want specifically.

MR. YOUNG: I will be satisfied with notifying the heads of the law enforcement agencies that are involved.

MR. GRAHAM: But I don't know who, I don't, we have not continually gone to every single officer and ask

them--

THE COURT: That is not what he is saying. I mean, he said law enforcement agencies. What if, it is, I don't know who the sheriffs department is in Alabama or Mississippi. Would it be suitable if the State would notify Lexington County Sheriffs Department. They can easily do that. The mirror agency prosecuting are, of Mississippi as well as Alabama. Tell his contemporary prosecutor in Alabama and Mississippi, would you please pass along to the agency, do not destroy notes.

MR. YOUNG: That is fine.

THE COURT: Can you do that, Mississippi and Alabama, those two circuits of counties? Would you rather do it to the agencies?

MR. GRAHAM: I think so just to cut out another person to deal with. And then we would know that it was done.

THE COURT: To the extent that you, it is the Smith County Sheriffs Department, you can do that. One letter, say please don't destroy that if at all possible. Fair enough?

MR. YOUNG: Yes, sir.

THE COURT: All right.

MR. YOUNG: Your Honor, number twelve is to make sure we have hearings that are on the record and with a court

reporter.

THE COURT: I can do that for everyone's protection. Granted.

MR. YOUNG: Thank you. And of course includes a request for a copy of the transcript from every hearing. I am happy to send a letter for a request.

THE COURT: I think they are okay with email.

COURT REPORTER: Just a simple request by email.

MR. YOUNG: And I think part of this is to make sure, I know that they have changed requirement with maintenance of records with regards to transcripts. And they be maintained forever and they not be thrown away. The recordings would be available if there were a discrepancy in the transcript. Thank you.

THE COURT: That is no problem.

MR. YOUNG: Motion number thirteen is a request that the State respond in writing to motions so that we can know what the issues are prior to being able to have a valid hearing and not waste a lot of court time.

THE COURT: I mean once they respond, we object to a hearing, that is a response.

MS. MAYES: We have no objection. If they notify to what their motions are we certainly can advise we either consent to that motion or we object and request a hearing. But beyond that it gets into legal arguments. By motions

we are going to have to have advanced notice of every motion and time to respond. The Defendant has the right to make a motion twenty-four hours beforehand. So we certainly have no objection.

THE COURT: Sounds fair to me.

MR. YOUNG: Yes, sir.

THE COURT: So any motions made by the Defense, the State will respond either we will consent or we object. The hearing will be conducted. Obviously it will be in front of me and very obviously for my protection it will be on the record. Not a problem.

MR. YOUNG: The final motion is motion fourteen would be just to ask the Court to specially, (sic), set motions hearings.

THE COURT: I was going to bring something like that up so I am agreeable with having some sort of predictable schedule. It helps everybody including my staff, scheduling court reporters, the State and the Defense. So I am agreeable with that. So we can discuss a schedule on when to get back together. Anything else we need to put on the record.

MR. YOUNG: I think there are proposed orders that are part of the Court's file for Your Honor's convenience.

THE COURT: We are going off the record.

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the County of Lexington, South Carolina on the 13th day of December 2017.

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

December 19, 2017

Joy Holston

Joy E. Holston, Court Reporter

My Commission expires: May 2, 2026

State of South Carolina	)	Court of General Sessions
County of Lexington	)	Eleventh Judicial Circuit
State of South Carolina,	)	Transcript of Record
vs.	)	2015-GS-32-00188 2015-GS-32-00189
Timothy Ray Jones, Jr.,	)	2015-GS-32-00190 2015-GS-32-00191
Defendant.	)	2015-GS-32-00195

January 5, 2018
Lexington, South Carolina

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge

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

R.S. Hubbard, Solicitor
David Shawn Graham, Deputy Solicitor
L. Suzanne Mayes, Deputy Solicitor

On behalf of the State

S. Boyd Young, Esquire
Robert M. Madsen, Esquire
On behalf of the Defendant

Stacy S. Johnson
Circuit Court Reporter

I N D E X

E X H I B T S

NO EXHIBITS WERE INTRODUCED

(Whereupon, the following proceedings were held on January 5, 2018, beginning at 10:07 AM.)

BAILIFF: All rise. All rise. Court is now in session. The Honorable Judge Eugene C. Griffith, Junior, presiding.

THE COURT: All right, folks. Y'all be seated.

I'm glad we got the transportation matters worked out. Sorry for the delay.

All right. This is a status conference that's also a follow-up to the orders which were kind of in some semblance of progress. My court reporter then, Joy, thought she sent me the transcript until I asked her about it earlier this week. She said I sent it to you two weeks ago, but she sent it to a different e-mail address that does not work for me and then she realized that and so I just recently got it.

In any event, what would y'all like to do first, Mr. Graham?

MR. GRAHAM: I guess a couple of things. I know that we had sent an order and I think Boyd's got it in his hand right there. We were -- had made a motion asking them if they would agree to access of information from the Department of Corrections and it's my understanding that we've worked out a consent order, and I think Mr. Young has it right here, and he signed his part. I don't know

whether the Solicitor has signed it yet.

MR. YOUNG: I accidentally just printed it on front and back. If you have a different copy, I'm happy to sign that.

MR. GRAHAM: I think that will work.

The only issue outstanding that we couldn't agree on is access to visitation logs. I want to pass this proposed order -- consent order up, Your Honor.

Mr. Young specifically wanted to exclude visitation logs and he also wanted to clarify language about medical records only coming from SCDC.

MR. YOUNG: Correct. It's clear that we've made no secret that Mr. Jones' mental health would be at issue at the trial, so these records would be given to the State at some point in time, so we consent to their production. However, we do request that the visitation logs be limited and excluded from any records from SCDC. When we -- we excluded that specifically from the consent order and then yesterday Shawn and I had said well, we would talk about the visitation log today, so late yesterday I sent a -- Motion Number 15, motion to --

THE COURT: I've got it in my hand.

MR. YOUNG: -- for an order sealing the jail/prison visitation logs and ensure that confidentiality is maintained and we're prepared to go forward on that today.

THE COURT: All right. Mr. Graham, anything -- do we want to present on that right now and just deal with that issue and then it goes back?

MR. HUBBARD: And I can deal with that one if -- when Boyd -- Mr. Young makes his presentation, I guess, since it's his motion.

MR. GRAHAM: We could -- from what I understand, that's probably the only issue. There's some housekeeping things that we can finish up, but that's the only issue before the Court this morning.

MR. YOUNG: Yes, sir.

THE COURT: All right. Let's argue that one then. Let's work on Motion 15, which is the issue of the jail slash prison visitation logs.

MR. YOUNG: Your Honor is well aware that Mr. Jones is in custody. Because of his status as being in custody, he is also housed as a Safekeeper, which requires him to be housed at the South Carolina Department of Corrections. The South Carolina Department of Corrections requires every visitor to present ID and sign in a logbook. These are experts, attorneys, family. Everybody has to sign in.

Now the defense routinely, as the Court is well aware, uses different types of experts. We'll consult with an expert, explore one issue, maybe reject that issue, go with a different expert on a different issue, and allowing the

State to have access to -- just to the names of the people and how they were -- who was there, when they were there, how long they were there, would allow the State to have confidential and privileged information, which they're not entitled to. It would allow them to anticipate defense strategies before the defense decides whether or not to use them. We believe as outlined in the motion that it would allow the State an unfair advantage and it would violate the ex parte nature of defense expert requests by allowing the State to find out who the defense is using prior to the defense disclosing that. I mean, the State's gonna find out who the defense is using at trial because we're gonna disclose that and they're gonna get reports and they're gonna have the opportunity to review those and have their own experts look at it. As far as people who we consult with and when they met, that stuff is just not relevant to the State and they shouldn't be entitled to get it and allowing them access to it gives them an unfair advantage.

THE COURT: All right. Mr. Hubbard. Solicitor Hubbard.

MR. HUBBARD: Your Honor, we -- we differ. We believe there's absolutely no expectation of privacy on a visitation log. It reveals nothing about trial strategy. If we know that they have twelve psychiatrists that go and talk to their client, well, we know they're talking openly

about a mental health defense. What does it reveal to us? Do we know what they're talking about? No. Is it for a consultant? We don't know. But I tell you what it does do for us. When we get to trial, typically we're ambushed. South Carolina is probably the last state in the country where a prosecutor walks into a courtroom and the defense calls a witness we've never heard of. That happened to me in a death penalty case, Judge. I remember an expert being called. He was a psychopharmacologist. I remember leaning over to Solicitor Myers saying what the heck is that and he goes I know, but you're gonna be crossing him in five minutes.

It doesn't reveal anything about their case, but I tell you what it does for us. We, too, knowing there's gonna be a mental health case, will reaching out to people. What I definitely don't want to do is end up calling somebody they've reached out to and then having a motion that they feel obliged to bring. I mean, we've been getting along great. I don't distrust these guys and, you know, we haven't gotten that personal animosity that you often see in a case, but I'd hate for them to feel compelled to say Solicitor Hubbard talked to one our experts and he clearly has tainted our case and he needs to be removed from the case. I'll now know these people are off limits. What they talk about, I will have no clue.

None. It does not help, you know, me decipher what they're doing, but it does help me know who they've had, and so when I walk into a courtroom I know Dr. So and So, well, I know he taught here, he taught here, he's testified before. How does that reveal a strategy? I'm entitled to do that. It's not hurting at all.

Now, Judge, I know the ex parte nature of getting these orders, and I understand that's the way life should be, because when they come to you and say Judge, we need a psychiatrist, Dr. So and So, they're usually giving you a basis for that. I don't need that. I don't want that. I'm not asking for that. There is nothing to be gleaned from a visitor log about strategy.

The last case you tried here that was a capital case was Kenneth Lynch. I am sure you had tons of ex parte motions in that trial with the defense on experts, yet if you recall in the penalty phase they called an aunt, a brother and they put up a mitigation expert only after we protested when they were just gonna put in an employment record. They had a social worker that we had discovered who sat during the trial and left. No social worker testified, no psychologist, no psychiatrist. They can talk to thirty people and put up none of them as part of their strategy. We will never know what that strategy is. I think we're just -- Judge, it doesn't -- it doesn't reveal

anything, but it will save some hiccups. And later, should we convict Mr. -- Mr. Jones, and if -- especially if he gets on death row, there will be PCRs. We'll be able to at least come in and say no, they did their job. Look at all the people they talked to. We don't know their strategy, they'll have to testify to that, but they certainly did their homework. And I'm sure Mr. Young and Mr. Madsen, knowing them, will do their homework. This allows us to actually help them later on down the road. That's why we'd like it.

MR. YOUNG: Briefly in response, as far as the issues that the State has raised, if they want to consult me and say hey, we're thinking about calling an expert to work on the case, here's the name, I would be happy to tell them whether or not we have talked to that person. You know, there's no reason for the State to have access to this information and it does reveal defense strategy. You know, you can Google these people's names. Where Tim was first housed is called -- used to be called MSU, it's now RHU over at Kirkland, which was the maximum security unit, and they maintained an individual logbook for -- just for Tim's visitation. So it's not gonna be hard for them to go through the names and figure out who we're calling and allows them unfair advantage in that regard.

If Your Honor is inclined to allow the State access

to that, we would request reciprocal information; that they provide us with the names of people who they have consulted with and talked to, other people that they have met with that they haven't told us about. We believe that we would be entitled to reciprocal information.

MR. HUBBARD: Judge, as far as reciprocal information, we really don't have a problem with that. Here's -- here's my take. If I talk or anybody on our team talks to, say, a psychiatrist and that psychiatrist goes Solicitor, I really think they've got a basis here, there's mental health issues, I've got to turn it over. I think as a matter of law and discovery, I have to turn it over. I'd lose my license, I can be prosecuted if I don't, and I don't mind turning over who we end up getting because we will be having a report done.

As Your Honor knows, typically -- and I know Mr. Young says he's done it differently and obviously we've never had the opportunity to work together, but we get reports and we turn those over. And I will tell Your Honor just as a matter of course everybody we talk to, we usually have somebody with the agency that made the case, in this case the sheriff's department, and we'll have one of our investigators, we typically do a synopsis of what was said and turn that over. We have no obligation to do that typically, but just in case there's something

discoverable, so we do that. We don't have a problem with that.

But going back to revealing strategy, Judge, knowing somebody is a Ph.D. or an M.D. in mental health doesn't tell us anything other than that's what they are and allows us to know what's their educational background. That's about all we get out of it, but I would like that.

MR. YOUNG: Briefly, it's more than that. If they know that we -- that somebody visited with Tim and that we don't call them, that tells them something, too, and then the State can try and call that person and figure out like well, oh, they didn't like something they said or speaking to -- I don't know, but that's the type of advantage. There's no basis in Rule 5 for the State to have access to the Defendant's visitation logs and who they're consulting with. Absolutely they're going -- the Court's gonna give me a date and say if you don't declare who your experts are and who's testifying to what by this date, I'm not gonna let them testify, and that's fine. They're gonna know who we're calling. There's not gonna be any surprises about the witnesses that we're calling, but allowing them access to the visitation logs does provide them with an unfair advantage, which is why they want them.

You know, I know that they're gonna let us know who they're gonna call, but that's not -- that's a lot

different than who all they have met with. I mean, I'm not gonna get a sheet from them about well, Adam Creech met with whoever for an hour, you know, which is what they're gonna get from us through those visitation logs. And this is only a function of Tim's custodial status. I mean, it's a disadvantage to an inmate who's -- if he was out and he wasn't in custody, they would never get any of this. So he's being punished and deprived and the State's given an unfair advantages solely due to his custodial status.

MR. HUBBARD: Just one follow-up to that. There is no expectation of privacy on visitation logs. None. And as far as us using somebody that they don't use, we're not gonna know if they use them or not until trial. I have never been in a capital case with all the capital cases I've been involved in where the defense is told no, y'all can't put somebody up because the Court wasn't aware of this witness. Judge, there's too much at stake for any judge in this State to do that, and we get that, but for us to reach out to somebody they don't use, Judge, that's inviting scrutiny on our part, are we trying to taint the case and trying to find out some private dialog a doctor or a medical expert had with a defendant. Judge, that's going into taboo land.

The only case we ever had where we reached out to a

defense witness was Jeffrey Jones. I mean, there were only two witnesses in the western hemisphere that could talk with expertise about footwear impressions inside of a shoe, which our Supreme Court said was bogus science anyway, and when they reached out -- this office reached out to the defense witness, they never -- they just talked about the science. We will not be doing that at all because there's not gonna be a question about the science here. This is mental health. There are plenty of experts out there. I don't need Mr. Young to say hey, you know, here's my list of experts. Judge, if we just know that they're seeking people, we know to stay away from them. Because we're gonna have to be reaching out as well if this case is, in fact, over mental health. So, again, there's no expectation of privacy.

THE COURT: All right. It seems to me that there needs to be some sort of way to disclose who you're consulting with so that there's no cross-consultation but have like a limit on it as to a name and contact information, but not dates and times and lengths of visits. That's kind of what concerns me is because this case is big enough there's -- might be able to get into a smaller area.

MR. HUBBARD: Your Honor, not to interrupt you, but my thought was if they -- if we do the logs, they're not

gonna have to reveal anything at all to us. There's no affirmative duty on their part and then we just have to figure it out. We may walk in with thirty experts that we know that may have seen their client, no idea if they're gonna testify, and that way they don't have to let us know who they're actually putting up. It's still puts an onus on us to do our homework and that's why I was thinking in those terms, Judge.

THE COURT: All right. Here's what I think should be disclosed as to part of the visitation log. I tend to agree with Mr. Hubbard not to divulge anything other than name, but the visitors log would be -- and I know the Department of Corrections probably keeps more detailed times and dates and length of the visit and that sort of thing -- disclosure of visitors' names and not the length of the visit or, you know, who they are. That will give them enough notice to stay clear of those people, but if somebody's visiting all day I don't think there's any need for that. Like you say, that would maybe provide some sort of tipping your hand education to the State, but names -- names and addresses only and not lengths of the visits, reason for the visit. Anything of that sort won't be disclosed. Just names. I think that would be fair enough not to provide anything other than -- I mean, because what would prevent the State from having the Department of

Corrections employee saying who's been coming down there; don't read the log, just tell me who you saw. There's not much way to stop that. So names and addresses only of the visitors log will be available to the State if they ask for it. It's not gonna be required. It's not gonna be an affirmative duty to provide it over, but if they ask for it they can get names and addresses of the visitors, all right?

MR. HUBBARD: Thank you, Your Honor.

MR. GRAHAM: I'll do a proposed order and send it up to Your Honor and to the defense as well.

THE COURT: Okay.

MR. GRAHAM: The only other issues I think we had to discuss was as Your Honor granted the State's Schmerber motion, after the hearing today we have Adam Creech to collect buccal swabs and we have Gail Heath to do the handwriting exemplars.

THE COURT: And we can do that here in the courthouse and defense counsel can be present when it's being done?

MR. GRAHAM: Yes, Your Honor.

THE COURT: All right. As long as that can be accommodated because I want them to be present if they want to be.

MR. YOUNG: Yes, sir.

MR. GRAHAM: I know -- one of the things that

Mr. Young and I talked about beforehand, I think Motion Number 9 of the defense motions that we addressed last time, had to do with testing of evidence and making sure that evidence that went for forensic testing wasn't consumed. So as far as the buccal swabs, we're gonna collect two swabs --

MR. CREECH: Two sets of swabs.

MR. GRAHAM: -- two sets of swabs. So that way one will go to SLED to be analyzed and the other one will just be kept in evidence in case they want to use it for anything.

THE COURT: All right.

MR. GRAHAM: In discussing Number 9, I'm gonna let Deputy Solicitor Mayes talk about this. We have some items that are at SLED. Some are in their evidence control area and some are with a forensic technician and in light of Your Honor's oral ruling on Motion 9 we had them stop at the time. I don't -- so I'm gonna let her discuss it and go from there.

THE COURT: Okay.

MS. MAYES: Judge, what we're passing up now to you, this is an internal document that we've created here, but it shows the 139 items that have been submitted by law enforcement and testing has actually already been done and completed by the State Law Enforcement Division. So

of these 139 items, there are already SLED reports out there that have been provided to the defense that accounts for the testing results of each of these items.

There are six additional items that are currently at SLED. We gave to Mr. Young earlier this morning a copy of that document where SLED has six items still there. Of those six items, one is a box which has five sub items. Basically that's gonna be some clothing items, a comforter, and then also a sheet. We want to go ahead and have these items tested as well. In December, we spoke with the DNA analyst. She's Stephanie Stanley. She feels confident that all of these items can be tested without using up or exhausting the DNA.

THE COURT: That's what we were most -- that's what seemed to be the issue that was most concerning is we don't want one test to consume the entire sample.

MS. MAYES: Right.

THE COURT: And if your expert can provide very reasonable assurances that it will not be consumed, then we can test that and it can be retested if necessary, and that's kind of what we're discussing at the hearing.

And that -- Mr. Young, that was your biggest concern is if an item needed to be retested by another expert there was an opportunity for that to occur; is that right?

MR. YOUNG: Yes, sir.

THE COURT: Well, can we have that language agreed to that very reasonable assurance from the expert tester, whoever that analyst is, that there will be adequate samples remaining after their test, that that can be retested and be done? Is that fair enough? Is that consistent with my --

MS. MAYES: It is consistent, Your Honor. I believe that's actually addressed on Page 95 of the transcript from the hearing and that was our interpretation of the Court's ruling as well; that it really only needed to be brought to the Court's attention if it appeared that we were going to potentially use up any remaining sample. But because we didn't actually have that order, we asked them to hold off and not do any further testing until we could address it with you. So we're gonna talk with her now and ask to these six additional items that are on the document provided earlier today to the defense, we're gonna ask them to go ahead and go forward. As I stated, she has given us her confidence that she can do the testing without using up the full quantity.

THE COURT: Okay. And if that can be done, that's consistent with my ruling. That's fair enough.

All right. Mr. Young, what do you got?

MR. YOUNG: Two things, Your Honor. Would Your Honor consider, and I don't know the appropriate language for

appellate purposes for this, but a continuing objection to the providing of the names from the visitation logs?

THE COURT: Absolutely.

MR. YOUNG: Just because I want to be protected.

THE COURT: Well, I'll tell you what we'll do. We'll do this. In the order that Mr. Graham will prepare, we'll put in there that this is the judge's ruling subject to your objection which will not have to be renewed at each time it's used.

MR. YOUNG: The log's updated, correct.

THE COURT: We'll put that in the order that my ruling is subject to your objection here today and we'll have that in there and that will be a continuing objection, but it will be allowed to that extent.

MR. YOUNG: I can't imagine anybody saying -- having anything to say about that.

THE COURT: Okay. So add that, please, Mr. Graham.

You know, I'm kind of a believer if you've raised the issue, we've discussed it, we understand it, it's really, really difficult sometimes to, you know, remember my objection, remember my objection; yeah, I've got it. But you've got to do it for the record and we'll do it in the order so it will be on the record. I like that better and then we won't have to keep revisiting it so it doesn't get to be like beating a dead horse.

MR. YOUNG: Yes, sir. Thank you.

MR. GRAHAM: Unless there's any other issues, I think that's the only issues as far as the State felt we needed to discuss other than when our next date for a meeting will be.

THE COURT: Okay. Let's talk to y'all. Y'all are the ones that are responding now with the information and whatnot. Let's -- what about the Friday of the February term of court? That will put us in a position that if Mr. Madsen's candidacy is up or down, it will be known by then. If he's successful, we need to address an attorney issue right then, and that will be Wednesday unless the General Assembly moves it. And so, Mr. Young, what I suggest is let's meet Friday of that week. It will be the 9th; is that right?

MS. MAYES: It would be. Yes, sir.

THE COURT: And then Mr. Madsen's in or out subject to that election by the General Assembly. If he's in, there's really nothing to do as far as the attorney issue, but if he's out, he's out.

MR. YOUNG: And not to put too much of a wrinkle there, I have plane tickets to my sister's in Mobile on that Thursday, Friday, Saturday and Sunday.

THE COURT: What's the next term of court? What have we got the following week?

MS. MAYES: The 22nd would be our next term of general sessions.

THE COURT: What have I got the following week, Lauren? What are you looking at?

THE CLERK: The 22nd of February? Our next term of general sessions will be February 26th.

MS. MAYES: The 26th. Okay.

THE COURT: What about -- I've got general sessions in Edgefield and as we know Edgefield's not too far a drive, but --

MR. HUBBARD: Yes, sir.

THE COURT: Can we do it the following -- that Friday I'm in Edgefield? Or Monday morning. I mean --

MS. MAYES: Either is fine.

MR. HUBBARD: Either one would be fine, Your Honor.

THE COURT: I mean, a lot of times if the jury's coming in and I tell, let's see, Mr. Reel, I couldn't think of Sonny's name, the clerk down there, to have the jury come in at 11:00 rather than 9:30, we can have a status conference Monday morning and I can still be down there for the jury qualification if that's the case, so.

Will you be back in town by Monday morning?

MR. YOUNG: Yes, sir.

THE COURT: Do y'all want to go with that Monday?

MR. YOUNG: That's fine.

THE COURT: I kind of want to keep my finger on this and not have to wait a week for general sessions for Lexington because it won't bother me to come through here on the way to Edgefield. It will be on the way.

MR. HUBBARD: That's the 12th?

THE COURT: Is Monday the 12th?

MR. YOUNG: Yes, sir.

THE COURT: You want to go in the morning.

MR. HUBBARD: Yes, sir. What time?

THE COURT: Let's say 9:00. Is that too much on my transport? Is that too early for you?

OFFICER: I don't know that I can answer that.

THE COURT: Whose our general counsel coordinator that we had contact with on your other case that kept coming here that was so helpful? Why can't we call her and say look, you know, if we send an order of transport, we want you to be ready.

This doesn't have to be on the record, Stacy.

(Discussion off the record.)

MR. MADSEN: And, Judge, just for clarification on the order that Mr. Graham is going to prepare, are you gonna make that reciprocal that they need to send us over names and addresses of anyone that they've met with?

THE COURT: I think so. Why not? What's the harm? Y'all think about that, all right? That way they don't

cross -- I'm worried about cross-poisoning people and having to duplicate things, so that was kind of the basis of my ruling so the State didn't call the wrong person and get involved with poisoning. I think that would be appropriate. That way we know who everybody's talked to. I think that's fair. Just names and addresses. They do not have to give them a CV. We're not getting into all that. Everybody's got their own homework. I mean, no explanation necessary, all right?

MR. MADSEN: Thank you.

MR. YOUNG: Thank you, Judge.

THE COURT: All right. Anything else?

MR. GRAHAM: Not from the State, Your Honor.

THE COURT: Okay. I'll see y'all when I see you again, but we'll see everybody in this crowd back here on the 12th.

(Whereupon, the proceedings were concluded at 10:41 AM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 5th day of January, 2018.

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

February 12, 2018

/S/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

State of South Carolina	)	
	)	Court of General Sessions
County of Lexington	)	
		2015-GS-32-0188, 0189, 0190, 0191, 0195
State of South Carolina	)	
vs.	)	Transcript of Record
	)	
Timothy Ray Jones, Jr.	)	
	)	
Defendant	)	

May 25, 2018
Lexington, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Jr., Judge

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

Solicitor Rick Hubbard
Deputy Solicitor Suzanne Mayes
Deputy Solicitor Shawn Graham
Attorneys for the State

Boyd Young, Esq.
Robert Madsen, Esq.
Attorneys for the Defendant

Joy E. Holston
Official Court Reporter

E X H I B I T S

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THE COURT: Mr. Madsen, is it you or is it Mr. Young?

MR. YOUNG: So, Your Honor, today we have scheduled or identified a number of motions filed by the Defense to take up today. I have left for, to deal with later, most of the motions dealing with the juror stuff and juror selection stuff. We can talk about that stuff in a little bit. But what I want to talk about today, we are mostly, some constitutional issues with regard to the death penalty overall and then some more specific issues as related to this trial in particular. And I know that we also need to identify for the State the witnesses that we expect to need for the evidentiary hearings for July 9th and I have some additional motions in limine that I need to get done before July 9th that I will go over with the State, I am happy to talk to them today or some other time. And then, of course, the State has a motion for an eval pursuant to the Defense's notice of an intent to present a not guilty verdict insanity defense which I think we need to talk about a little bit.

THE COURT: All right. Solicitor, you or Ms. Mayes.

MR. HUBBARD: Your Honor, I guess we are waiting to see what motions they want to put up.

THE COURT: Sure, Mr. Young, where do you want to start. I had my Law Clerk make an index of the motions that I think is going to be helpful for me just to keep up

with, motion number 18, she tells me what it's for. Because rather than having to, so I have got an index.

MR. YOUNG: Yes sir, and I should have included one in there, I apologize.

MR. HUBBARD: Boyd, can I jump in real quick.

MR. YOUNG: Yes, sir.

MR. HUBBARD: And just say, Your Honor, the other thing for us, obviously, is scheduling. Your Honor knows because of all of the other stuff we have going on too, that is a topic we need to take up.

THE COURT: Okay. Scheduling a lot of stuff, a lot of irons in the fire other than this one but this is the biggest one.

MR. YOUNG: Yes, sir. Your Honor, just to backtrack just a little bit. I know that Your Honor was working on some orders for the hearings that we have had so far, I think the first 17 motions filed by the Defense we have heard and then a number of motions filed by the State. I believe that most of the ones filed by the State have been made moot by us providing names and contact information for the experts and providing the notice of intent to offer a not guilty verdict insanity defense. We want to bring that up to the Court and if there is anything we can do to assist with those orders or a copy of those orders, for those proposed orders.

THE COURT: What happened with what I ruled on.

MR. YOUNG: You have ruled on everything. I think Your Honor was going to do some orders, specifically on the preserved evidence, number 10; preserved notes, number 11; the State responding in writing, number 13; and then, that's it. But Your Honor has ruled on the record and there is no issue with that, just want to make sure that we are all on the same page on what those rulings were.

MR. HUBBARD: Just want to make sure I know, like number 13, responding in writing. I know, just to make sure we are on the same page. Your Honor didn't say we had to respond to each and every motion in writing. I want to make sure we are on the same page. We have responded on some that we think are genuinely contested and that it would help Your Honor. But otherwise we are going to be sitting here, you know, writing for quite a while. Your Honor, I think the big thing was-

THE COURT: Is it fair to say that if you don't respond in writing you are not objecting to the request?

MR. HUBBARD: No, sir. No sir, not at all. It is just like the last Capital case where we had 120, 140 motions. Your Honor said you didn't want to be inundated by briefs and memos and all of that, that a lot of it we can walk in here, argue and Your Honor can rule without that waste of time. There are some things Your Honor

would probably like us to flush out, more than happy to do that. But I think that the real gist is, there were no written orders. I think Your Honor ruled from the bench on a number of things which is fine. But on that, but just to clarify, number 13, Your Honor has not ruled that we have to respond in writing to every motion because my take from what Your Honor is saying is that you don't want to be inundated with tons of briefs.

THE COURT: No, I don't think, if you want to respond you have the liberty to do so but you don't, I don't have any prejudice about it, but it seems to me that the law ought to be clear which way we are going to go. I mean it is just something that needs to be ruled on.

MR. YOUNG: Yes, sir. I just want us to, as best as possible, avoid things where we have a hearing and then we say we want to brief that issue so we have to get the transcript and then a brief and then a replied brief and then a rebuttal brief. And it is easier if we can flush it out on the front end. However Your Honor wants to deal with it, its fine.

MR. HUBBARD: And I agree, it would take an awful long time if we go down that road. But it becomes an issue of timeliness on these motions too. Like for instance, number 28 through 79 is before Your Honor today. We have got, in our possession, Monday of this week. So,

Your Honor, a lot of these, and the Defense acknowledged that, they were getting those to us. But that becomes an issue too, that we are going to have a hearing and then all of a sudden we get hit with 50 motions and then, oh, Solicitor, have you written a response. So I know Your Honor doesn't want to go that route.

THE COURT: I don't. We just got to rule on them, if you want to respond you can.

MR. HUBBARD: Right.

THE COURT: And they are making the motions, they obviously got a file on the front end, you have got to ask.

MR. YOUNG: Yes, sir. I guess the only one that I really would request the Court is the order to preserve notes that haven't been destroyed yet and that needs to be something that gets disseminated to law enforcement so that they don't throw anything away.

MR. HUBBARD: Your Honor ruled on that and we have passed that on to law enforcement. Of course we always do that as well, any notes they have we need, they can't destroy.

THE COURT: Okay. Well, and I ruled on that.

MR. HUBBARD: Yes, you did.

MR. YOUNG: You did.

THE COURT: Mr. Young, you want a written order

granting that motion?

MR. YOUNG: I just want to make sure that it gets disseminated. We have got so many enforcements, so many agencies involved in this case from the FBI to Mississippi to Alabama.

MR. HUBBARD: The only thing, Your Honor, we obviously broadcast that. Now, what was done four years ago, I have no idea but we have put them on notice. And, Your Honor, we always do that. In fact, I know in the past we have sat down with our paralegal, she has actually audited files and looked to see, multiple times, to see if there is anything we have missed.

THE COURT: Okay.

MR. YOUNG: I have identified for the Court and the State the motions that we would like to proceed on today, and we are ready to go forward on that if the Court is ready.

THE COURT: You want to start with number 18?

MR. YOUNG: Yes, sir.

THE COURT: All right.

MR. MADSEN: Judge, we would request that all evidentiary matters be heard in-camera, that Your Honor exclude any public, electronic, media. Obviously these are extremely sensitive matters. We are making this request under U.S. Constitution--

MR. HUBBARD: We consent.

MR. MADSEN: Okay.

THE COURT: All right. Now, let me ask y'all this. If I say, okay, we are going to do any evidentiary matters in-camera or is there a potential landmine that we are going to get from WKDK in Newberry, I want to use them as an example because they are not going to come.

MR. MADSEN: And I would assume that the State agrees with the same thing. Your Honor is going to hear a lot of evidentiary matters. Your Honor might rule that something doesn't come in, there has been a ton of pretrial publicity that none of us want outside of this courtroom. We want it heard in here and if there is a piece of evidence or a photograph or something that they want to get in that gets disseminated then you have the potential to taint the jury and then you lead to a situation where we might have to go somewhere else, which I know they don't want and we certainly don't want.

MR. HUBBARD: Your Honor, not to cut Mr. Madsen off. I think we both have an interest as well as Your Honor to make sure that this isn't tried in the media. Obviously if say, the State newspaper, somebody files a motion with Your Honor, Your Honor can have that heard. We would certainly, I think both parties would like to be there to have a say. We can cross that bridge when we get there

but I think both parties agree these matters should be handled like they are being handled today.

THE COURT: I agree with that. So, to the extent we can and it is not objected to, we are going to handle all evidentiary matters in-camera.

MR. YOUNG: Thank you, Your Honor. That would be motion number 19, the motion out-of-state, provide written notice of evidentiary non-statutory aggravation that the Solicitor may introduce at any phase of the trial including rebuttal and require the Solicitors to provide such notice no later than 30 days after the discovery of such evidence. I will rely on the pleadings, Your Honor, just to notice the motion on what the State intends to present in aggravation.

MR. HUBBARD: Your Honor, we will be doing that. Obviously we are still on the collection phase right now. But we will be doing that.

THE COURT: So you will have to provide that no later than, no shorter than 30 days for discovery. Okay.

MR. YOUNG: Thank you, Your Honor.

MR. GRAHAM: Excuse me, no later, the timing they are asking for was what, I just want to make sure.

THE COURT: After you find this evidence they want to know it within 30 days.

MR. HUBBARD: Your Honor, that's going to be the

issue. Right now we are collecting and evaluating it. Right now I can't even say where we are on discovery other than, I know for instance, we are waiting on their reports. We will be generating more at that point, rather than doing it piecemeal. What I had planned to do and what we have always done in the past, so it becomes clear, it is not a dribble effect that here is what we are planning on doing so that everybody kind of walks in and there is no issue about what we turned over three months ago versus now. And it is kind of a general notice.

THE COURT: What about something along, by a certain date, I mean September 1st.

MR. HUBBARD: Your Honor, I tell you what--

THE COURT: That would be 45 days out.

MR. HUBBARD: I would prefer this, Your Honor. As we go along, we have some more meetings, to just see where we are on that.

THE COURT: Okay.

MR. YOUNG: That's fine. Obviously there is some stuff that we know about from Tim's priors and stuff like that but we are aware of.

THE COURT: Y'all have got to provide non-statutory aggravation evidence. I am not going to put a timing on it but we are going to have status conferences and motions hearings of this type inside of 30 days from here to the

trial. I mean, we are going to be meeting regularly anyway. And so if you want to ask each time, do you have anything today. And they say, no, then that is fine, they don't have it yet. So we will address that issue at each hearing.

MR. YOUNG: Thank you, Your Honor.

THE COURT: All right.

MR. MADSEN: Judge, the next motion would be motion number 20. This is a motion that the State had filed a written memorandum opposing. We are requesting, in this motion, production of all matters involving, or victim impact statement. Obviously at any stage of the trial, certainly anything that is exculpatory or potentially exculpatory which I believe that they have to provide based on Brady and Kyles versus Whitley anywhere. And the victim's impact statement that we are requesting is that that is described in Payne versus Tennessee. We are basing that on the Fifth Amendment, the Sixth, the Eighth, the Fourteenth and then of the South Carolina Constitution Article I, section 3, 9, 10, 11, 12, 14 and 15. Obviously there are Constitutional guarantees for Mr. Jones to be able to confront adverse witnesses for the effective assistance of Counsel, due process and a reliable verdict. We believe that we should be provided this information, advance notice and provide it, provided that, obviously

under Payne versus Tennessee there was a concurring opinion in there that expressed concern over potentially emotional and unduly prejudicial and excessive nature of victims impact testimony. I will tell you a few things that obviously we know that we haven't been provided by the State but they might find additional information. We know that Amber, who had not see the kids in about three months, was talking to family members and receiving gift cards from them to take the kids out and used it to do this or to do that. She hasn't seen the kids in three months. If they develop any of that information we certainly believe that we would have, if there is any victim's impact in relation to her, that we have the right to be able to effectively rebut something like that. Additionally we know or we have been told that the State has met with Tim's parents and that they had, at least the father had expressed the fact that he is against the death penalty. We received notes from that meeting from Investigator Creech, there is no mention of that in there. That certainly would be exculpatory. Additionally we have been told by Amber's attorney that Amber has had a meeting and expressed to them that she does not want the death penalty. We have not received anything from them in relation to that. Clearly I think that that goes more so under Brady and Kyle versus Whitley, that that is

exculpatory and anything such as that ought to be turned over to us. And so we would make that request.

THE COURT: Right now you say there is two witnesses, potentially, that would have this type of testimony which would be Tim's father and Amber.

MR. HUBBARD: What was that, Your Honor, I am sorry.

THE COURT: Is that right? There is two witnesses potentially--

MR. MADSEN: What we are asking, for any type of, I mean those are just examples that I was giving to the Court that we know about.

MR. HUBBARD: I will start by addressing, if it is Brady or Whitley, we are turning it over. As far as the interview we had with the father, we turned that over. That is how they got that information. As far as Amber, we are still talking to her. But at the end of the day it doesn't matter what their personal feelings are on the death penalty. I do not represent them, I represent the State of South Carolina. We are seeking death. I have no problem, obviously they are on notice on how these folks feel apparently. I have not heard that from Amber's mouth, but to me it is of no effect. If they want to go into that, should she be on the stand, I have no problem with that. And any interviews we have we have done summaries, we will continue to do that so they will know,

not just the information asking for but everything else we have gone into. That is just how we do it.

THE COURT: Who else are potential victims in this?

MR. HUBBARD: Your Honor, I will tell you this, there is, there is Mr. Jones' parents and family; and then there is Amber. There is not a lot of other family.

THE COURT: I just don't see a large cast of characters, I say characters, not negatively.

MR. MADSEN: I agree. And that's--

MR. HUBBARD: And I do believe their personal feelings, at that point would be inadmissible. Now, if we are in the penalty phase, I know that is going to become an issue for you. But, Your Honor, it is not a question about what they want, their personal thoughts on the death penalty. Like I know Mr. Jones' father, he has expressed that he doesn't believe in the death penalty. Of course, he seems to be, he doesn't really seem to care what happened on this case. But, Your Honor, you can't put that before the jury. I mean, but anyway, we will be turning over everything in compliance with Brady and Kyles, compliant with Brady and Kyles.

MR. MADSEN: And, Judge, I guess my point is that, the Solicitor had disclosed about the father to me but we got notes that didn't say anything like that. We ought to be able to make, as far as, you know, Brady or Kyles

versus Whitley anything that deals with potential mitigation. And we understand that there could be argument that these things aren't appropriate. But we feel that we still should be, those things should be turned over. Additionally, we would request any hand written notes or any notes taken at that time because obviously we are getting something that is later been typed up and provided over to us. And so if there is any difference we certainly need those notes. Because like I said, the Solicitor and I had that discussion but then we get something from law enforcement and there was no mention of that and they are in the same meeting is my understanding. He was kind of, I guess the scrivener for that meeting.

MR. HUBBARD: We will do our best to turn all of that over, Your Honor. And I think part of the issue was, just the delay in getting that report done.

THE COURT: Okay. All right.

MR. MADSEN: And there is, I believe we filed in this motion, there was a proposed order for Your Honor to review, adjust.

THE COURT: Am I wrong in thinking that the request for production of all matters related to the victim impact evidence, is that not a real broad, the way Mr. Madsen described it, real broad request?

MR. MADSEN: It is, Your Honor. But if you look at Capital cases that is one area that has a tendency to kind of get them flipped. You are entitled to it, my understanding is from Mr. Young that that is something that is entitled in other states. I don't know if we have gone that far but it is something that is clearly important where it is extremely, because of the nature of it and the ability to be effective advocates on Mr. Jones' part, that that is something that we think that we need so that we can work on his behalf.

THE COURT: All right. Well, I guess being such a broad thing under Rule 5 and Brady, they are giving you what they have got. They are suppose to communicate with you what they got, as long as they are doing that then they are in compliance. If there is something that, I guess my problem is, I don't want to hold them to a standard that they don't realize what you are wanting. They said, we didn't deem it important and didn't seem to be, the victim impact evidence and therefore we aren't going to use it and we cast it aside. And you see it, oh, that is usually important. Your perceptions of the two things are different and I don't want to put them in a trap for not giving you a check mark beside a name.

MR. MADSEN: But at the same time, obviously, you know, we would request, obviously we would think that they

ought to air on the side of presenting it. Because what they, you know, we don't want them to be the gatekeepers of what they think is exculpatory or goes to mitigation. Because obviously, you know, we are not sitting here, they are not going to be in our meetings knowing what our strategy is. And so, you know, we need that information, they shouldn't be the gatekeepers of, we have determined that this isn't exculpatory or it doesn't go to mitigation of the punishment and we certainly do.

MR. HUBBARD: That's why we turn over way more than we typically are required.

THE COURT: Well, I am not going to grant the motion or deny the motion. I am going to require everybody to fully comply with discovery, Brady, Rule 5, keep providing the information to them. If they see something that they think there may be additional statements, drawing, representation of any type of victim impact evidence, then they can ask for it. And then if y'all have it then we will deal with it. But I am, I think thus far, from what I have been told and the way y'all presented it is y'all were giving more than you think you need to and then now they, y'all seem to be cooperating in the big scheme of things, in my opinion. You are not on the same team and all, you are advocating your side, y'all are cooperating with the discovery process fairly well from the Court's

perspective.

MS. MAYES: Yes sir, Your Honor. But the order that, the proposed order that Mr. Madsen just mentioned a few moments ago, it actually has a provision setting a prehearing on the victim impact child presentation. And I don't know if Your Honor has seen the State's returns, specifically on this motion. But we did file, yes sir, Your Honor, we did file a return specifically as to this motion 20. And specific notice and the hearing is not required under South Carolina law. There is numerous cases on point. What the Court found to be appropriate was the notice provided under the State versus Byrum case that, the testimony would address the victim's unique characteristics. And then secondly, the impact of the victim's death on the people around them. And that is what we foresee offering in this case, Your Honor. But the order that Mr. Madsen just mentioned has that language in it requiring a hearing.

MR. MADSEN: And like I said, that was a proposed order that Your Honor could adjust however Your Honor set forth.

THE COURT: I am not going to sign that order but I am going to allow the discovery to go in broad fashion it is going on, if something comes up and we can go back and readdress this.

MR. MADSEN: The one question that I had that I think Solicitor Hubbard had mentioned, and quite honestly wanted to just flush it out or find out. We have been told by Amber's attorney that she has met and expressed that she does not want the death penalty. I am not sure if he is saying that that is not true, that that didn't happen.

MR. HUBBARD: I will make it clear. We have not gotten that from her. And I will be honest, it is way at the bottom of our list of things to do because it, I don't have any problem with Mr. Madsen knowing if we hear that from her mouth. I don't have a problem putting that in writing. But obviously we have got a lot bigger things because we are seeking death regardless of how she feels.

MR. MADSEN: Did you hear from her attorney?

MR. HUBBARD: I have not heard that from her attorney or from anyone, I don't know if someone else in our office, it doesn't appear so. I will let Mr. Madsen and his team know when we hear that, if we hear that from her mouth I will put in writing and let them know.

MR. MADSEN: And I trust the Solicitor. I just wanted to know if maybe somebody else wasn't being truthful with us.

THE COURT: It is not being truthful or untruthful.

MR. MADSEN: No, no, I am not talking about them. I am talking, we got the information from someone else. If

that individual is not being truthful with us.

THE COURT: If Amber is making representations of that type to people, what Solicitor Hubbard said is that she has not made that representation to him.

MR. MADSEN: And that is what I was just trying to find out because we have been told that she did.

MR. HUBBARD: Well, I don't know who Mr. Madsen is talking to, I am not going to go down that road. All I know is what I got and what we have done. We don't have that. I will turn it over when and if she says that. But otherwise it is nothing that we really care about.

MR. MADSEN: Okay. I was trying to figure that out for myself.

THE COURT: All right. So if any statements Amber makes regarding any issue of that type y'all will turn them over, likewise the Defense do the same thing if she makes it to the Defense. I don't know that she will, probably talked to her lawyer and he may, I don't know. Y'all let me know what happens.

MR. MADSEN: Yes, sir.

THE COURT: Mr. Young, are you in 21?

MR. YOUNG: Yes, sir.

THE COURT: All right.

MR. YOUNG: Your Honor, the State has provided us with redacted discovery. So all of the contact

information for all the names and I don't know what page number we are up to, somewhere, 7,500, somewhere around there. So all the contact information, date of births, social security numbers, addresses, telephone numbers are blacked out in all of our discovery. Of course, we have been able to identify some people and find some people but we would really appreciate just a list of the people that are in discovery along with their contact information not blocked out.

MR. HUBBARD: Your Honor, just to jump ahead. Obviously a lot of those witnesses would be law enforcement officers, there are going to be, there may be mental health people, there may be professionals. And we are required, as Your Honor knows, to protect the identifying information of these people when we turn stuff over. I think they are asking for something way too broad. If they have specific people that they are interested in we will turn that over. Right now we don't even know who our witnesses are going to be. We are just talking to people right now. So, I mean, it is premature to know who we are actually putting up. But if they have got some folks in mind that they want to get, say a rap sheet or see if there is criminal history and to verify that we have not withheld anything, I am fine with that. But right now, talking about all witnesses, it is going to

be law enforcement and other professionals.

THE COURT: Is there any way we can perhaps do that, if you have a witness on there that you are not sure because it is John Smith and there is five John Smith's in the West Columbia area.

MR. YOUNG: I'm all right with that.

THE COURT: We can do it by a person by person, who you are not certain.

MR. YOUNG: Sure, I will give them a list of specific people and then we can revisit if that is acceptable to the State.

THE COURT: And then the law enforcement folks, you shouldn't have any trouble finding them, locals.

MR. YOUNG: The ones that are still here, yes sir. From our efforts to reach people, people have moved, people have changed jobs, Columbia entail shut down and sent those people, they are in Oregon, they are in Austin, they are all over the Country now. And I think the State certainly has better resources than what I can do on the internet to where those people are.

THE COURT: So if it is a non-law enforcement, if you will provide a list of names you want to, any information the State has, is that what you are good with?

MR. YOUNG: Yes, sir.

THE COURT: Can y'all go with that?

MR. HUBBARD: If he provides us a list we will do our best. If there is any issues I think it can be something we just get right back with you on a status conference.

THE COURT: All right. We can do that.

MR. YOUNG: Thank you, Judge.

THE COURT: All right, 22.

MR. MADSEN: Judge, this is another one that the State has filed a motion in opposition of. In looking at it, our request, at least the caption of it ask for the disclosure of the psychiatric histories. That is probably not the best caption for it because we are, not only are we requesting that but we were also requesting any arrests, convictions, any adult or juvenile of any of the witnesses, any probation or payroll records, any law enforcement activity. And then obviously any psychiatric or psychological records. Obviously there is a component of Brady and Kyles versus Whitley, we did not update this with the Blackwell case which I do think will be controlling as to the disclosure of any privileged mental health records. But that indicates that if we are going to get it from a particular witness then obviously that witness be given the ability to consent to the disclosure of those records. If they do not consent to it then a hearing be made that if Your Honor was so inclined in the Blackwell, I believe it was reservable because the Court

did not. But Your Honor review those records in-camera to determine whether those are appropriate. We are obviously making this request under the confrontation clause. Like I say, without that information would potentially limit our ability to conduct cross-examination on a person. But we believe that if the individual does not consent to those records that Your Honor should conduct an in-camera or review in making a determination. Obviously the importance of the witness and whether the records potentially contain exculpatory information that should be provided to us under the Constitution of Brady and Kyles versus Whitley.

MS. MAYES: Yes sir, Your Honor. The State has filed a return on this matter. And Blackwell is the controlling case. Your Honor, the State's objection is based on the motion from the Defense and just the blanket nature of that motion that they would somehow inquire as to this information to every potential witness in this case, which again would include law enforcement, crime lab personnel. If someone who is a teacher and will be testifying about their roll in this case as a teacher sought mental health treatment for marriage counseling or anxiety when they were 18, something of that nature would never be relevant or probative in this case. And so that's our number one objection, Your Honor, just a blanket nature of the

request by the Defense. If they can identify which witness or a specific number of witnesses that they are truly seeking information on, I think we would be able to work a little bit better towards trying to reach a resolution on this. But regardless, they would still have to make a showing to the Court as to why the information is necessary and that's going to be under South Carolina statute 19-11-95. That is their burden to show the good cause. And then once that is done it would have to be notice to the patient and the patient would be heard on the matter. And then if there is not consent, after that hearing or after proper notice is given to the patient then Your Honor would have the ability to review the records in-camera and that is the Blackwell procedure. But even then there is a series of factors that the Court would have to consider dealing with how material the witness is and how relevant the information is, whether or not it is remote in time, things of that nature. In the Blackwell case that witness actually saw the murder, she was, I believe, the ex-spouse of the perpetrator in that case. And so her information was a lot more material than I can imagine potential witnesses being in this case. We don't have any eye witnesses to the murder. So I guess that would be our first inquiry, Your Honor, which witness is it that they are potentially seeking this information

on. Because right now we have no psychiatric history or data on any of these witnesses.

MR. MADSEN: Obviously and certainly we are not asking for law enforcement who transported Tim from point A to point B had no discussions with him, had some kind of marriage counseling. That is certainly not what we are asking for. I will tell you that the witnesses, obviously, that we are most interested in would be Amber and any of the teachers.

THE COURT: Teachers psychiatric histories?

MR. MADSEN: Anything we know, my understanding is we have had at least one teacher, because of something going on along those lines, have been fired from the school district that taught one of the children.

MS. MAYES: Your Honor, I believe, we need a specific name. We have probably eight to ten school officials involved in this case. The three oldest children were all students at Saxe Gotha Elementary when they disappeared. One of the school officials is actually who first reported them missing to law enforcement. So I can't imagine that anything dealing with psychiatric history of one of the school officials would potentially be relevant in this case. But, again, we would need specific notice on that. As to Amber Jones, Your Honor, she is represented by Counsel. So first and foremost we would need to get

notice to her attorney, which we can convey that to him. But at this point we don't even know that there is a psychiatric history. And then we would give she and her attorney an opportunity to be heard on that matter and then allow Your Honor to conduct an in-camera with you pursuant to the guidelines of Blackwell.

MR. MADSEN: And, Judge, we can get them the name of the teacher, I have asked Mr. Young, quite frankly I don't recall the name of the teacher. There were about 600 names of individuals in there, I have got a list of them. We can certainly get them that name.

THE COURT: And so, just so we have an appropriate ruling on the thing.

MS. MAYES: We will still be required, Your Honor, under 19-11-95 to have the Defense make a showing for good cause. And, again, we don't even know at this point whether any of these people do have a psychiatric history. That's our primary objection at this point. They would need to make that showing and that would be the first prong of this analysis before we even move to notice to the patient.

MR. MADSEN: And we can do that to individual people that we think that it is necessary.

THE COURT: Okay, so y'all are going to do that?

MR. MADSEN: Yes, sir.

THE COURT: If y'all do that and find there is a potential psychiatric history then we can go forward and see if there are any records that are, may be relevant considering the Blackwell factors. But until then the State is not going to provide you anything on that issue.

MR. MADSEN: Yes sir, we will provide them with names.

THE COURT: Okay. All right, 23.

MR. YOUNG: Your Honor, 23 is, I will shorthand it as the ring motion, failure to state aggravators in the indictment pursuant to the United States Supreme Court, Arizona versus Ring. South Carolina has specifically decided this issue against the Defendant and not requiring aggravators to be put in the indictments, Capital cases. I am arguing that the South Carolina Supreme Court should revisit this issue in light of the additional arguments provided in the briefing which I will not, we think the South Carolina Supreme Court has gotten this issue wrong and that by requiring indictments to bring Defendants to trial the State should require aggravators to be put in the indictment in Capital proceedings.

THE COURT: Okay. And I am going to rule consistent with the law that the Supreme Courts of South Carolina has handed down. And if you get an opportunity to argue that to the Supreme Court, they change their mind then more

power to you. I am not going to require them to amend the indictments to show the statutory aggravating factors.

MR. YOUNG: Thank you, Your Honor.

THE COURT: All right.

MR. MADSEN: Judge, motion number 24 is a motion for the disclosure of any improper biased or prejudiced or grounds for any legal claim or possible basis for the disqualification of the Solicitor, court personnel or any other actors. Obviously a judicial officer needs to recuse himself when impartiality is reasonably questioned. Obviously disqualification is required if there are facts which will deny this Defendant the possibility of a fair minded, exercise Prosecutor's discretion and obviously any doubt should be resolved in favor of disqualification. And the Prosecutor must disclose on such facts that might support a reasonable inference that he would be disqualified. So obviously this motion is kind of kicking it over to the Solicitor and saying, hey, if there is any reason for this disqualification then obviously he needs to present that to the Court.

THE COURT: That's the rule.

MR. HUBBARD: Yes, sir.

THE COURT: You've got to follow it, follow the rules. But do you know of any potential biased that would bring this issue up from anybody on your staff?

MR. HUBBARD: No sir, Your Honor. As a minister of justice, I know I have a duty to make sure that we are all working forward on this without any biased or any kind of conflict. And also as a minister of justice I will turn the tables and ask the Defense because my obligation is both to you and to the Defendant, not Defense attorneys. So I am going to ask them to ask and put on the record the very same thing that they have no conflict, no one on their staff has any conflict and that they will not in any way impair the protection of their client in going forward.

MR. MADSEN: We do not.

THE COURT: All right. Well, if that issue comes up because sometimes it appears later, if it comes up I want to hear about it and we will deal with it right then. All right, 25, prior bad acts.

MR. YOUNG: Your Honor, this is a Lyle motion, just notice of prior bad acts.

THE COURT: Do y'all have any potential Lyle issues right now?

MS. MAYES: Not at this time, Your Honor. I will state that we have already disclosed through our voluminous discovery numerous events which would qualify as a prior wrong, other wrongs, subsequent bad act, even following the homicides and that he was found in

possession of drugs. So there will potentially be a more specific notice as we get closer to the trial date. As Your Honor has indicated, we will continue to have status conferences. And I think once we are about thirty days out we can potentially identify those in a more specific nature. But they certainly have discovery which addresses prior alleged events and drug use and things of that nature.

THE COURT: Okay. All right, 26.

MR. MADSEN: Judge, 26 is kind of the same as 24 except for basically it's putting Your Honor in the same position as the Solicitor as far as any possible basis for recusal.

THE COURT: I have done a self-reflection. I can't think of any potential conflict or basis I would have in this case because I know so few. I know the lawyers, all five of you. It is not from that, I have got no inkling that I have a potential reason to provide to the parties for a recusal. All right, 28.

MR. YOUNG: Your Honor, this is a motion to declare the Death Penalty Statute as written in South Carolina unconstitutional pursuant to Gregg and Furman and its progeny, South Carolina having 21 statutory aggravators has turned every murder into a potential Capital case. There is no whittling of death eligible murders in South

Carolina based on the number of aggravators. There is no way to commit a murder in South Carolina and not have it be death eligible such that we are back to where we were in Gregg where the death penalty is just arbitrary and capricious. That would be my argument.

THE COURT: All right. Anything, Solicitor?

MR. HUBBARD: Just for the record, whether it appears statutorily proper and okay to seek death penalty, we haven't had a death penalty since 2012. It is something that is, that is just one factor. And, anyway, we believe the statute obviously is constitutional.

THE COURT: My reading and understanding of the statute, it is constitutional so I am going to deny that motion. All right, 29, motion to prevent communications.

MR. MADSEN: Judge, that is just consistent with the rules of court and we would make that request that there be no ex parte communication.

THE COURT: And the only ex parte communication that I am aware of that is going on in this case are the communications that I have to have with the defense team regarding funding. That is occurring as it is required to do so. Aside from that, trying to do emails, scheduling things, joint telephone conferences and in-person status conferences and I think we all have done a good job of that.

MR. HUBBARD: Yes, sir. And, Your Honor, just so there is not any issue, I know Your Honor and I have had to talk a lot about scheduling because we have, obviously, a docket of a lot of other things on it. I don't want there to be any accusation that we are doing something toward, typically there is always a defense attorney in the room when we are doing that anyway because we can't talk logistics without the other side. But just so the other side knows in this case that there has been a lot of communication with you about logistics and scheduling on other matters.

THE COURT: And there has been scheduling other matters with the, obviously the biggest window of time requirement is this case. And, so yes, that has been done but only for scheduling. And Mr. Madsen's staff and other assistants have been a part of those also. But that is a big broad brush so I don't find scheduling over the next six months, discussing the trial rosters to be a violation of any factual ex parte communications, it is just scheduling. All right, number 30.

MR. YOUNG: Your Honor, this is a second constitutional challenge to the South Carolina Death Penalty Statute because it does not require that jurors determine that death be the appropriate sentence beyond a reasonable doubt pursuant to Ring and Apprendi. I am

aware that these issues have been decided against my argument, I am arguing that South Carolina has incorrectly decided these issues and should revisit them.

THE COURT: All right, your record is protected, we are going to proceed, proceed with this case under section 16-3-20 and the sections that follow in part of the constitutional, they are ruled otherwise and we rule otherwise. What about 31.

MR. MADSEN: Judge, that is a motion to strike as unconstitutional the articles regarding the imposition of the death penalty in Chapter three of Title 16 of the official code including 16-3-20 and 16-3-25, Your Honor. Our argument would be to strike the death penalty statute in violation of equal protection, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment and the Fourteenth. And also Article I, sections 3, 9, 10, 11, 12, 14 and 15 of the State Constitution. Obviously our argument is that the State must institute some type of uniform statewide standard to guide the process in deciding who should seek the death penalty in order to comply with equal protection. And the large majority of our motion is based on Bush versus Gore, the hanging Chad case where when fundamental rights are involved in equal protection the Fourteenth Amendment requires that there be some type of uniform and specific standard to prevent the arbitrary and

desperate treatment of similarly situation people. And in that situation you have the implicit right to vote, that was the basis of that which is implicit, not even written, here are the right to life, at least has the same constitutional protections as the right to vote. But the State must establish safeguards to insure that it does not treat its citizens in a desperate and arbitrary manner in regards to their lives and the absence of standards that govern the Prosecutor's decision to seek the death penalty in South Carolina leads to arbitrary treatment. In Florida they were basically, you had a, the same machines, using the same forms but in different locals, they were using different standards to decide whether it was a vote or a sufficient vote. And so there were basically a lack of standards. Here there are a lack of standards to guide local Prosecutors in their death penalty decisions and that leads, like I said, to an arbitrary nature of it. So you have some place as the Solicitor had mentioned, their last death penalty was 2012. But if you take a 20-year period, Lexington has quite a few death penalties that have occurred. But you look at Lexington as the sixth largest county in South Carolina, York is the seventh largest county in South Carolina and York has not had a death penalty in 20 years. And so while there is, as Mr. Young had indicated, where there are aggravating

circumstances that have been expanded, those are supposedly excluding or giving them a list of cases that they can proceed on but it doesn't provide them any type of system. And therefore we get back to Gregg where it is just kind of arbitrary. And I think that you have seen through the years that there have been numerous Justices that have kind of indicated it is almost like a lottery. You know, okay, this case we are going to seek death on it but you have this one out here that is worse and we are going to let that be tried as a non-death penalty case. So it has just kind of gotten back to that point where it is arbitrary. And so that would be our request is to find the articles, for Your Honor to find that as unconstitutional. I will say that, I believe this is an issue of first impression here in South Carolina. But like I said, it is taking the equal protection logic in Bush versus Gore which dealt with the voting rights and applying that obviously to the life of someone which we would say is obviously of higher importance.

THE COURT: All right, Solicitor.

MR. HUBBARD: Your Honor, obviously we believe the death penalty scheme is constitutional. We believe that we have shown, certainly by our practices, that we have not been arbitrary or capricious in how we have gone about this. In fact, we have been very, very cautious. We

haven't had a death penalty case since 2012, before that I think it was 2007, before that it was probably 2006. This case, we have a daddy who killed his five babies. It falls under the statute, but there are a lot of other factors we look at. We look at our evidence, we look at the heinous nature, I don't know how you get more heinous than this case. In all of the years I have been dealing with these cases, this is probably the most incredible case I have ever seen. But you also look at quality of evidence, our ability to go forward. We look at things like where is our court today, where do we think they are going to be tomorrow. We are having to figure that out which is something that, there is no training, no guideline for, there is not going to ever be. We look at our community, where are we today. There is so many factors we consider but we began with the statute. And the statute may, may in their view be defective because all murders, as they say, may fall under it. But, Judge, we are not seeking death on all the murderers we have. I had 35 pending murders when I became Solicitor just in Lexington. This is the only one we are seeking. So, there is nothing, any Court anywhere can say we are being arbitrary and capricious, particularly when they look at the facts in this case.

THE COURT: I guess it has been my observation, the

facts that are driven, the determination by the prosecutor, evaluate the facts and how they fit. I am going to respectfully deny that motion because I don't see that it being arbitrary because of the timing end of it, the number of Capital cases here in Lexington as opposed to York. All right.

MR. YOUNG: Your Honor, motion number 32 is the same logic applied to the plea bargaining process, that there aren't any standards, there is no review committee, there is no, anything about for Prosecutors on how and when they engage in plea bargaining or even require them to engage in plea bargaining. We believe that that is a violation of the Eighth Amendment to the U.S. Constitution and South Carolina Constitution and depravation of equal protection, due process in violation of the Fourteenth Amendment, the U.S. Constitution and the South Carolina Constitution.

THE COURT: All right, again, that is respectfully denied. What is Court Reporter tapes and notes, what is that.

MR. MADSEN: Judge, it would be just, I believe it is just the backup tapes that we are requiring. Your Honor might have seen this, I have seen this a couple of times where I have had to go in on PCR's to try to recreate a record. We have had a Court Reporter that had a car broken into and things stolen. We would just request that

those be made a part of the record, that if we do get to the point of appellate review and something was to happen there is the ability to look back at those to get an accurate transcript of the proceedings.

THE COURT: Can I amend your request to say that digital files, they are not tapes anymore. I think most of the Court Reporters are on digital files and I believe, since I have handled the case, we have only had two Court Reporters, Ms. Holston and we have had Ms. Johnson. I am not aware, I don't remember anyone other than those two ladies taking transcripts for our motions thus far.

MR. MADSEN: Well, I guess our request is that instead of the Court Reporter, I believe that they generally keep that, that those be made a part of the Court record so that we have it.

THE COURT: I think they can do, they can duplicate the digital files. They are going to keep their own copy also.

COURT REPORTER: That has to go through Court Administration, they won't let us let those go.

THE COURT: What I am saying is, I am going to make you duplicate it. You are going to keep it too just like you are suppose to but I can get you to duplicate the digital file and make it part of the Court record, we can do that. It is still going to be your file. I will look

into that and make certain we can do that. I am not going to require the Court Reporter to turn over their files. If I can get them to duplicate them I will. I think that is the proper way for them to do it, if it can be done. All right. We have been going about an hour and so I want to step off and stretch my legs. We will stand down for about ten minutes.

(Whereupon, a short break was taken.)

THE COURT: Okay, are y'all ready, we are on 34.

MR. YOUNG: Yes, sir.

THE COURT: All right.

MR. YOUNG: So number 34 is actually, it is a motion to challenge the execution procedure, particularly as it relates to lethal injection in this case. But it should also be challenged, electrocution or lethal injection or they are debating the firing squad or there is the nitrogen gas thing now. My request for the Court, rather than us having a full blown hearing on the execution procedures in South Carolina, would be to say that this motion is not yet ripe and then if it becomes ripe then we can have a hearing then and determine the scope of that hearing at that time.

THE COURT: I think that is appropriate. If it becomes ripe then you can argue it at such time.

MR. YOUNG: Thank you, very much.

THE COURT: Okay, 38.

MR. MADSEN: Judge, that was a motion for an identification hearing pursuant to Neil versus Biggers. The only one that we can identify right now is maybe a lady out of Alabama at a gas station. But just wanted to put the State on notice that if they have anyone who doesn't, you know, who says, hey, I saw Tim do this or that, that we are requesting a Neil versus Biggers. Like I said, the only one that we can identify right now is potentially some lady in Alabama at a gas station. The State might not even be intending to use her on that situation. That was our request under 38.

THE COURT: All right. So if they intend to use her then you will want to--

MR. MADSEN: Someone who doesn't know or make some type of identification that we have a Neil versus Biggers on that individual.

THE COURT: Okay. If they are not going to use the lady at the gas station--

MR. MADSEN: Right, if they are not using anyone for ID then obviously we don't have a need for a Neil versus Biggers.

THE COURT: That's fair enough. If anyone used for ID then y'all get a Neil versus Biggers hearing. All right. If the State intends to use a witness of that type

then your motion is granted. 42, we are on page two.

MR. MADSEN: Judge, this is a motion to prevent law enforcement, court officials, bailiffs, from placing any inappropriate influence on members of the trial jury. We are basing that on the Fourth Amendment, the Fifth, the Sixth, the Eighth, the Fourteenth, the Fifteenth and also the South Carolina Constitution. It is consistent with the general principles governing cases in which the death penalty could be imposed and it is obviously imperative that the Court take every reasonable step to lesson the risk of improper prejudicial influences upon a trial jury in a Capital case. And we believe any type of communication that prejudice should be presumed. And obviously you have situations and we put one of those in the motion such as in Mercer versus State which was a Georgia case where a juror asked a bailiff if they could have a portion of the witness' testimony and the bailiff responded to the juror by saying that the jury's would have to go with what they had. We are trying to prevent things--

THE COURT: To the extent I agree with you on all of it and I am certain the State does also. But to the extent that this will help I am going to have a meeting of the bailiffs and security staff, but particularly the bailiffs of limited communications with the jurors other

than timing, weather, meals, that sort of thing. Because I don't like and I have heard bailiffs before in different counties, well, here is what is going to happen next and they try to give an explanation and that is just not appropriate and I am not going to have it. So I am going to have a team meeting as the presiding Judge and the Clerk is going to be there with me that we are going to give instructions of what we expect from the bailiffs in the case and that is what I intend to do on this one.

MR. MADSEN: Yes, sir.

MR. YOUNG: Your Honor, motion number 41 is to declare a section of 16-3-20 unconstitutional as it does not allow for a jury to determine punishment if the Defendant were to plead guilty or guilty but mentally ill. This issue has been cited in South Carolina, I believe the South Carolina Supreme Court was incorrect in their decision upholding that provision and would ask that they revisit it.

THE COURT: So 41 is where someone enters a plea but then becomes a bench trial in sentencing as opposed to a jury trial.

MR. YOUNG: Yes, sir.

THE COURT: That is the procedure currently if we go guilty plea and then a Court determines the punishment.

MR. YOUNG: Yes, sir. That is guilty or guilty but

mentally ill, would deny the Defendant an opportunity for a jury sentence.

THE COURT: Has that ever been argued?

MR. YOUNG: Yes, sir.

MR. HUBBARD: Yes sir and our Court has said that is reversible error. If Your Honor were to rule for them on this motion it would reverse this case should we get to that point.

MR. YOUNG: It wouldn't reverse it giving the Defense what they wanted. But they had certainly said that that is the law and that the law is constitutional and that, no, if you plead guilty or guilty but mentally ill you don't get jury sentencing.

THE COURT: I think we will stick with the law that that is what they are going to do. But you have made your motion and you will renew it at the time, if that occurs, that you are requesting a jury's determination of the sentence. But we are going to stick with the statute.

MR. YOUNG: And our point is that we can't plead guilty but mentally ill, get cracked with the jury for acceptance of reasonability or be punished by not accepted responsibility and still going to a jury trial. Whereas if we could say guilty but mentally ill and still have a jury trial we would be able to get at least some benefit from the jury who may think that that is a mitigating

factor as the acceptance of responsibility.

THE COURT: Okay. Your record is protected, I am going to rule against you on that one.

MR. YOUNG: Thank you.

THE COURT: I am going to skip 41, we have already dealt with 42. So now we are on 44.

MR. YOUNG: Have we dealt with 42?

THE COURT: Yes.

MR. YOUNG: Okay. That was the bailiffs, sorry. Your Honor, this is just the motion to sequester witnesses prior to hearings.

THE COURT: If it is requested I generally grant sequestration.

MR. HUBBARD: And, Your Honor, generally on sequestration it is not an issue but I think they have gone a little bit beyond that. Obviously we don't tell witnesses what a prior witness said. I would just say that your standard, what I would consent to is your standard rule on sequestration, that that is what applies. Obviously we typically keep witnesses separate, whoever testified and then those that testify we don't let them go back in that room, we do give them instructions on what they are suppose to do. And typically I think that is how Your Honor has asked us to handle it in the past. And that is what we would be doing.

THE COURT: We have a practice of that type, is that suitable?

MR. HUBBARD: This is prior to voir dire as well so I am not exactly sure exactly what they are asking for.

MR. YOUNG: Your Honor, looking back at my notes. Right now all I would request is that the witnesses be sequestered for the pretrial hearings. At trial I think there is going to be situations where it is appropriate for, particularly experts to see certain portions of testimony. I think we should deal with that on a case by case basis.

MR. HUBBARD: I guess my confusion is this. Sometimes we meet with more than one witness at a time in prepping a case. I don't want this rule to somehow get involved. That is why I am comfortable for how Your Honor has generally done it. And just ask, sure if we have a hearing and we are taking testimony to sequester, but when we are prepping and preparing, Judge, when I go to like Mississippi I am going to be sitting in a room full of officers.

THE COURT: I don't think it applies there, I think it applies in the courtroom. What about the voir dire, prior to voir dire, what do you mean. You are just asking for the general sequestration during court proceedings?

MR. YOUNG: I will modify this request to just

request sequestration for evidentiary hearings, witnesses testify at evidentiary hearings, pretrial and we will deal with trial stuff later.

THE COURT: Absolutely, okay. That is granted but you can talk to multiple witnesses in a room getting them ready and so can the State. They don't have to be sequestered during non-court proceedings.

MR. YOUNG: Yes, sir.

THE COURT: The court proceedings is to sequester.

MR. YOUNG: We are good about that, thank you.

THE COURT: I have got it, I know what you want now. What is an impartial witness monitor?

MR. MADSEN: Basically the way the sequestration is done right now is, they are the ones who are doing it. Given the fact that this is a death penalty case we are asking for basically a neutral third party person to be there to enforce that. Basically we are asking the Court to appoint one or more people to act as a witness monitor. They would be responsible for supervising the witnesses both before and after their testimony to ensure that there is no discussion of the testimony with other perspective witnesses or with witnesses that are subject potentially to recall.

MR. HUBBARD: Your Honor, we object. This almost pulls you into this process that, it pulls you off the

bench and into the rooms of our office. Judge, sometimes prior to putting people up we are still working those witnesses. We are still talking to them. And to have some other party back there, this has never been done, to my knowledge not in South Carolina. I don't know anywhere, frankly if I can't be trusted to manage our witnesses and comply with Your Honor's current ruling then that is something Your Honor is going to be dealing with me on anyway. But this is just, who would that neutral person be.

MR. MADSEN: Our request in this was someone such as a bailiff.

MR. HUBBARD: And they have just questioned whether the bailiffs can be trusted. Your Honor, when we are back there, when we are back in our office we are working our case and very often before they are up, I might have a witness on the stand here and Mr. Graham may be back there talking to those witnesses. I don't know why anyone else related to the court, working for Your Honor would want to be back there and then later there be some kind of accusation that a bailiff who is bringing your lunch has told you what we are doing back there.

THE COURT: I am thinking the bailiffs, in my team meeting with the bailiffs, bailiffs are very, to the extent I can use the bailiffs, if they hear any

conversations they will report them back to me and we will deal with them then. But I am not going to give somebody a part in going into a witness room or in your witness room for that matter. But the bailiffs will be on, they generally are, listing and reporting any unusual conversations back to the Court. But I am not going to appoint an impartial witness monitor.

MR. MADSEN: Thank you, Your Honor.

THE COURT: And 46, I kind of standardly do that. I manage the courtroom in that fashion. I don't like displays of emotion and sighing and shaking heads, that just annoys me, either side. But I had a lot when I am looking at one table or the other and there is a victim's family behind there and they give me all sort of body language. I don't like that, I don't like the way it impacts it. So I will manage that myself.

MR. YOUNG: Yes, sir.

THE COURT: It is not a problem. 52, we talked at a pretrial status conference about the management of the jury. My inclination, I think I told y'all was that, with very rigorous instructions to the jury once it is succeeded, I am going to let them, unless there is some reason not to, let them sleep in their own homes. I think that is better, they will sleep better provided they follow the instructions of the Court. That would be my

inclination where we do not sequester them and take them and take them away from their normal routines and families and pets and whatnot. So, I am in agreement with that right now, that would be, my lean would be going that way.

MR. YOUNG: Thank you, Your Honor.

THE COURT: All right. 57.

MR. MADSEN: Judge, motion number 57 is a motion to declare the South Carolina death penalty scheme unconstitutional and preclude the prosecution from seeking the death penalty during the failure and meet the minimum constitutional requirement set forth in Furman versus Georgia and the subsequent cases after that. We base this, Your Honor, on the Fourth Amendment, the Fifth, the Sixth, the Eighth, the Fourteenth and Article one, section 3, 9, 10, 11, 12, 14 and 15 and also Your Honor on Furman versus Georgia and Gregg's versus Georgia. We believe that the South Carolina Capital sentencing scheme is arbitrary and standardless within the meaning of Furman and therefore it violates not only the State Constitution but also the US Constitution and that the arbitrariness and the standardless violate due process, cruel and unusual punishment, fair and impartial jury and fair and impartial sentencing. Your Honor, we have attached as 57b our memorandum indicating our arguments flushed out a little more. Additionally, I believe it was Mr. Graham, I

said 57b, I mean 57a, excuse me. I would like Your Honor to mark as a Court's exhibit and I gave a copy of this to Mr. Graham today, an article to be put as 57b to also supplement the record. Like I said, I presented a copy, I think Solicitor has a copy and we would like this to be marked also, I guess 57b, to also supplement our argument.

MR. HUBBARD: For the record, Your Honor, we just got that, this morning as well. So, I mean, obviously we believe the statute and all of it facets is constitutional, it has been held so and would obviously object to anything in these, in the memo and their arguments in support.

MR. MADSEN: And, Judge, if he wants to wait he might read the article and agree.

MR. HUBBARD: Our objection is also based on State v. Goolsby at 268 SE 2nd 31, 1980 case. Talking about statutory scheme and upholding it as constitutional. And, Your Honor, it has been also held by our U.S. Supreme Court.

THE COURT: Court's exhibit on this?

MR. MADSEN: Yes, sir.

THE COURT: All right, that will be so marked. Will it be easier to mark it as 57b?

MR. MADSEN: Yes, sir.

THE COURT: Make it Court's 1.

(Whereupon, Court's Exhibit 1 was marked for identification only.)

THE COURT: We have got it marked as Court's exhibit 1, also as number 57b, therefore it is referring back to the motion.

MR. MADSEN: Thank you, Your Honor.

THE COURT: All right, we are now on 62.

MR. YOUNG: Yes, sir. Judge, we haven't discussed really sort of security measures in the courtroom and what those might be like during the trial. Obviously we would like to be heard on that, like how many uniformed deputies, where they are positioned, those types of issues that could in order to, of course there will be cameras. We have talked about that a little bit in-chambers but I just wanted to file a motion, we can sort of put it at the placeholder to come back and make sure we talk about prior to the trial. I don't know that we have to have a specific plan today.

THE COURT: I think the management of the courtroom, whether it be media, victim's families, families of Mr. Jones, whomever, there has got to be an orderly management of the courtroom with people coming in and coming out, where they are seated, non-uniformed deputies in certain places, different things like that. That is part of the management of the courtroom and the media order that I

envision getting the media to having one source of information that would be disseminated outside. That coordinating of the courtroom management we will discuss later. And what your request seems reasonable, there are many facets to it so I think that will be something that we just put a placeholder there and work on that. And I will take any suggestions y'all think may be reasonable as to how to manage the courtroom and secure the inside and we will take law enforcement's recommendation what they feel comfortable with also.

MR. YOUNG: Yes, sir.

THE COURT: All right, 64.

MR. MADSEN: Judge, that is our motion for a daily transcript of any voir dire proceedings. Obviously we are asking this because, in this case particularly, issues that implicate the reliability and the integrity of the jury selection process. There is precedent that says that the Defendant is not entitled to this but I will say that those opinions generally predate some of the U.S. Supreme Court cases which deal with jury selection in death penalty cases. Obviously, before we can assert a challenge as to the Prosecutor's use of preemptory strikes we must be prepared to present evidence and arguments in a meaningful and effective manner. The transcript would obviously help that. Additionally, not only does it help

us for that but when Your Honor is going back to make a ruling and deciding, a transcript helps Your Honor to know exactly what the people said instead of us saying, hey, they said that. The prosecutor saying, well, we heard this and then Your Honor having to go back and getting those pulled anyway. So there is a element that makes it a much more, a efficient process because, you know, whether the prosecution is saying we are misstating or they are saying or we are saying that they are misstating, it just helps to have a transcript. And our request is for that, there be a daily transcript of voir dire. We believe that failure to give that would be an abuse of discretion, a right to a fair trial, effective assistance of counsel, due process of law, people protection and then also cruel and unusual punishment.

THE COURT: Okay. Well, I will hold that as a placeholder too. In having a daily transcript is very convenient except for the Court Reporter having to provide it. And so I don't know and I will tell you this. Ms. Holston likely will not be the assigned Court Reporter once we start jury selection because she and I have talked about it, she is enjoying being a grandmother very much so right now. Anyway, the likelihood that Ms. Johnson will be assigned the case, I say, if she can do that without having to certify that as the official transcript, what

they call it, I think what the Court Reporter calls it is a dirty transcript. If she can do that and it is not too inconvenient to her and then she can electronically transmit them to us, we will wait and talk to her to see if that can be done. I agree with you, I like the idea but I am not going to tell Ms. Johnson right now that I have ordered her to do that yet. I will talk to her first and say, are you comfortable doing that and if she says, no but. There is another Court Reporter that may do that, I may see if we can get the other Court Reporter. I don't want a Court Reporter being in an uncomfortable position of something that we are wanting them to do.

MR. MADSEN: That explains why we weren't getting dirty looks from her during the motion.

THE COURT: I have already addressed it because I asked her would you like to sit in this case. She said, yes, but no and here is why. She said she would rather not.

MR. HUBBARD: And, Your Honor, if we do end up going down that road which is in your discretion, talking to the whoever that Court Reporter would be, we would just want to make sure that, you know, it is understood that, though that person is doing their best effort to get an accurate transcript, hasn't been certified at that point as complete, don't want that to be an appellate issue later,

that somehow it varied from the official transcript. So I don't want to create a problem when there wasn't going to be one because we put a lot of pressure on a Court Reporter to double time them.

THE COURT: Here is what we will do. If we do that and the transcript is dirty, we will all say we are getting limited information, that is all we are getting. And if it comes something, determined to be something different later, that is just how it is going to be. It is not going to be, we didn't get the best transcript available at that time. We are going to get what we get and we all are going to agree to that. That is not going to be, I tend to agree with you on that.

MR. HUBBARD: My concern is that attorneys, this courtroom might agree that 20 years, if this case goes the way the State wants it to go, 20 years from now a defendant is sitting there with a new set of attorneys saying, this shouldn't have been done. That is what I am trying to prevent so I am just putting that on the record.

THE COURT: Okay, fair enough. We are not ruling on that, we are going to ask the Court Reporter can it be done and if so we will deal with it then. We have already addressed 66.

MR. YOUNG: Yes, sir.

THE COURT: With the bailiffs management by the Court

and the Clerk's office so we will handle that. 68, isn't that against the rules?

MR. MADSEN: Yes sir, and that is, you know, State versus Bryant there was a new trial granted in a Capital case because law enforcement and/or Solicitor's office investigators, so that was basically our motion.

THE COURT: I am not going to tell somebody not to break the law, they know not to break the law so don't break the law. That is standard. Okay, 72.

MR. YOUNG: Your Honor, this is a notice pleading and of course it is getting well ahead of ourselves. But I think the analysis, of course I still have to object during an argument, if an improper argument is made. I just put the State on notice of types of arguments that have been found to be improper and of course I would be arguing that once the State is on notice and then makes an improper argument we would talk about sanctions differently then, if they adopted on those.

THE COURT: And Solicitor Hubbard is well aware of some of the statements that have been reversible errors. Some of them have to be worked with, I think everybody is well aware of what is allowed and what is not allowed and what is crossing the line. So we will all play by the rules but you have to put them on notice. You will be listening.

MR. YOUNG: Yes, sir. I have to object and I am putting them on notice. Thank you.

THE COURT: And 73 is the same thing?

MR. YOUNG: Yes, sir.

THE COURT: Okay. The same ruling.

MR. YOUNG: Thank you.

THE COURT: 74.

MR. MADSEN: Your Honor, that is our motion for the jury to be able to view the execution process, the Supreme Court held that the fundamental respect for humanity underlining the Eighth Amendments, prohibition against cruel and unusual punishment gives rise to a special need for reliability and the determination that death is the appropriate punishment. The penalty phase is not only relevant but is obviously central. This evidence needs to be placed before the jury, the jury must fully understand the nature of the punishment options that they are being asked to consider. There is research and I think 57b contains some of it about some misconceptions or misperceptions that are shared by jurors. We believe that they ought to be able to review the execution process given our proximity and the Court's ability to grant jury views. We are going to Broad River Road so it is not like we have to go to Charleston or some place else a couple of hours away. It is simply a few miles down the road and

that would be our request that the jury be able to view how the death penalty is imposed.

THE COURT: On someone else?

MR. MADSEN: We would anticipate that the room be vacant at that point and time.

THE COURT: Okay.

MR. HUBBARD: Your Honor, obviously this has never been done before. I am thinking, well, who is going to be dieing because I haven't see anybody executed in South Carolina for quite a while. But obviously jurors have no business being part of that process. They make the already painful decision on what the judgment should be. But that would be highly inappropriate.

THE COURT: I don't think so, that just doesn't seem, I am going to deny that motion. To my knowledge that has never been done. Now, doesn't the statute read by lethal injection or by electrocution. The statute is published to them, is it not?

MR. HUBBARD: Yes, sir.

THE COURT: Okay, that's fine. They get that but the viewing of the room I don't believe is appropriate. 75.

MR. YOUNG: Your Honor, South Carolina law allows for the State to make a general deterrence argument. We think that is improper that they should not be allowed to make a general deterrence argument. And if they are going to be

allowed to make a general deterrence argument we should be allowed to submit evidence to the contrary and argue to the contrary. The South Carolina Supreme Court thus far has barred evidence that there is not a general deterring factor to the death penalty.

THE COURT: All right.

MR. HUBBARD: Your Honor, will make permissible arguments allowed by our court and the fact that they want to bootstrap something else on there we would object to. But Your Honor would be able to address our argument at that time.

THE COURT: I am thinking, whatever is argued, if y'all want to suggest for rebuttal, I will consider it then but I am not going to say up or down right now.

MR. YOUNG: Yes, sir. And our request would be to be allowed to present statistical evidence to the jury on murders, the States with the death penalty, crime rates to show that there is not a deterrent effect to the death penalty.

THE COURT: Oaky. And I will consider it then.

MR. HUBBARD: And I would just say right now I know what the law is and that would be inadmissible but we can address it later.

THE COURT: I am not going to grant the motion yet. I will hear it then if we get to that stage.

MR. YOUNG: Sure, I just got to be prepared to make, if the Court is going to allow us to make a presentation on that then--

THE COURT: Very unlikely to try to set new law by doing something different that is already the standard. Not likely to do that.

MR. YOUNG: So that would be, you would deny my motion and then I don't have to go to a statistician and do all of that presentation. You should just deny it now.

THE COURT: I am going to deny it now.

MR. YOUNG: There you go.

THE COURT: 76.

MR. MADSEN: Judge, that is a motion to preclude prison conditions, in other words, privileges that give someone who is serving a life sentence for the State to present saying that they have access to a yard, work, education, meals, canteen, phone, library, recreation, mail, TV and visitors. We believe that that injects an arbitrary factor into a jury's sentencing consideration and that is in violation of 16-3-25. It also violates the Eighth Amendment. Evidence in the sentencing phase of a Capital trial must be related to the character of the Defendant and the circumstances of the crime. And as I said, we do not believe that that is appropriate. There is some case law that we have included in the motion that

indicates, you know, the jury doesn't need to know when a Capital Defendant takes a shower or whether they will be lonely or withdrawn during their tenure in prison. So that would be our motion.

MR. HUBBARD: Your Honor, we have never brought this up in our case-in-chief in the past. It has always been a response to the defense when they talk about conditions in prison, what it is going to be like for their client, why the jury should sentence somebody to a life sentence. Then it is appropriate based in reply based on what they bring up. So I think it is premature at this point saying what they are going to bring up.

THE COURT: It sounds like a rebuttal argument to me. So I am going, it sounds like a motion in limine is what it sounds like to me. So we will sit on it, I am not going to rule on it but will be listening for it. So if y'all open the door, the State is not going into it but if y'all open the door by expounding on it then perhaps I will hear arguments from the State to see what they get to rebut. But not ruling on that. All right, 77.

MR. YOUNG: Your Honor, this is another improper argument motion.

THE COURT: Yes, don't, the State will require not to make improper arguments. So you can't do that. What is 79.

MR. YOUNG: 79 is the State's notice, the Defense's notice that they intend to present a not guilty by reason of insanity defense.

THE COURT: The State obviously does not have to accept that and they declined it, correct?

MR. HUBBARD: Correct.

THE COURT: All right, the Court will not rule on that. That is just you provide the State notice and the State provide to you the contrary notice.

MR. YOUNG: Yes.

THE COURT: All right. Those are the motions that are listed on my inventory. Do we need now to discuss some scheduling?

MR. GRAHAM: For scheduling, one thing that we haven't talked about, that we have submitted a proposed order for Your Honor to sign for the mental health evaluation based on the insanity defense.

THE COURT: I have that in my hand, a proposed order.

MR. YOUNG: I have no objection to the State requesting a DMH evaluation. They had, at a prior hearing, indicated that it was their intention to select a private evaluation. And we, of course, would object to multiple evaluations. The State can't have DMH do one and then a private one and then pick which one they like.

MR. GRAHAM: I was going to say actually we can but

we would have to provide it to them. At this time, Your Honor, we are asking to sign the order so we can start the process. We are still leaving open the option of hiring an outside individual. If we are going to have them be present in any interview with Mr. Jones we will obviously ask the Court permission to do that and notify the Defense and we can address that at the time.

THE COURT: That sounds plausible. Having a private person in there with the evaluation.

MR. GRAHAM: If we decide that we are going to go down that road we will bring that up to the Court's attention and let the Defense know.

MR. YOUNG: And we will object and ask to be heard on that.

THE COURT: All right. When y'all decide we will hear it.

MR. GRAHAM: My thought is that we go ahead and get the DMH order signed, get the DMH order started to go down that road and we will continue to flush out whether we are going to do that and we will notify the Court and them to have a hearing prior to any outside private person being present during that evaluation.

THE COURT: DMH order is signed. Step done and if y'all want to take additional steps we will readdress it here at the next status conference.

MR. GRAHAM: One big concern that we have, Your Honor, is that, we are still waiting for the Defense to give us all of their mental health information, discovery reports because the DMH person won't be able to make, they are going to be limited in what they are able to do if they don't have the information. And the longer they wait to get the information to us, when we talked with a DMH individual before, they were telling us they honestly need three plus months, I believe, is what they told us to do, a proper evaluation between the many documents and talking to the person and writing reports. We are starting to push that. So the longer they wait to give us that information it is going to slow down DMH.

MR. HUBBARD: And, Your Honor, it also has an impact on whether we do hire or retain another person who will also need time.

THE COURT: All right, when do y'all think y'all's reports will be forthcoming.

MR. YOUNG: Your Honor, I have, as of two weeks ago been sending weekly emails saying, asking for an update on the status. I haven't heard back yet and I think Dr. Dorney, who is doing our evaluation report, is in trial in Georgia but should be out today or this week. So, I hope to hear from her on Tuesday and can provide the Court an update then.

THE COURT: Well, I mean, y'all know as good as I do, one thing impacts another which impacts another and impacts another. So the ripple effect is going to be magnified the closer we get to the end, to a trial date.

MR. HUBBARD: And that is my big concern, Your Honor, approach the topic of the scheduling. Your Honor knows what we have on our plate now and in that just in fairness to our office, particularly with the motions we are being hit with, Your Honor addressed the motion the other day on a case out of the Tri-County on, you know, we have to try this in a timely manner. We have been hit with some more since then. We are being inundated so we are in a pinch. Your Honor knows that early in my term a case that we had held over from the prior administration. We had two murder defendants who burned a man alive in the trunk of his car. That case was dismissed due to lack of timeliness. We have had a number of these cases and so we have got a huge number of things we need to sit down with you on. And frankly, I am just telling you, we can't do it if October 15th is still the date and I have got to do that as well.

THE COURT: All right.

MR. HUBBARD: I do have a suggestion. I mean, if we know when we are going to be getting this stuff we can start making a little bit more reasonable timeline, once

we get this stuff in hand. Because ultimately I think what is happening for both the Defense and it will happen for the State is we are relying on a profession outside of this courtroom now to let us know when they can get stuff done but it kind of stops the train on these issues for us. And meanwhile we have got other issues we need to address outside of this case.

THE COURT: Okay. How about this, why don't we ask you and Mr. Madsen to report back as to the status of the reports next Friday.

MR. YOUNG: That's fine. I have got it, I was just checking my email to see. And I know that Dr. Dorney, we had talked about one of the orders that was submitted to the Court was for the depositions, particularly that of Amber Jones and I know that the victims attorneys had responded to all of us and agreed that if we added the attorneys for DSS and for whoever the attorney is for the Lexington, Ink., I think was the location that was sued by Amber and depositions taken regarding the sale of the spice. And they would be notified then, they were fine with it. I know that Dr. Dorney is waiting on an opportunity to review those depositions and finalize the report, those witnesses have not agreed to talk with us independently.

MR. HUBBARD: Your Honor, obviously we would love to

see those depositions too. Our concern is I think we have only really talked to one attorney and that is Amber Jones' attorney. The other attorneys we can't speak for, I don't know what their position is but I think they have a right to be heard in front of Your Honor on that. So if that is holding us up, that's something I think we would have to be, have that addressed.

THE COURT: What do you think, we need to bring the attorneys and talk to them and see why they are objecting to y'all?

MR. YOUNG: Yes, sir. I don't know that they are.

MR. MADSEN: That was, from Amber's attorney that was just a suggestion. But quite honestly we had not contemplated initially because we had had discussions with him saying, hey, if you get a court order we are happy with turning them over. And then I believe it was Mr. Graham, one of them said, hey, okay, we are okay with it but you might want to talk to this person and this person too because they might have interest.

MR. HUBBARD: We just can't bind other parties, that's all I am expressing to Your Honor.

MR. MADSEN: And like I said, we had not contemplated that, at least initially.

THE COURT: So what do y'all want.

MR. YOUNG: Can we just meet here next Friday and

give them notice to come in and see if they have an objection?

THE COURT: I have got civil court in Newberry that has been canceled so I can be here Friday.

MR. GRAHAM: I would just propose, Your Honor, since they don't know the answer we can have a hearing but in the meantime if they could just contact those attorneys and ask for their consent we may not need to have one and we can just move forward.

THE COURT: Okay. Why don't y'all communicate with them and then if there is going to be an issue we will address it Friday.

MR. YOUNG: Yes, sir.

MR. HUBBARD: I know one of the attorney's, Mr. Harpootlian, he is in and out of the State too. So I think a phone call behind the scenes would be a good way to do this.

MR. MADSEN: I think we are okay with him.

MR. YOUNG: Yes.

MR. HUBBARD: As far as next Friday.

THE COURT: He has been the one y'all have been communicating with without much trouble.

MR. YOUNG: Yes, sir.

THE COURT: Okay. It is some other employees of the store and whatnot. Those are the ones you are having an

issue with.

MR. YOUNG: Yes, sir.

THE COURT: Let me know, contact and if you have an issue with them we will round them up and we will deal with it next Friday.

MR. YOUNG: Yes, sir.

THE COURT: All right. And whoever they are let's get it in an email where I know who they are and the prosecution knows who they are. Give me the names in the loop of, we are having difficulty with these people and maybe the lawyers can be more reasonable when I get involved with them.

MR. YOUNG: Yes, sir.

THE COURT: What else?

MR. YOUNG: Your Honor, the State had asked us to identify the motions for, the evidentiary motions for July 9th, those would be number 27 with regard to suppression, improper roadblock. Number 36 is not testimonial but this case involves a large, large number of photographic evidence that the Defense would have issues with. I would like to get those to the Court so we can just sort of go through them one by one. And then, of course, we have number 39 which is the Denno hearing. There were a number of statements given and a number of interviews so we need to go through all of those. I believe it is necessary,

witnesses would be Wayne Thompson who was with the Smith County Sheriffs Department which is part of the roadblock; Charles Johnson, Smith County, Mississippi Sheriffs Office, part of the roadblock; and Marty Patterson, Smith County Sheriffs Office would be the three witnesses necessary to have a hearing on the roadblock. The photographs, I don't think we need to take any evidence on. And on the issue of statements, I believe the necessary witnesses would be Eric Johnson who is with the Mississippi Bureau of Investigation, under Sheriff Patterson, again, with Smith County; Adam Creech with Lexington County; Tim Jones, Sr., who will accept service in a United State subpoena and Dave Mackey with the FBI.

MR. HUBBARD: Your Honor, I would take this twofold. The roadblock, that is something that can be done. I do want to address the date on that again for other scheduling issues. But the roadblock is something that we can do, it may involve even more witnesses than the Defense has eluded to. As far as statements, Your Honor, we are going to be getting into the mental health stuff there as well. Is this admissible, they are going to have reports that we don't have now. You know, may have an impact on state of mind of these statements. I am sure their experts have looked at them to address them. The only way you can do the Denno stuff, Your Honor, I

believe, is like you would a normal trial right before trial. And the second aspect of this for us is financial, bringing all of these people out here. This would be a long, long hearing, almost a week long thing, I believe, if we were to do it this way. So I think the best way, both economy and also just, as a practical matter because we haven't received everything yet. We can address that roadblock at some point in the future but the Denno stuff I would do right before trial like you normally do.

THE COURT: You are suggesting we do the roadblock stuff in July and then the Denno stuff closer to trial?

MR. HUBBARD: I would like to address the July date again because as Your Honor now knows, when we first set that I brought to Your Honor's attention about the Northcutt hearing in July. And Your Honor had said, well, I will deal with that. And we have hit a roadblock on that.

THE COURT: Yes, we have. Y'all are not privy to that. We can talk about the other ancillary issues. Can we go off the record here shortly. Anything else you need to put on there, Mr. Young, for the time being?

MR. YOUNG: The only other thing that I made myself a note to talk to the Court and the State about was some juror questionaries, whether or not we are going to send them out, when we are going to mail them out.

THE COURT: We have not addressed that yet but we need to start working on that also. Let's go off the record on the scheduling.

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the County of Lexington, South Carolina on the 25th day of May, 2018.

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

August 13, 2018

Joy Holston

Joy E. Holston, Court Reporter

My Commission expires: May 2, 2026

State of South Carolina	)	Court of General Sessions
County of Lexington	)	Eleventh Judicial Circuit
State of South Carolina,	)	Transcript of Record
vs.	)	2015-GS-32-00188 2015-GS-32-00189
Timothy Ray Jones, Jr.,	)	2015-GS-32-00190 2015-GS-32-00191
Defendant.	)	2015-GS-32-00195

December 19, 2018
Lexington, South Carolina

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge

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

S.R. Hubbard, III, Solicitor
David Shawn Graham, Deputy Solicitor
L. Suzanne Mayes, Deputy Solicitor
On behalf of the State

S. Boyd Young, Esquire
Robert M. Madsen, Esquire
On behalf of the Defendant

ALSO PRESENT:

William H. Davidson, III, Esquire
Celeste Moore, Esquire
On behalf of SCDSS

Stacy S. Johnson
Circuit Court Reporter

I N D E X

E X H I B T S

NO EXHIBITS WERE INTRODUCED

(The following proceedings were held December 19, 2018, beginning at 1:41 PM.)

BAILIFF: All rise. The Honorable Judge Eugene C. Griffith presiding.

THE COURT: Good afternoon. Y'all be seated.

All right. What all -- I don't know what -- what all are we gonna try to get done this afternoon? We want to go over the questionnaire proposals. I want to make certain the scheduling -- the tentative scheduling thing that I put out is still a good scheduling order, I guess. I've been calling it a scheduling order. It might not be a scheduling order, but...

Also what else do we need to hear? There's some motions that were listed, some of which I thought we'd already heard, and I gather from the last hearing we had actually motions heard until -- Whitney's not here, I've got a different law clerk, so she doesn't have a recollection to say oh, yeah, you did this and you did that, but I thought I ruled on a lot of those motions --

MR. HUBBARD: You did.

THE COURT: -- and are we still waiting on orders? Are y'all exchanging orders or did I say I would do the order? Which I don't think is the latter.

MR. YOUNG: And I don't think -- the ones that were ruled upon as far as the -- not identifying alternates and

-- I know the State has a better list than I do, I don't know that we need it, a separate order for those.

THE COURT: Just tell me where we stand because we're gonna go through the questionnaire for certain. What else do we need to do in addition to that?

MR. YOUNG: I know that we need to talk about discovery and what else is out there and when we can expect to receive that --

THE COURT: Okay --

MR. YOUNG: -- information and the exchange of the information. The Solicitor and I talked briefly before the hearing today. Both of our experts are doing criminal responsibility evaluations; Dr. Dorney on behalf of the defense and Dr. Frierson on behalf of the State. Neither have produced a draft report or are anywhere close to coming up with a final report. I think that's sort of, you know, something that the State supposedly needs to deal with.

THE COURT: Do we need to put a fuse on them?

MR. HUBBARD: Here's the problem. I think there's a standoff. I know Dr. Frierson is still receiving, you know, a lot of information as we're uncovering it, but the one thing he's waiting on from the defense is their expert's, Dr. Dorney's, report. My understanding is it's kind of complete, but it's kind of not. She's waiting to

see what he says, so he's not gonna be able to do what he needs by looking at all of their experts and then all of the information we give to weigh out and sort it through. I think that's really the holdup for him.

THE COURT: Okay.

MR. YOUNG: You know, as they provide new information to Dr. Frierson or -- and us and they give it to Dr. Frierson, we have to give it to Dr. Dorney, too, including new discovery and, most recently, some 50 gigs of new information that was provided on -- in a Blu-ray format, which I don't have the ability to open or look at, for the State today. I brought them a hard disk. They're in the process of putting that information on that disk, but that stuff relates to criminal responsibility and, of course, Dr. Dorney doesn't have it yet because I don't have it in a format that I can give it to her yet and then she's got to go through it and incorporate that new information. So as new information comes in --

THE COURT: All right. Well, we've got to somehow say as of so and so date with what information has been received, by opinion is thus and so with the subject to new information may change his opinion. I mean, we've got to -- we've got to be able to put our foot in the door somewhere.

MR. HUBBARD: I have a suggestion.

THE COURT: Uh-huh.

MR. HUBBARD: If she goes ahead with what she has, makes a ruling, she can always do an addendum. But Dr. Frierson is working for you, so all of us, the State, there's a lot of work we can't even begin to do until he's done his job. So from our standpoint he needs to be able to get done, so we're trying to get him everything that we've uncovered.

For instance, we just had phone information that part of it was just trying to unlock stuff, we got it, got the experts we needed to do that, gave that to him, but what he's gonna need is something from her. Now if when he does a report she wants to do a addendum, Judge, that's fine, you know, we don't have a problem with that, but we're not gonna move forward. But I would propose that as the solution; go ahead and have her report on what she has because I know they've been working on it for a long time and she's had to be talking with these other experts. That's kind of, I think, the process, they've got their team, and then she can do an addendum and, Judge, we can -- we can take that that way. At least we're moving forward. That's my proposal.

THE COURT: I mean, why can't we do something like that? Because we've got -- we've got to have a starting point of this is my preliminary report as of December 20th.

MR. YOUNG: Sure. And she doesn't have to do a report at all. I mean, the State knows that her finding is that Mr. Jones is -- should be not guilty by reason of insanity. That's her -- that's her finding. What all she incorporates in her report and what all she refers to -- you know, I'd like to have a report, I think it's a good idea to have a report and have all the information incorporated in it, but she doesn't have to do a report at all. The State's on notice that we're gonna call her and as to what her opinion is. We've provided the State with all of those records that we have that we've given her. The State has all discovery.

The difference between her and Frierson is that Frierson has had access to information that she hasn't had. Frierson requested the State go out and investigate the electrical system out at the trailer, which they did and they provided to us and Frierson, but Dr. Dorney needs to go back and interview Tim as Dr. Frierson already has concerning that information. Dr. Frierson has arranged an interview with Amber Jones, who hasn't wanted to meet with us. That's fine, but that is information which is critical to a criminal responsibility evaluation, which only Dr. Frierson is gonna have.

Now I told the State today that I was gonna ask the Court to consider an order to tape the Amber Jones

interview by Dr. Frierson. I asked Dr. Frierson about requesting a court order for that information or requesting him to consider taping that interview and he told me that the Department of Mental Health's policy is not to tape interviews absent a court order, but he was still checking with legal about taping an interview of the spouse since she wasn't the one who was being evaluated for criminal responsibility. I haven't heard back from him regarding that, but that information would be critical to any criminal responsibility evaluation.

MR. HUBBARD: I think what I proposed is the way to go forward. As far as them saying Dr. Dorney doesn't have to do a report, Judge, since we started this thing we've been told there's gonna be a report. It's really up to them what they ask her to do. If they ask for a report, we'll get a report. That's gonna prompt this thing to go forward. Do they have to? No, they don't. But, Judge, as many experts as they have I know those experts want to see what the other has done; not go through their notes, but a report. We've been told the whole time we're gonna be getting one, so I think it's just the only way to go forward and she can do addendums and -- and if Dr. Frierson on hearing stuff thinks he needs to, too, that's fine. That's fine.

THE COURT: Can we get a preliminary report done by

the end of the year?

MR. YOUNG: No, sir.

THE COURT: Why not?

MR. YOUNG: Because --

THE COURT: I'm telling you, you had time. You had all fall. We've been going at it.

MR. YOUNG: Yes, sir. I don't even have -- I mean, we got 50 gigs of information. I don't know what's on it.

THE COURT: Well, I mean -- all right. Don't include the 50. This report is contingent on going through the 50 gigs. I can't keep kicking the can to go over the next amount of 50 gigs. I mean, she's gone through something to date.

MR. YOUNG: Yes, sir. She's gone through a ton.

THE COURT: Well, she can write a report to that that's she's gone through and then say subject to going through more information. I mean, you're always gonna have that. I mean, I can't -- I can't continue to have status conferences saying golly, there's more stuff coming in, they've got more of this and y'all have got more -- y'all are both saying the same thing to me. Golly, there's so much information, we can't organize it and our experts can't organize it because we can't organize it. I mean, y'all both are saying the same thing. You know, to date I've gone through these things and my

opinion is thus and so. I'm gonna -- you know, why can't we do that?

MR. YOUNG: If you'll let me check my e-mails real quick, I know that Dr. Dorney and I had discussed a date for a preliminary draft report to get done. Now she doesn't know about the new discovery information yet because I haven't sent it to her yet, and I know that she wanted to come meet with Mr. Jones again after the electronic -- the information about the electric system at the house. I -- if the Court could give me a minute?

THE COURT: Sure. Sure.

(Pause in proceedings.)

MR. YOUNG: Your Honor, I apologize. I can't put my hands on it right this second. My recollection is that she could have a draft with the information that she currently has by mid January.

THE COURT: I think our biggest struggle is everybody's -- there's so many different people out there and everybody's waiting on somebody else, for somebody else, for somebody else and if we don't put a fuse on everybody, we're not gonna ever get there. We all have high hopes, but it's time to cut bait, you know.

All right. What's this electrical issue with the house or the trailer? What is that? How does that have to do with this criminal responsibility evaluation?

MR. HUBBARD: Dr. Frierson had a question about it. So we have no real idea of what he's doing. Obviously maybe it will become clear when he has a report, but he's exploring that based on his conversations with -- with the Defendant and so obviously that's his field. We do try to give him the information he's asked for, otherwise, we wouldn't have known that would have been important for him at all.

THE COURT: And this is the circuit breaker box at the house?

MR. HUBBARD: No, sir. It's that there's an outlet, there's evidence that it went out and there's a question of what else went out when that went out and, you know, other things in the house. I think based on his conversations he's just being extremely thorough about certain factual allegations made by the Defendant about what happened and the way things were, so I think -- my assumption is he's trying to confirm what the Defendant has said for -- to verify his credibility, which is gonna be pretty important. That's been given to him.

Again, my concern is I know that the defense has a lot of witnesses and they're all talking, and they should, that's good, but this is your doctor appointed by you and the question is gonna be posed to him well, what about what all these other folks say. In fairness to him, he

needs to know what they're gonna say. We just got some stuff -- was it last week -- on what their other experts are gonna say. We just got that, turned that over to him, so now that's a -- that's a big wave of information that he's -- to do his job he needs to look at it, but the key person, their anchor is their Dr. Frierson, which is Dr. Dorney, who basically has everything but just hasn't put it in a report.

So, Judge, all I'm asking is if we get into mid January or later, we're really straining to get to late April.

THE COURT: Yeah.

MR. HUBBARD: So the sooner we can get it -- and I know -- I know it's a lot for all of us, but, Judge, we're trying to run on this thing and right now we're in -- we're in a stop.

THE COURT: All right. January 9th, it's a Wednesday, three weeks, seems like a good date to me. That will give somebody a deadline to work against like we all need.

MR. YOUNG: Your Honor, I'm in Florida on the 9th. Can we say the 10th?

THE COURT: No, I just want the report.

MR. YOUNG: Okay.

THE COURT: I mean, I don't care whether you

hand-deliver it. You make Mr. Madsen do it. You don't have to bring it to me, I just want it by the 9th. It's her doing, right?

MR. YOUNG: I mean, she's the one who's drafting it.

THE COURT: Okay. You don't have to be here to receive it.

MR. YOUNG: No, sir.

THE COURT: Okay. Just get it. Get it to -- certify to me that it's been delivered to the State by then, the preliminary report. It won't be final. I don't expect it to be final because every -- I think until we -- when the trial's over, y'all are still gonna be telling me oh, we just discovered something else this morning. That's just gonna be the way -- the way we've got to deal with it. That's just gonna be our struggle, so that's okay.

I mean, can she get it done? I want that to be her deadline, not -- I don't want another hearing. We'll probably have another hearing other than that.

MR. YOUNG: Yes, sir. I mean, I'll inform her that she's been ordered to get something produced by the 9th.

THE COURT: All right. And then we'll have that delivered to the State by then.

MR. YOUNG: Yes, sir.

THE COURT: Excellent.

MR. HUBBARD: Thank you, Your Honor.

THE COURT: And then Dr. Frierson may need a deadline. I'll give him one, too, if he wants.

MR. HUBBARD: Your Honor, I have no idea where he is because obviously since he's yours there's much more of a limitation on us sitting down and saying hey, what have you've got, where are you.

THE COURT: You don't think he'd be okay with me saying by that Friday?

MR. HUBBARD: He might jump out a window.

THE COURT: All right. Now -- all right. I hope Dr. Dorney can do that. I'm gonna expect it done and that will keep us on track to keep moving forward.

What else is still out there along these two lines before we get into this questionnaire situation?

MS. MAYES: Your Honor, regarding outstanding discovery, I know that was one of the matters that was set forth in your scheduling order. The defense and the State entered a consent order back on November 20th of this year and that was for records of the South Carolina Office of Inspector General. That's an oversight agency and they review the actions of DSS. In this particular case, they're looking at the actions of Lexington County DSS. That order that we entered in November supplements a previous order that Your Honor issued in this case for DSS records and we're at the stage now where because

experts are relying on all this discovery if there's anything out there we both need it. Both sides need these records.

We have provided the defense with the initial discovery from Lexington County DSS during the initial investigation of this case, but we -- both sides believe there's still DSS records out there that we don't have and that's gonna include Child Protective Services' records, dictation, caseworkers notes, things of that nature.

DSS is here, Your Honor, because in response to the consent order -- and I'll go ahead and pass up a copy of that, but in response to the consent order that was issued in November they replied that they wished to be heard on that and we have not yet received any records.

Now their position is that there may be some attorney work product in there. We have no objection to the Court conducting an in-camera review in the limited aspect of if they can separate out what they believe is attorney work product, but, Your Honor, both the State and defense, we're looking for the true Child Protective Services' records, the dictation, the caseworker notes, and those have never in the past been protected by any privilege that we're aware of.

THE COURT: They are -- are they protecting that

because of the civil case that was initiated by Ms. Jones?

MS. MAYES: Your Honor, their attorneys are here, so I'll give them the chance to be heard on this. They did e-mail today and ask to be present.

THE COURT: All right. Mr. Young and Mr. Madsen, are y'all okay with me hearing from them?

MR. YOUNG: Yes, sir.

THE COURT: Y'all want the same information I'm certain.

MR. YOUNG: It's a consent order. We agree.

THE COURT: Okay.

All right. Come on forward, lady and gentleman.

MR. DAVIDSON: Your Honor, I'll set up right here, if you don't mind?

THE COURT: That will be fine.

MR. DAVIDSON: It looks like they've got a pretty full situation.

THE COURT: Well, this courtroom is cozy.

MR. DAVIDSON: Your Honor, my name Will Davidson. I'm the attorney in the civil case on behalf of the Department of Social Services. Celeste Moore is assistant general counsel for the Department of Social Services.

This case was brought back -- the first claim essentially was brought by -- Mr. Hyman Rubin wrote the Department making a claim. I think it was for like

$3 million against the Department. Subsequent to that, a lawsuit was filed and I was retained to represent the Department. As part of that representation, I received a copy of the CPS investigative file from Lexington County. My understanding is that that file was produced to the Solicitor's Office and my understanding is it also included dictation and other documents. It was their complete file on the Jones family situation. In fact, when I reviewed Mr. Rubin's claim against the Department, it had in it references to that file and we had not provided it to Mr. Rubin. I would assume the Solicitor's Office may have provided either that entire file to the family of Ms. Jones or they provided it to Mr. Rubin and, in fact, during discovery it was -- part of that file was produced to us in response to some discovery. So my understanding is they have the entire CPS Lexington County file that deals with the Jones family; both Ms. Jones and Mr. Jones and all of the children, which includes dictation.

In anticipation of litigation and in accordance with protocol at the Department because they obviously have several suits involving deaths of inmates -- of inmates, excuse me -- of individuals like the Jones children, including infants, Ms. Moore requested the Office of Investigation to prepare a report going through the

actions of DSS, including policy matters, to review in anticipation of litigation. I mean, kind of when you have five children killed, you can anticipate that there's probably gonna be a lawsuit coming down the road. And in most instances, any time you have a child that's involved with the Child Protective Services that may die either in the custody of the Department or in the process of the investigative department, there's usually a lawsuit.

So Ms. Moore had the Department's investigative services, which reported to the Office of General Counsel at that point in time, prepare a detailed report not only of the investigation of DSS, but also looking at policy matters to determine whether there were any issues in regard to whether or not the caseworkers followed appropriate policies within the agency. I have that report. I've been using it in anticipation of litigation and in preparation of my case, which is in Richland County, but subject to a motion to change venue to Lexington County.

We were not provided notice of the hearing of the order. I have a motion prepared, which I can file today and I can give copies to both sides, on something like this is something that I believe the Department should have been placed on notice of. We did not consent to producing those records and, in fact, we object to

producing those records. And there's several grounds for the motion, not the least of which is we didn't have notice of it and, number two, the documents they request are attorney/client work product privileged documents, which are not discoverable either in the civil case or in the criminal case. They go to the defense of the Department in the civil case.

We have an affidavit from Ms. Moore about behind the scenes how it came about; that, in fact, she was the one that requested the Office of Investigation to do the investigation. She consulted with them during periods of the investigation, she received a copy of their investigation, met with them, all of which were done in accordance with protocol in anticipation of litigation.

So it's our position that those documents are protected and not subject to disclosure either to the State or to the Defendant in this matter. And I have a copy and I'd be glad to show it to you.

THE COURT: Uh-huh. What are y'all looking for? I mean, y'all are looking for that?

MS. MAYES: And, Judge, just to clarify, there was a reference to Mr. Harpootlian getting a file. Whatever he got would not have come from the State, it would not have come from the Solicitor's Office or to my knowledge from law enforcement. I believe you may have been the judge,

I'm not a hundred percent sure on that, but pursuant to the civil suit Mr. Harpootlian got a court order that allowed him access to the DSS records, so he had it in the order.

THE COURT: He got an order giving the access or a copy or an image of the phone to proceed on the civil case, but subject to an order of protection that he couldn't disseminate to anyone else. It was purposes of discovery in the civil case is what I remember. There may have been other stuff in it, but I remember the phone was in evidence, they wanted a copy of it. To not violate the discovery protection, they gave him the phone to be imaged and returned and so he got a copy of the hard drive and all the data on the phone for whatever purpose and DSS also was gonna get a copy of it. It was shared.

MR. DAVIDSON: We did. We have it.

THE COURT: It was shared to both sides.

MR. DAVIDSON: You're absolutely right, Your Honor. That is what happened. There was a phone that was in the -- I believe in the property of the Department -- or the sheriff's department.

THE COURT: To my recollection, it was Ms. Jones' phone.

MR. DAVIDSON: It was Ms. Jones' phone and they got the text messages and things like that off of it and

Mr. Harpootlian provided it in accordance with the order, I think which we consented to. We got copies of all the imaging of that phone that he got from some expert he used to get it.

MS. MAYES: Right. So how --

THE COURT: Right. It was, yeah, a phone -- a computer expert of some type.

MR. DAVIDSON: Yeah, forensic.

THE COURT: But that was -- that was within this case shared with that case. Why isn't the converse true? Why can't --

MR. DAVIDSON: Well, you have. And, in fact, I believe there's an order allowing the production of depositions that were in our case.

MS. MAYES: And we got those, Your Honor. We did get those.

MR. DAVIDSON: So we provided information to the State and to the defense, I believe, of the depositions that were taken in the case involving Amber Jones against the Department of Social Services, so there has been exchange of documents; not only of the phone to us and Mr. Harpootlian, but the discovery that was done in our case. And I can't remember all of the parameters of what we produced or what Mr. Harpootlian produced to the Solicitor and to the defense, but we have exchanged

documents back to them in that case. The original records of DSS, my understanding, were provided to the sheriff's department and the Solicitor's Office at the beginning of their investigation into the death of the children. And the reason I am aware, and I did not bring my entire file because it would probably take this whole row, but my review of some of those documents that they produced to us they had notations in them that did not come from the original DSS records and Mr. Hyman Rubin who, in fact, was the attorney for the family on October 13, 2015, sent a letter where he listed out various things that could have only come from the CPS file, and I have a copy of that letter I can show you if you'd like to see it.

So my understanding is I don't -- we don't have a problem if they want another copy of those records. I have them available. I can make a copy of them. They're actually Bates numbered by my office so I can keep up with what I am producing. I can reproduce those and give them to them on a disk if they don't have all of them, but my understanding is they were provided all the Child Protective Services files or any files that dealt with the children from Lexington County.

THE COURT: Y'all have got that?

MS. MAYES: And, Your Honor, if I can clarify further, as to Mr. Harpootlian's role in this, we're not

sure where he got the records from. Obviously we did have a previous Solicitor in office. There could have been an exchange of information there, and I'll let Mr. Young expound on this as well, but we're both of the belief that there are records out there pertaining directly to the Child Protective Services' investigation conducted by Lexington County DSS that we do not have and I think Mr. Young can explain that further.

So, again, we're not looking for privileged attorney work product. What we're looking for is a full scope of all dictation, caseworker notes, et cetera, related to the May 2014 investigation, the July into August 2014 investigation, and then there was a previous 2011 investigation.

MR. YOUNG: Your Honor, I'd just say I know that there are a number of references to pictures and other notes being made in the DSS -- you know, where they're -- where they're talking about what they did and they took pictures and all this kind of stuff. We have found some of those pictures, but we do not have a complete copy of those files that include the pictures that they took, the conditions that they witnessed. We have their notes and their report that they filed when they got back, but we don't have the ancillary documents that go with it.

THE COURT: All right. Now -- all right.

We talked about the Child Protective Services' file. Ms. Mayes, you mentioned something else also other than the Child Protective Services' file, didn't you, earlier?

MS. MAYES: The dictation and caseworker notes, Your Honor. I believe all of those would be part of it. Our understanding is that after that initial Lexington County DSS investigation, this group, the South Carolina Office of Inspector General, then as an oversight agency reviewed what actions DSS took, so there may be something there as well that we would be entitled to, but we just don't know at this point because we don't know what they have. But both the State and the defense believe that the records may be more involved than what we have received.

So if they're willing to give us the full Child Protective Services records from Lexington County DSS, we'll be glad to take those and then compare them to what we had originally and then Mr. Young can let us know as well if he thinks that we are still missing items.

THE COURT: All right.

MS. MOORE: If I may be heard, Your Honor, I'm Celeste Moore with the Office of General Counsel of DSS, and as Mr. Davidson spoke I did consult with our Division of Investigations. There has been a restructuring since 2014 and the Division of Investigations is now under the supervision of our DSS Office of Inspector General. Now

when Ms. Mayes references the South Carolina Office of Inspector General, which is the oversight agency, I'm not really sure whether she's talking about our, the DSS investigative entity, our statewide entity, and if she's talking about the DSS investigative entity, it is our position that those records are attorney/client privileged or protected by the work product doctrine because I -- the investigation started at my request and I consulted with the investigative entity or agent during that investigation.

And with respect to all of the CPS records, I am aware of some of the requests that came in to the Division of Investigations shortly after this incident and that our agents were cooperating with law enforcement in terms of producing records. So certainly if they do not have all of the CPS records by the Lexington County Department of Social Services, we will produce those records to them.

THE COURT: Well, of course -- and they're not sure. That's what -- I think that's what I'm getting from them is they don't think they do.

MR. DAVIDSON: And if she doesn't mind, I'll -- I have produced all of those from DSS in the civil case. And let me tell you when -- my understanding was when this case occurred because of Ms. Moore's concerns and request that they investigate -- the Division of Investigation

investigate for the Office of General Counsel because of concerns about litigation, the Department's Office -- Division of Investigation -- I have to try to keep it straight what was going on back then -- they, in fact, took custody of all of the records that were in Lexington, the CPS records, and they still have those records in the custody of -- what's the -- what's it called now?

MS. MOORE: Now it's the Office of Inspector General.

MR. DAVIDSON: The Office of Inspector General. They have the original records.

THE COURT: And Ms. Mayes has been referring to that as the state office. Actually it's the DSS office.

MR. DAVIDSON: It's the DSS -- it's the DDS state office.

MS. MAYES: And what they've just described is exactly what we'd be looking for, those original records which were seized I guess you could put it from Lexington County DSS at the onset of their investigation.

MR. DAVIDSON: And in response to the order that we didn't know was coming, I have talked with the individual at the Division of Inspector General, I hope I get all of this right, and they are in the process of preparing -- actually I was supposed to meet with them at 3:00 this afternoon to try and make sure they had all the records, compare them with what I have, and then I can produce a

copy of those records or if they want to look at the originals, I can arrange for them to look at the original records either at my office or at the Division of Inspector -- the Inspector General's Office, Your Honor, either way. But I have a copy. They're on my computer. I can -- I can't, but somebody can put them on a disk. I can't. I still use a fountain pen.

THE COURT: All right. Both sides -- if Mr. Davidson produces the copy he's describing to both sides, they're Bates stamped. Do you have an index of what's there?

MR. DAVIDSON: I've got -- it's all Bates numbered. I think it's by -- I think it's by encounter, Your Honor. I think there were three or four encounters with the Jones family, either Ms. Jones or Mr. Jones, over a period of time, and I think I've got them Bates numbered by encounter. I may be wrong.

THE COURT: All right. Now what you're suggesting sounds like a good step in the right direction.

All right. Ms. Mayes first and, Mr. Young, you second, is that what you're looking for?

MS. MAYES: It is, Your Honor.

THE COURT: Sir?

MR. YOUNG: Yes, sir.

MR. DAVIDSON: And I'll make sure --

THE COURT: Can you -- can you let me know you let

the attorneys have it?

MR. DAVIDSON: I can and I will -- I know there are some photographs in the file and I have those -- I believe all of those are on my computer, too. I can put them with the production so you can see all the photographs. There's some of the house or the trailer when it was in disrepair, there's some of the children when they came to the house to do their investigation, that type thing, but I can -- I can get that also.

MR. YOUNG: Your Honor, that's fine. I would just request that a copy of the stuff for which privilege is claimed be copied and filed with the Court under seal as part of the file.

THE COURT: All right. Other than this file, what else do you got that you claim privilege on?

MR. DAVIDSON: I've got privileged documents, Your Honor, that were prepared for Ms. Moore in anticipation of litigation that are essentially the Inspector General -- not Inspector General, the Division of Inspections' review of the case and providing information to the Office of General Counsel about what went on and potential issues surrounding the potential litigation in this case.

And I've got a copy. I can -- you know, I can seal it, give it to you and let you look at it. I just -- because it is attorney/client privilege, obviously I

don't want that document out in the public, especially since I'm now defending a lawsuit where they're claiming $3 million against the estate -- or against the State. Excuse me.

THE COURT: Against the State, yes, sir.

MR. DAVIDSON: Yeah.

MR. YOUNG: Your Honor, my reply is under Davis v. Alaska their privilege would fall to Tim Jones' right to access information under due process and Brady subject to Your Honor reviewing it and saying hey, this is -- because it's Brady, it's got to be given to defense obviously, but first things first is that Your Honor should have an opportunity to review it.

THE COURT: Let me see it and review it and then we can move forward and we can have a hearing on it if you'd like after I've reviewed it.

MR. DAVIDSON: We probably -- if you're inclined to release it, Your Honor, we'll probably need a hearing and I'll probably have to, I think, take it up or, I guess, get the contempt and then go up on it. Because I really think -- even though I don't think it is necessarily negative to the Department, it is just one of those documents that's been used in the litigation in this case to assist me and the Department in its defense.

THE COURT: All right.

MR. DAVIDSON: And I don't mind if you want me to stick around to the end of the hearing to provide you a copy of it or I can -- however you want to do it.

THE COURT: All right. And the stuff you're asking protection and privilege on, I'd like to have a copy of it and then let's come up -- boy, we've got a lot of different parts.

What's the status of y'all's case right now? Is it kind of sitting waiting on this?

MR. DAVIDSON: It's stayed waiting on this. I've got a motion to change venue because obviously they brought it in Richland County, but obviously all the events occurred in Lexington; although under the South Carolina Tort Claims Act as you know venue is in the jurisdiction where it occurred, so that's got to be heard. But we're all -- there's some discovery that needs to be finished up on, but we're getting close to getting us a trial date, Your Honor, which we're waiting on this case for.

THE COURT: Okay. And they've taken depositions of all my caseworkers, you know, I've taken Ms. Jones' deposition, so. And I think that's all been produced. I may be wrong.

MS. MAYES: And just to check on that, if we could get a listing of everyone who's been deposed. We were

provided some deposition transcripts and we did that through a consent order that involved numerous people involved in the civil case, but we could then cross-compare their list of who's been deposed with the transcripts that both the State and the defense received.

MR. DAVIDSON: I don't mind giving them that.

THE COURT: Okay. All right. Then you give that.

MR. DAVIDSON: If I can get the persons to provide it to with the State and with the defense, I can send them a letter listing out who's been deposed and copy the Court with it.

THE COURT: Okay. Well, let's -- before you leave, I'll give you a singular e-mail attorney on each side and then each attorney can share it with their team. So Mr. Young will name somebody, whether it's Mr. Madsen or whomever. One attorney will view each, copy me, and then we'll go forward with that.

All right. The privileged information, I'd like a copy of that and I'll review it in-camera without disclosure to anyone, but if -- since this is the request of both sides, if I find -- what do y'all want me to look for? I mean, what scrutiny, I guess, do you want me to cast upon it?

MR. GRAHAM: I think what we would probably look for is during the Inspector General's investigation if they

were actually interviewing somebody and there was some kind of a fact witness or something passed on from a fact witness that may differ or not be included in the other material that we've gotten because that wouldn't be protected.

MR. DAVIDSON: Well, it would be.

MR. GRAHAM: Not with a fact witness.

MR. DAVIDSON: It would be -- okay. If it was done at the direction of the Department, it would be work product and you'd have to show exception to be able to get that.

THE COURT: All right. What do you say, Mr. Young?

MR. YOUNG: Your Honor, anything regarding Mr. Jones' demeanor, his attitude, his mental health would be relevant to all --

MR. DAVIDSON: That would all be impression and conclusion of the investigator who was doing it under the auspices of the Office of General Counsel and would be opinions and conclusions which can be gleaned from the CPS investigation, so.

MR. HUBBARD: Judge, my concern is this. When I walk into the courtroom on this criminal case with our team, we're the State. DSS is gonna be part of the State. I'm responsible for whatever they have. I'm -- my Bar license is on the line, my team's Bar licenses are on the line.

Mr. Young's right. I owe a duty to his client and this Court, so a big thing I'm looking for is, is there anything exculpatory, is there anything that the defense can use, and a big part of it is, too, just so we can countercheck what we have. If there are additional witnesses, obviously we're gonna go out and talk to those witnesses ourselves if we can and when we talk to them, we always turn over that stuff over to the defense. We're talking about the criminal process, which is very different from the civil, and the stakes are pretty high for all of us.

MR. DAVIDSON: And I understand that, Your Honor, but I'm also defending the State in a $3 million suit. I doubt if the Solicitor's Office wants to sign an indemnity agreement that says they will reimburse the State for any monies that might be recovered from DSS as a result of the improper disclosure of attorney work product and attorney/client information. You know, I represent some solicitors around the State and I can assure you I wouldn't if I was them, but that's what I would need. That's why -- you know, this is like my investigator, your investigator, going out and interviewing people and getting information from them for the use by the Office of General Counsel and myself in defense of the case. All the records that were reviewed

set forth the facts of what happened. They set forth who was in contact with Mr. Jones and Ms. Jones. They set forth the contacts they had with the family towards the end where actually the sheriff's department went with the DSS worker. All of that is in the CPS investigative file, all of which has been explored in my depositions that were taken by Plaintiff's counsel.

MR. HUBBARD: Just real quick, Your Honor, if he just turns over what -- you asked about what to look for, and that's a fair question because you haven't looked at all the other records.

THE COURT: Yeah.

MR. HUBBARD: And if we need to give you those so you can compare them, that's fine. If there's something you think might be relevant for this case that both sides need, then we can have another hearing; otherwise, we're just kind of beating in the air.

THE COURT: All right. I want -- thus far we've got three things. Okay. We've got the stuff that the Office of -- I'm gonna call it Inspector claiming privilege on the civil file. That privilege log and attached files are to be presented to the Court and I'll review those. The Child Protective Services file, which you have Bates stamped with the photos, that will be provided to each side here. It seems like I may need a copy of that also

to compare what I'm considering in-camera to be privileged or not.

There was one other thing. What am I forgetting?

MR. DAVIDSON: The list of depositions.

THE COURT: The depositions list --

MR. DAVIDSON: I've got the list.

THE COURT: -- you're gonna give that to each lawyer also, the same two lawyers.

MR. DAVIDSON: Yeah, if they'll provide me their e-mail address or I can give them my e-mail address and they can e-mail me who gets it and I'll copy you, Your Honor.

THE COURT: Fair enough. Okay. Now if something is questionable to the Court that may or may not be privileged, we're gonna have another hearing with the two of y'all and the six of these, everybody here, and we'll try to get that together at mutual inconvenient time.

MR. DAVIDSON: I would advise the Court the reason I'm leaning on this bench is I'm having back surgery the 22nd of January, so I'll be out for three to four weeks with that. I can obviously work at home and do some things, but I'm limited on driving and things like that. I just wanted the Court to know that. I'll try not to fall down while I go out the door.

Do you want to look at the documents today and let

me provide it to you so you can -- I can give you an in-camera kind of here it is and this is what it is?

THE COURT: Sure.

MR. DAVIDSON: And then if you want me to seal it and send it to you, I can do that also.

THE COURT: I think that will be fine.

MR. DAVIDSON: I'll stick around until you --

THE COURT: Okay. Good enough.

All right. This is off the record.

(Off the record discussion.)

THE COURT: All right. Well, y'all hang around.

Do y'all got anything else other than that? I mean, we kind of dealt with that one little issue or one big issue.

MR. DAVIDSON: I'm done.

THE COURT: Okay.

All right. Now next issue.

MR. YOUNG: Your Honor, I need to make this formal request for the record. I would request the Court to issue an order to the Department of Mental Health ordering them to tape-record any interviews with Amber Jones. Obviously that order would be subject to counsel for the Department of Mental Health, if they have an objection, they should get an opportunity to be heard on that if it turns out, but I just needed to do that for the record

and make that formal request. I don't know if they have an objection or not.

THE COURT: All right. Can we -- do y'all have an objection to being recorded subject to a -- like an opportunity for the DMH to be heard?

MR. HUBBARD: They may want to be heard and her attorney might want to be heard, too. Mr. Harpootlian.

THE COURT: That's true. I didn't think about him. Have y'all talked to him?

MR. YOUNG: I've talked to Hyman Rubin and told him that I was going to request that the interview be -- we requested to be present and that was immediately no, you can't be present for an interview of her. The fallback was that we would ask that it be recorded. I know that she will have an attorney with her in the interview with DMH.

THE COURT: All right.

MR. HUBBARD: I would just suggest this, Your Honor. Since that's kind of out of the norm, if we get another hearing -- I know we've got several dates that you set off for follow-up hearings, I think January the 7th and the 14th. If we want to follow-up, give them some notice, and hash that one out, too, that might be advisable, too, Judge.

MS. MAYES: And I would just have a follow-up

question. Did DMH indicate the date -- that a date has been sent for the interview with Amber Jones?

MR. YOUNG: No.

THE COURT: All right. Why don't we do this? Why don't we send a request that it be recorded from y'all? The State's not objecting to it, so the Court will issue an order directing that unless they want a hearing and the hearing will be set January 7th and let them object to it if they're gonna object. They might consent to it.

MR. YOUNG: Sure.

THE COURT: If they consent to it, then I'll sign a consent order that it be recorded.

MR. HUBBARD: I just wanted to let you know, too, our assistant says that she's spoken to Dr. Frierson and that he's gonna object to it, so. I know that just kind of makes it a little more difficult for us. This is out of our realm. We're not -- obviously that's his profession. I know it's out of the norm. He is a contract worker, so -- but he's contracted to do this case, so if we need to have a hearing or however Your Honor wants to proceed on that. I just wanted to let Your Honor know that.

THE COURT: Well, that makes scheduling a hearing little easier. We'll schedule a hearing for it.

MR. YOUNG: Yes, sir. I'll just file a motion and

serve DMH --

MR. HUBBARD: That will be fine.

MR. YOUNG: -- Amber's attorney, the State and -- I'm assuming we'll be setting another hearing.

THE COURT: I'll set the hearing now and you can go ahead and put it in your motion to have it heard all at the same time and we'll commit to it. If we go -- we might as well start getting things organized for the next week if we're gonna meet regularly.

MR. YOUNG: For the Court's information while you're looking at dates, I'm out of the state from the 7th through the 9th of January, but otherwise --

THE COURT: The 9th is a Wednesday, so do y'all want to --

MR. YOUNG: I'm available Thursday and Friday.

THE COURT: Do y'all want to shoot for that Friday, the 11th?

MS. MAYES: Yes, sir, Your Honor. That suits.

THE COURT: Let's go on Friday the 11th. That way you can put in there -- your request if a hearing needs to be held, it can held on January 11th. Let me see where I am. The good news for us is I've got civil things in the Eighth Circuit, which the civil roster in the Eighth Circuit is pretty organized because I've been away.

Okay. That week I am in nonjury down in the

Fourteenth Circuit and I have three days of court scheduled; Monday, Tuesday and Wednesday. They don't have enough requests for Thursday or Friday, so I am not scheduled anywhere. That day will work perfect in the Eleventh. I have no obligations to be somewhere else.

All right. We'll need -- Ms. Frick, can you get me a courtroom here?

THE CLERK: Ms. Lisa can handle it.

THE COURT: The week of January 7th --

THE CLERK: For the 11th?

THE COURT: -- yeah, for Friday the 11th. That morning.

CLERK OF COURT: Got you. We'll find somewhere for you.

THE COURT: Okay. Good enough.

All right. Make a note to tell Tiffany we need to be scheduled here that week.

January 11th we're gonna do that as well as whatever else we come up with here momentarily.

Okay. We're gonna work on that, the recording of the mental health interview.

MR. YOUNG: I'll get it.

THE COURT: All right.

All right, Mr. Young. What else?

MR. YOUNG: Judge, you will recall that we came over

to Newberry to take some handwriting exemplars from Mr. Jones. The defense has never received anything back from the State regarding those exemplars and having discovery passed we would move to suppress any handwriting reports or anything because we haven't gotten anything.

MS. MAYES: That report was issued by Gail Heath. She is the agent that reviewed those materials, Your Honor. That report was provided as part of discovery.

THE COURT: That's the lady with SLED?

MS. MAYES: That is the examiner.

THE COURT: She's already issued a report?

MS. MAYES: Yes, sir, Your Honor, and it has been sent in discovery.

THE COURT: Y'all haven't seen it?

MR. YOUNG: No, sir.

MS. MAYES: All right. Ms. Grigsby is here. She is on top of discovery and we can pull the date that that was sent and take care of that matter.

THE COURT: I remember Ms. Heath. She's appeared several times. She's the only one in SLED that does it.

MR. YOUNG: Yes, sir.

THE COURT: Okay. Because they can't find a replacement, so she hasn't retired. Is that her?

MR. YOUNG: Yes, sir.

THE COURT: I know what she looks like.

MS. MAYES: In addition to that, Your Honor, we have also provided all of the bench notes and the underlying data associated with all lab work that was done by SLED and that was compiled by Captain Lori Johnson. That's also been provided pursuant to discovery, so at this stage they have every SLED report and then they have the bench notes accompanying those SLED reports. That has all been provided, but Ms. Grigsby will get the actual dates that those materials were provided.

THE COURT: Okay.

MS. GRAHAM: It's my understanding that they're on the Blu-ray disk that you can't open.

THE COURT: Okay. There you go.

MR. YOUNG: Your Honor, a couple more things regarding discovery. We have, of course, requested hearings regarding any statements made by Mr. Jones and a motion to suppress any evidence received as a result of the unlawful -- what we contend would be the unlawful license checkpoint in Mississippi. And I know the State has said that they didn't want the additional expense of having to get those witnesses here ahead of time. We have met with those witnesses in Mississippi. We have taken affidavits from those witnesses. We have provided the State with copies of those affidavits and an additional memo. I think based on the affidavits and

the information contained from the officers who were conducting the license checkpoint that live testimony is not needed and we should set those motions for hearing.

MR. HUBBARD: Your Honor, next month we're gonna be back out there. We would object to having a hearing on affidavits. We've been talking to those folks as well. We think we have a solid basis to uphold that stop and we're going back out there to see if there's any way we can expedite it by having a hearing early, so I'm exploring that, but I'm not gonna know their availability and who exactly I need in order to -- that we need to make our position clear why that stop was good, so. But we're going out there next month and I'll be able to let Your Honor know. Hopefully, if it's something when we're talking to those folks we're gonna be saying can we get you there before our court date and have that hearing. Because obviously we would like to know as well on how to proceed on this case, but right now I would absolutely object to having that kind of hearing, which is -- everything hinges on that stop. All of the evidence in the car, his statements, the bodies, all come from that stop, so to have a hearing on affidavits I absolutely object to that.

THE COURT: You know, when do you want -- all right. Are you proposing to have that before the trial week,

have the validity of the roadblock?

MR. HUBBARD: Yes, sir. And if we could do it -- depending on when we see who we need and who's available, we'd like to do it as soon as we can, too, if we can do that, so. But I'm kind of shooting in the dark right now guesstimating. I really need to talk to them, but that is one of the purposes of going out there is to firm that up. Right now I understand we only have one affidavit from the defense anyway. I don't know how we'd make a -- have a hearing on that, but, Your Honor, that's one thing we're going out there to do. I mean, among other things.

THE COURT: Uh-huh.

It seems like we need to get out here and kind of get organized here shortly. When are y'all going out there after this, the 11th?

MR. HUBBARD: We're looking at the week of January 21st, Your Honor, and what I did is I went ahead and set aside that week for our crew to do whatever we need to do, obviously maximize our time out there, so I'm hoping to see where we are and also see where they are. And, again, we're in communication with these folks.

And, Your Honor, I don't think it's gonna slow us down on all the other issues if we keep meeting and having these status conferences on where we are. I think as long as this is heard -- if we can have it heard as soon as

possible, great, but, Your Honor, I just can't even in fairness to the Court and to the defense say when we can do it. But I don't think it's gonna slow us down at all.

THE COURT: How many -- I mean, y'all don't know. How many witnesses do you think you're gonna need to show -- or how many witnesses do you anticipate?

MR. HUBBARD: Judge, I can't candidly give you an answer to that. Obviously there's officers there at the scene, but it's ultimately gonna come down to a legal question as well involving not South Carolina law, but Mississippi law.

THE COURT: Well, how about if we shoot for -- I mean, is it too late to wait until the last week of February? Is that too late?

MR. HUBBARD: We can certainly shoot for it, but, Your Honor, obviously I haven't even talked to these folks about their schedules, so, you know, obviously I need -- Your Honor, perhaps what we can do is this. When we get back, maybe we can reach out to Your Honor and the defense and give y'all an update when we get back, so maybe that Monday the following week give you an update. Because I know we'll be on the road probably end of the weekend, but maybe we can just give you an update and then -- then we can set something more firm, Your Honor.

THE COURT: Okay.

Well, that's kind of like -- I'd like to shoot for that last week of February if all possible, but I think if you let us know what you find out when you get back and let's have a --

MR. HUBBARD: Yes, sir, Your Honor.

THE COURT: Let's see. What in January -- the last week of January, starting the 28th, that week I have Common Pleas Nonjury in the Eighth Circuit for three days. Certainly I can work something in for this that week, the week following.

MR. HUBBARD: Your Honor, what we could do is -- that would be the Monday we're back. We can shoot an e-mail by e-mail letting you know what we have or if you want to have a conference call. Whatever Your Honor is comfortable with.

MR. YOUNG: Your Honor, I'm just checking with the clerk's office to make sure that those affidavits got filed. If they didn't, I'll take care of it today.

THE COURT: Okay. He's talking about the one, you're talking about more than one?

MR. YOUNG: Yes, sir.

THE COURT: Okay. That's what I thought you meant.

All right. Why don't we take a couple minutes break because I want to step off and clear my nose and go to the bathroom.

(Recess taken.)

THE COURT: All right. Now the next issue.

MR. YOUNG: One final issue that I have, Your Honor, is that Dr. Litman, our pharmacologist, and the State has a draft report from him, has requested that the spice, spice residue, be sent to a different lab for more advanced chemical analysis. I know that that stuff is at SLED -- my understanding is that stuff is at SLED right now. I just wanted to be able to discuss with the State how they want to do that, do they want SLED to Fed Ex it, do they need somebody to come pick it up or how do they want to do it.

THE COURT: What do y'all think?

MR. HUBBARD: Your Honor, obviously I think it's fine if they have their independent test, but obviously we want to make sure that everything's secured, that all the processes are proper chain procedures, all those things to make sure it's, you know, untainted. All the things that we have to do to make sure that when we go into a courtroom the object is what it purports to be. So how we do that -- I don't know if it's a SLED or if -- usually when stuff's sent to SLED and it's tested, then the sheriff's department will pick stuff back up and store it in their evidence, so I don't know where it is right now. I guess we can follow up on that. It sounds like

the sheriff's department would have that, Your Honor.

THE COURT: All right. Can we find out about that and then let the -- have a plan to transmit it to -- does your pharmacologist know where he wants it to go?

MR. YOUNG: Yes, sir.

MR. HUBBARD: Can we do this, too? Can we have -- perhaps Mr. Young can prepare an order. That way there's something in the file showing what the process is.

THE COURT: Where it's going, how it's going.

MR. HUBBARD: Correct.

MR. YOUNG: Yes, sir. Sure.

THE COURT: What would be the -- do we have a preference of how it's picked up or how it's transmitted? Via courier?

MR. HUBBARD: No, sir. I don't think so. Do you?

MR. YOUNG: We'll do it.

THE COURT: Just make sure it will comply with the security measures y'all both are asking for.

MR. YOUNG: Yes, sir.

THE COURT: Okay.

MR. HUBBARD: You know, I'm just -- I guess my thing is just gonna make sure -- we want to look at the chain and the process, so I just want to be able to say that they were able to observe that.

THE COURT: I think that's fair.

All right.

MR. GRAHAM: Do you know where they're -- are they wanting to come take the whole package and the item or are they just wanting to take a portion of it? Are they gonna take the container? Are we not gonna have things to introduce into evidence? I guess I just don't know exactly what you're asking for and we'd obviously want to consult with SLED ourselves to see where that leaves us. I mean, if you're gonna take a container away and the container disappears, then we don't have anything to introduce at trial anymore.

MR. YOUNG: Right. That's why I wanted to talk about it. I don't know what -- is it like something that you can swab and then you can send swabs or SLED can portion out -- like here's enough of the sample, that is what is appropriate for testing? I don't know.

MR. HUBBARD: Why don't we do this? It sounds like it's premature. We need to know what his expert needs, we need to see what we have and make sure SLED -- I don't want to interfere with anything SLED has that would interfere with their ability to still look at an object that they once tested and say we recognize what this is and, yes, we had this in our possession. So if we can get over that hurdle, maybe if Mr. Young can get that done and then let us know exactly what his expert needs,

we'll get with SLED and we can probably wrap that up pretty quick.

MR. YOUNG: What I need is the spice sent to a lab for testing.

MR. HUBBARD: We need to know what he needs. Does he need the residue? What's he need to test?

THE COURT: I mean, I think y'all are saying the same thing, it's just you want to know one thing and you don't know exactly the quantity they have.

MR. YOUNG: No, I would think that they would need to send packaging, the can, the stuff that was collected from the floor.

MR. HUBBARD: Now that -- that does raise a problem. I was thinking he was talking about residue. You can get a swab, something like that. We're good to go on that because then we still have the physical items here, which obviously we're charged with maintaining.

THE COURT: Uh-huh.

MR. HUBBARD: And then, of course, as Your Honor knows from SLED testifying, they're gonna be identifying what they did by those packages. So I'm gonna be very reluctant to release that. So if his expert can do a test based on something other than all the packages and canisters, whatever it is that the sheriff's department has, I'd like to know.

THE COURT: Well, you need a viable sample to have tested.

MR. YOUNG: Right. Yes, sir.

MR. HUBBARD: Otherwise, Your Honor, what has been done in the past is an expert comes to, say, SLED, so SLED in order to not interfere with their process, they're in the room, watch the process. If we do it that way, that way SLED can the whole time say that we saw what was going on and those are still the objects that we tested, so I'd offer that up.

THE COURT: How much of a viable sample of the spice product do you need to send to your lab for your expert's opinion is what you need to propose and if SLED has enough or the sheriff's department has enough to provide that to you, we'll do that.

MR. YOUNG: Yes, sir.

THE COURT: I'm not gonna make the State turn over everything. If you want to see everything, the expert can come to SLED to -- or come to see it, this is what I've got. Would a viable sample of what they've got to be tested be suitable?

MR. YOUNG: Yes, sir.

THE COURT: Okay. That's what we'll go with.

MR. HUBBARD: Thank you, Your Honor.

THE COURT: Uh-huh.

All right. Now where are we?

MR. YOUNG: Your Honor, that's my list of discovery-related issues.

THE COURT: Okay.

MS. GRAHAM: And discovery-wise, Your Honor, it was my understanding that they were going to have their own cell phone extractions done and provide us with that.

MR. YOUNG: Your Honor, I reported in an e-mail that we had our own electronic extractions done. It's about 14 terabytes of information. If the State would provide me with a way to make them a copy of it, I will.

MR. HUBBARD: We can do that.

MR. YOUNG: I'll request that the digital printers do that. I don't know what the time or expense is involved in making that copy. I know it took him three days here to do the extraction, so I don't know how long it would take to make a copy of that. I'm meeting with him again this Friday and can find out.

THE COURT: Find out what he needs to make a duplicate image of what he's got and the State -- State, y'all get that so y'all can have a copy of it at your expense, all right?

MR. YOUNG: Yes, sir.

THE COURT: All right.

MS. MAYES: And, Your Honor, just to revisit the

previous issue regarding SLED agent Gail Heath on the handwriting analysis, we did find the discovery on that. It was provided June 20th of 2017. It's Page 160 of 2061. And then it was provided, once again, December 7, 2018, on the SLED disk that contains all bench notes and underlying data.

THE COURT: So it's on the bench note disk?

MR. HUBBARD: Yes, sir.

MS. MADSEN: That's the one we can't open.

THE COURT: Okay. You have it locked away safely.

MS. MAYES: I believe one is a CD. Yeah, the first one when it was provided was a regular plain CD. As for the Blu-ray, Your Honor, we have provided several items by Blu-ray. Whatever we need to do to resolve that so that the defense has a working Blu-ray, I think would be expedient to both sides.

THE COURT: What can the State do to help y'all with that?

MS. MAYES: It's going to cost about 50 to $60.00 I'm told to purchase a Blu-ray player.

MR. YOUNG: Your Honor, I just learned that Mr. Madsen has one in his office, so --

MS. MADSEN: Maybe two.

THE COURT: I was gonna see about getting one you can borrow.

MR. YOUNG: Right. Yes, sir. I think we can get it taken care of.

THE COURT: All right. Let's see if you can run it on Mr. Madsen's viewer.

All right. What else do y'all have outstanding sitting there?

MS. GRAHAM: The jury questionnaire.

THE COURT: The jury questionnaire.

All right. I've reviewed kind of a little bit what y'all submitted for the defense, but the State didn't expound on -- it wasn't approved very much.

MS. GRAHAM: Your Honor, what the State had proposed was basically what we've been using in Lexington County for -- I know I've been involved in seven. This is what we've done for seven times. I know Ms. Hope with the clerk's office has been involved with a lot more. The simplest words has never been said to be wrong and so that's what we think we should stick with.

THE COURT: All right. Mr. Young, let's hear from you.

MR. YOUNG: Your Honor, I mean, if the Court's purpose in providing a questionnaire -- or my purpose in providing a questionnaire we'd be able to get information which would move along the voir dire process. If you're just asking them name, how long you've lived here and,

you know, that's it, what are your bumper stickers, which is the court form, then it doesn't expedite the voir dire process at all and it ends up taking about thirty to forty-five minutes per juror to educate them, for Your Honor to educate them how the death penalty works, what it means, and to finally get to what their views are.

I know the Court has ours. I'll provide it to the Court -- this is copies of the questionnaires that were done in two cases. One was the last case that I was really involved in, which was the trial of Earnest Daise down in Beaufort, and the other one was a trial in Chesterfield regarding Mr. Bixby. Both of these questionnaires, especially the one in Beaufort, were able to substantially shorten the voir dire process where we could weed out jurors who were clearly not qualified through their questionnaire responses and not take up valuable court time in doing that case.

And, Casey, it took us eight days in Beaufort?

MR. SECOR: Less than that.

MR. YOUNG: I think it was a week of jury selection in Beaufort, but -- and I have the transcript, which I can provide the Court a copy of as well, you know. And Judge Mullen clearly indicated that -- what she thought had really expedited that voir dire process was the fact that we had a questionnaire that addressed death penalty

views in a meaningful way that was able to expedite it.

MR. HUBBARD: Your Honor, my concern is not just expediting the case. I mean, obviously we'd all like to try and move this case along, but looking at their questionnaire, Your Honor, this is just -- it's blatant staking out the juror's position. If Your Honor looks at a case called Stanko, State versus Stanko, it will address a lot of the questions they're asking. I mean, Judge, they're getting into -- going way beyond when they start asking -- first of all, they introduced the jury -- potential jurors to what the case is. I gonna tell you, Judge, if we let this jury know we've got a death penalty case and what it is, we're not gonna get a jury here or anywhere. You might be able to on some other case, but you're not gonna get a jury here or anywhere.

But they go and ask if you've ever studied or had experience with psychology, sociology, criminology. Judge, that's a question they can ask somebody on the stand if they really want to know their background, but, otherwise, when they start getting into issues like do you have a friend with a substance abuse problem, well, you know where that's going. They're staking them out. What are your feeling about it? Describe the circumstances. That's going way beyond a questionnaire that you have no control over once it's out there. These jurors aren't

sworn in -- these potential folks aren't sworn in, they're out there, you don't know who they're talking to. If they find out it's a capital case, they're gonna be wondering what case this is. If they know it's Tim Jones, they're gonna be looking it up. In a questionnaire form, you have no control. Even if you tell them don't do that, they're gonna do it. You're not gonna be able to be sure they don't.

But it goes on talking about have you ever sought the services of a psychiatrist, what are the circumstances? You're gonna be violating some law on that. That's absolutely protected. Then you get down to Facebook. Basically turn over your Facebook account to us so we can -- we know what to look up.

Judge, to the extent that they've made stuff public, we can reach out once we have jurors names, but to go deeper than that, Judge, that's going way beyond the bounds of what I think voir dire's about.

Describe your feelings about the criminal justice system, police officers, prosecutors. That's staking. That's improper. And then a number of these things, Judge, I think you can handle in your general qualification when we're doing the panel as a whole. You know, Your Honor typically asks some standard questions about affiliations with certain groups like MADD mothers

and things like that. You handle that in your general qualification.

Judge, but it gets really improper when they get down and they start talking about an insanity defense. They tried to do that in Stanko and the judge trying that case basically shut them down and said listen, if you're gonna talk about affirmative defenses, we're not gonna stake out a defense, we'll give you a list of all those defenses, and then the question ultimately for all of these, the whole purpose of voir dire, can you be fair and impartial.

So if you ask going through this list if this is an issue in this case, can you be fair and impartial, ultimately that's what Your Honor cares about. That's what we all care about. But if we go beyond that, as Stanko says you're not entitled to ask potential jurors about their specific views about a particular affirmative defense like insanity. Voir dire is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions. You're not entitled to a certain type of juror and staking them out, you know, how solid are they on our side. The right does not entitle a defendant to handpick a jury. The goal is to have an impartial jury. They lay out a process in Stanko, Your Honor, on Page 4 of how that

Court went through it and the Court found that that was a perfectly proper process. It's one that we've used.

Your Honor, this is a massive case with a lot of notoriety. Why do we want to experiment? I think you're gonna want to stay, and I would certainly argue that we need to stay, on the tried and true and, Your Honor, with the focus that all we're really wanting is a fair and impartial jury. That's all we really want, Judge, and I'm absolutely concerned that if Your Honor sends this questionnaire out, we will get zero jurors.

Even if you move it to another county, we will get zero jurors. And if the Defendant's demanding a jury trial, he's demanding what now we can't have. That's why I think all the years that this tried and true form that -- I know Ms. Frick can talk about more capital cases than Mr. Graham and I both have been involved in and -- and how it's not been a problem because it doesn't clue them in on the particular case or what's going on, but it gives us that -- that initial information that I think we're gonna need. And, Your Honor, you're gonna have some people fall out right off the bat on that just initial form and we're gonna find out a lot.

But the process we've asked, Your Honor, is we've -- I know you've seen it, we passed it up, is that we send out the general -- general questionnaire and then

when we impanel the jury, the entire panel, you do a general voir dire and then once they're qualified as a whole, as a panel, you break them up into groups. We've done it as five or six in the past. Five probably works because there's gonna be a lot of questioning and then that way they're not all waiting. You bring them in at certain times and you bring them in one at a time so none of the other jurors get to see what's being asked and when they're done, they go home. They don't go back to the jury room and so they don't get to prep another juror.

And then what we've done as well is we have the three types of jurors. We have it on a sheet. We've used this for years and years and years. It's what you see in all of these reported cases, including Stanko, as being the proper way to handle this. What we've done is before that potential juror comes in from the back room to take the stand, they look at this, they read it and then you ask them -- you start off the questioning by saying have you read this, do you understand it, is there a category you would place yourself in? There's no right or wrong answers.

THE COURT: Uh-huh.

MR. HUBBARD: And you go on to apprise them of the process. You educate them rather than us and then Mr. Young or our side gets to ask questions and then we

rotate as we go asking jurors and then we basically can cover pre-trial publicity and all that at that time. You don't want a juror standing up in front of everybody saying what they know, what they heard, but we can ask them everything at that time.

And, Your Honor, what we would be looking for is a panel of approximately 75 jurors and then at that time we'd have them randomly drawn and the State gets five strikes, the defense gets ten. Judge, it's just a process we've used so many times, but what I would suggest is before we get to the actual voir dire process maybe we have another sit-down in order to expedite things and go over what type of questions we're gonna be asking so that we're not stopping for three hours on one juror holding up the train, but that streamlines the process. That's what I'd do, Judge. I think we're gonna have a train wreck if we don't do it.

THE COURT: All right. Mr. Young, what do you want to say?

MR. YOUNG: Your Honor, South Carolina case law is pretty all over the place as far as voir dire goes, particularly with -- first of all, none of these questions are stakeout questions. A stakeout question is saying if I prove to you X, will you agree to vote Y. None of these questions are stakeout questions. We're asking about

people's opinions on various subject matters, not -- and you can say I don't have one. I mean, that's fine. There's no right or wrong answer to any of these questions.

What I would request at this point in time is that we just go through the defense's proposed questionnaire and the State can tell me which questions they have an objection to and I'd like an opportunity to do some research and get back to the Court with case law and briefing as to those particular questions.

MR. HUBBARD: Judge, I can state it quick. I object to anything that goes beyond the standard. In looking at it, Judge, they have some of the standard questions on the first two pages. There are a couple that go beyond, but, Judge, it is clearly staking out. What stands out most in your mind about what you've read, seen, heard or learned about this case? They cite the indictment here. What are your opinions and feelings? That is classic stakeout. But, Judge, there's less subtle stakeout, too, when they start exploring a particular defense. You just can't do that.

And, Judge, there are a lot of cases. Ultimately it's your discretion, but basically our goal here is not to stake out or get their opinions, it is just whatever they've heard. They don't have to even go into it. They

may have heard it from radio, newspaper or whatever, but can you set that aside and make your decision -- base your decision on witnesses you hear in the courtroom, evidence admitted in the courtroom and based on the law as you give it. That's ultimately what we need to do, but when you start talking about their feelings and what do you think about the death penalty, Judge, that's way out of line. Your Honor, there's not gonna be a case scene. That's okay. There's not. That's staking.

So what I would offer is just to make this quick and easy, our tried and true, and if there's something he thinks is absolutely necessary to be added to that, that's the easier way to do it. But, Judge, I object to this.

THE COURT: Okay. I understand your position.

Mr. Young, have you got -- since you're the one who proposed it, why don't you propose why you think it should be added?

MR. YOUNG: Sure. I'll do that.

THE COURT: All right.

MR. YOUNG: I'll go through each question proposed that's beyond the standard form with authority. I mean, of course, if you can't have it in South Carolina -- first off, I continue to object to the term "staking out" and would ask to define that term --

THE COURT: Well, I mean, I think --

MR. YOUNG: -- as to what it means.

THE COURT: -- an example is, you know, when I thumbed through it was: What do you know about the insanity defense? Is that not an example of staking out?

MR. YOUNG: No, sir.

THE COURT: It's not?

MR. YOUNG: Some people say -- listen, I -- I think that it's the same as the Twinkie defense. I would never find anybody insane. That's fine. That's an okay -- it's a perfectly valid opinion to have. But the question about can you put that opinion aside and be fair and impartial is specifically, that question, specifically by the United States Supreme Court, an improper question.

MR. HUBBARD: Stanko also says Appellant was not entitled to ask potential jurors about specific views of the insanity defense during voir dire. It is staking out. It's improper. Now what they also go on to say is this doesn't mean there's a ban on asking questions, but there's a proper way to do it. But it's all got to come back to whatever you've known, whatever you've heard about or learned about psychology, can you set that aside and take from the courtroom -- based on what you hear in a courtroom and base your decision on that. That's the whole thing is making sure people aren't making decisions on their feelings, predisposed feelings, or their

predispositions, they're setting all of that aside and coming into the courtroom and just basing it on the evidence and testimony and the law as you give it. And, Judge, to explore well, do you have feelings on this, well, Judge, you're asking them to set it aside anyway, so we're really opening can of worms, but we're also staking out what's coming, and that's -- it is staking. It's -- clearly it's definitional staking. That you're exploring -- you're cuing them in saying there's gonna be self -- insanity here. Judge, they don't need to know that now. They haven't heard anything factually yet. That's why it's improper and, frankly, the questions -- the other thing that bothers us about these questions, Judge, is that when you start talking about this specific case, reading the indictment out -- writing it out in here, sending that to them, Judge, I'm gonna tell you -- social media. Who doesn't have a smart phone today? People are gonna be looking that up. We're gonna open up a can of worms that otherwise these jurors might come in here and not have any idea what case this is and then you tell them now you're under oath, you can't do it, it puts you in control when they're in the courtroom; otherwise, you're not in control.

THE COURT: All right. Mr. Young, what else have you got?

MR. YOUNG: You can have them come in and fill out questionnaire here after an instruction from Your Honor. We'll continue to argue about the term "staking out", but I would like to provide the Court with some more case law on proper questions and scope of voir dire.

MR. HUBBARD: And, Your Honor, I think that would be fine when we get up to the voir dire time. That's kind of what I was getting to, alluding to. Let's get this questionnaire out and then we can spend more time delving into what can we actually ask these jurors, but let's get that questionnaire out there now, let's get it done, and know where we are. Some of those folks are gonna drop off just with the standard questionnaire and then we can go ahead and set a time and start talking about what do we ask these jurors.

MR. YOUNG: How would anybody drop off on the standard questionnaire?

MR. HUBBARD: Here's what happens based on our experience. Somebody writes in that they're unavailable or that they've got an issue. Judge, I know Ms. Hope Frick can probably tell you we've had numerous meetings in the past on capital cases and we send this out and then all of a sudden we get back responses that are of concern or they call in based on this with concerns and we take it up, you have a hearing. All right. Do y'all consent to

let this person be set aside or do we need to bring them in? How do y'all want to handle it? That's happened every case I've dealt with just using the standard questionnaire, mailing it out, but the bulk of the folks come in and we have our 500 or more jurors that -- potential jurors that you qualify and then we -- hopefully before we even begin questioning them, we have a little bit more of a roadmap once they're individually on that stand, what are we gonna do, how are we gonna ask questions. If he's got specific things he need to probe, let's explore it before they get up there because that slows the train down. This makes it more efficient. That's why it's been used for so many years.

MR. YOUNG: Your Honor's got a copy. Can I sit down?

THE COURT: All right. What about -- I guess my thinking right now is go with the standard questionnaire, but then have maybe a supplemental questionnaire to be filled out that day. I mean, is that plausible? But I'm looking at a more open-ended questionnaire, I guess.

MR. HUBBARD: I guess what I was envisioning is this. The only issue I'd see is where do we house them when we do that?

THE COURT: Yeah.

MR. HUBBARD: And my thinking is this. Whatever

they want to ask if it is appropriate and you deem it appropriate, it's gonna get asked, it's gonna get covered, but that initial questionnaire is not where we need to do it. Again, if it's done here, you're in control, and ultimately as Your Honor knows, that's -- that's the way it's got to be done.

THE COURT: Uh-huh.

MR. HUBBARD: So that's what I suggest. And then, Judge, if we bring them in, if there's --

THE COURT: I mean, the downside is it takes a long time.

MR. HUBBARD: But that's why I was saying before we even bring them in we have yet another meeting. So if there are questions he wants to ask, we've worked that out so it goes quicker. That way we're not haggling over is this question proper or not when Juror Number 5 is on the stand and then we take two hours arguing over it. We've already kind of hashed that out. We're still gonna end up having objections. You Honor knows that --

THE COURT: Uh-huh.

MR. HUBBARD: -- but this gives us a real good, clear map -- roadmap of how to go. But it's all done within your control. That's why I suggest it. I think it would make it go much smoother and still cover them and they can ask their questions.

THE COURT: All right. What else, Mr. Young?

MR. YOUNG: Your Honor, I just think that if you're not gonna include the United States versus Morgan -- or Morgan versus Illinois, sorry -- question on there about people's views on the death penalty as an appropriate punishment for somebody who has been convicted of murder, it takes a long time -- a long time to understand what the legal definition of murder is, understand what we're talking about and then what your opinion is. If they've answered the questions beforehand, we can deal with it quickly, we can -- I'd certainly think that their type one, two and three misstates the law in a number of manners, but I've included a type one, two or three on the questionnaire that I don't think misstates the law and those questions can be very telling. I mean, we can cycle through a lot of people very rapidly by having them -- having those answers before they get here. We don't even need to waste time calling them.

One of the motions that I have proposed would be that people -- only people who said that they were a type three, we should move all those people to the top of the stack, and move the always and nevers to the bottom and not get to them if we don't have to.

MR. HUBBARD: I would tell you why we haven't done that is -- and we haven't even passed the questionnaire

around when they're sitting in the room is we don't want them talking about it. We don't want them at their house asking people about it, calling up their Aunt Jo saying what do you think about this, what do you think I should think? You're out of control -- you have no control. That's better way of saying it, not out of control, but no control. So what we've done in the past, judge after judge has done this, is you show it to them for the first time in the hallway and then you get to explore that. And, Judge, you know, some people will honestly come in here and say I've never thought about the death penalty. Now when we get to the issue about like defining murder and all that, of course, that comes from you. And the Bixby case, I think they passed that up. If they didn't, I'll pass you up that case. You can't ask people what do you think murder is. We don't go that way. It comes from you to them. That puts you in control again and then --

THE COURT: Bixby is an Abbeville case?

MR. HUBBARD: Yes, sir.

MR. YOUNG: It's one of the -- it's the questionnaire they had in -- I guess they tried it in Chesterfield, I think. Is that right?

MR. HUBBARD: I'm not sure.

There you go, Your Honor.

But anyway, Your Honor, I think -- and, of course,

the three questions, our Supreme Court has repeatedly said that's the way to go, so.

THE COURT: All right. I'm gonna want to study it a little more in depth since I haven't had a lot of time. I want to read both of these cases and then we'll just -- what I want to do, Ms. Frick and I have discussed it, we'd like to have the questionnaire ironed out and ready to roll because our time to mail was roughly the end of January.

Isn't that right, Ms. Frick?

THE CLERK: Yes, sir.

THE COURT: That was our timing, which we wanted to have it resolved by then. So how about this? At the January 11th, that Friday, we'll discuss it further and have it decided then as to what we're gonna do with -- what we'll do with the questionnaire and what we'll do with a potential follow-up questionnaire. How about that?

MR. HUBBARD: Yes, sir.

MR. YOUNG: Your Honor, that's fine. The defense has filed Motion Number 57 regarding information from -- where our questions come from, why do we ask them that way, what questions are appropriate for jurors, and a lot of that research is contained in that motion and we had requested an opportunity to call an expert. I believe that she's available on January 11th. It's about --

THE COURT: All right.

MR. YOUNG: -- three hours' testimony and I could have her here to testify for that motion and go through those materials with the Court on that date.

THE COURT: Just so I know, maybe I'm not seeing them all, but when y'all file motions are they filed with my e-mail address or just with the Clerk of Court?

MR. YOUNG: Just with the Clerk of Court, Your Honor.

THE COURT: Okay. I've not read them prior to coming here and it's kind of putting me at a little disadvantage because I don't carry the clerk's file around, it's too heavy.

MR. YOUNG: Yes, sir.

THE COURT: If y'all want me to read something before you come in here, if y'all send it to me I promise you I'll try to read it. I don't take notice of what's in the clerk's file when y'all say Judge, it's in the clerk's file and go check it out or tell my law clerk to go check it out. I've not done that and if that's gonna be a -- I'm glad to be included in e-mail chains and get some of that, but I've not read anything that's downstairs because I don't go down there. I understand it's in the clerk's file and it's kind of imputed that I'm supposed to know that, but I've not gone down and done that. If y'all want me to read it, y'all let me know, say heads up.

MR. YOUNG: Yes, sir. We'll get -- that's my fault. We'll make sure that you have a copy of them all.

THE COURT: Okay. And, I mean, I'm not faulting y'all. I'm just saying I haven't seen them coming and so I've not been reading up on the motions when y'all say you filed this motion and that motion. I'll read them all and we'll argue them all, but if y'all want me to read them ahead of time, let me have a copy on my e-mail that you're filing with the clerk and it will just make my life simpler.

MR. YOUNG: Yes, sir.

THE COURT: I'll be glad to -- I'll be glad to consider anything from either side on that.

MR. YOUNG: Yes, sir.

MR. HUBBARD: That's fine, Your Honor.

And just one final thing on the questionnaire. I think obviously no objection to taking that back up January 11th and as Your Honor will see, judges have done things different ways, but it depends on the case, too. Ultimately it's your discretion, but, again, just on this file, I don't know if you're familiar, looking at their questionnaire on this case, I think we've got a problem so that it would affect how we draw a jury and whether we --

THE COURT: I don't think whichever questionnaire we

use we're gonna avoid problems.

MR. HUBBARD: I agree. I agree with that, but I think as you go through it I believe you'll see that -- why I'm saying that; if we follow that questionnaire, we're not getting anybody.

THE COURT: Okay. I mean, that's possible.

MR. HUBBARD: You might with some other case, but I don't think you will with this one.

THE COURT: All right. January 11th, that Friday, that will suit me to have the motion -- is it 57, Mr. Young, you said?

MR. YOUNG: Yes, sir.

THE COURT: Send that to me and if you want the witness, see if she's available. If not, Thursday's okay, too, if you want to go Thursday. The 10th or the 11th, either day. The Clerk's gone now, but she said she'll get us a courtroom. If Thursday's better than Friday, I'm available either day, but let's -- before the end of the year let's get it e-mailed around we're okay with it and that way we can all be here and we can get a transport order for Mr. Jones and everything, okay?

MR. YOUNG: Yes, sir.

THE COURT: All right. So two things on January 11th for certain are --

THE CLERK: The hearing on the taping from mental

health --

THE COURT: Yeah.

THE CLERK: -- and the questionnaire.

THE COURT: So the DMH recording and the questionnaire will be the two issues we hear on the 10th or the 11th, whichever date we all agree on. And if we can't come to an agreement, then I'll make the decision on which date the hearing is. We'll make it work.

I've tried to let y'all -- since there's more of y'all than there is of me, dictate the hearing dates, and that's not been a problem thus far. We'll continue to do that on these status conferences. The consensus will kind of carry the water.

All right. Anything else?

MR. HUBBARD: Nothing from the State, Your Honor.

THE COURT: Are we up to snuff? Have you got something else?

MR. YOUNG: I have two things to address ex parte with Your Honor.

THE COURT: Okay. And I do with Mr. Davidson also.

(Whereupon, the following proceedings were concluded at 3:39 PM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 19th day of December, 2018.

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

February 6, 2019

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

State of South Carolina

Court of General Sessions

County of Lexington

State	)	
	)	
	)	Transcript of Record
v.	)	2015-GS-32-188 - 192
	)	
Timothy Ray Jones, Jr.	)	
	)	
Defendant.	)	

January 11, 2019
Lexington, South Carolina

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge.

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

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I N D E X

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
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P R O C E E D I N G S

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THE COURT: All right. We -- the group of us, through our group e-mail chain, were discussing the best order of presentation a little bit, I think, or maybe just Whitney and I were. My thinking is we've got to do the questionnaire, a couple of other things, and then do the presentation on the other issue. Have y'all agreed to an order, because I was thinking the questionnaire ought to go first.

MR. HUBBARD: We do have -- we have Dr. Friersen and some other folks here. I think we'd be in agreement if we could just address that right off the bat, and then get to the questionnaire. We'd be happy to do that.

THE COURT: Does that sound good?

MR. YOUNG: Yes, sir.

THE COURT: All right. Let's go in that order then.

MR. GRAHAM: So defense motion 83, Your Honor, is the motion to record the interview of Amber Jones by DMH. And it's my understanding, and I'm going to let Mr. Young state, but, apparently, he had conversations with Mr. Harpootlian who represents Amber Jones in a civil suit. And I'm not sure

exactly what was said, so I'll let Mr. Young --

THE COURT: And that seems to --

MR. YOUNG: Well, we've run into a wrinkle. And to give a little bit of background, I have been informed that Ms. Jones had agreed to an interview with DMH regarding --

THE COURT: Y'all were of that belief?

MR. YOUNG: Yes. Criminal responsibility. And that we had asked and Ms. Jones had thought about meeting with us and, ultimately, had decided not to, which was her right, so we asked that the interview at the department of mental health be recorded.

And I knew that the department of mental health -- Dr. Friersen had told me they had a policy against recording without a court order, so we served everybody with that. And, of course, Ms. Jones, through her attorneys, objected to the recording of that interview. And I agreed that we would modify our request to allow our psychiatrist to be present during the interview.

So, basically, it would be the State psychiatrist and the defense psychiatrist at one time during the interview. And Ms. Jones' attorneys agreed to that, so that was fine with them. Their main issue was a concern about creating a recording

that could be used in the civil case. So that was agreeable to them.

I notified them that they didn't need to be present this morning, based upon that agreement, and that we would get back and modify our request on the record, that we were just requesting that our psychiatrist be allowed to be present for that interview.

Dr. Friersen, who's here with his attorney, has objected to that. And I'm not trying to put words in his mouth, and know he will correct me if I'm wrong, but he says, basically, given the sensitive nature of what needs to be discussed, he would prefer not to have anybody other than himself present for that interview.

I understand his concern. You know, these are both psychiatrists, both operate under the same rules of ethical behavior for their conduct. And I know that the lawyer for Dr. Friersen is here. And I guess, at this point in time, it would be appropriate for him to address the Court.

THE COURT: All right. What position do y'all have?

MR. GRAHAM: I mean, whatever they want. It comes down to what DMH policy -- I mean, he's not

ours, he's yours. So we really don't have a position other than we're here to facilitate them, to state their positions and their concerns.

THE COURT: Okay.

MR. HUBBARD: And, Your Honor, I'll just add onto that. If it's their position, both professionally and legally, that this pushes them beyond bounds where they're comfortable, then that does affect us because we do want to know what the one true neutral expert in this case has to say. We don't want anything to impair or inhibit his ability to do his job because that does affect us.

THE COURT: Okay. Well, let's hear from DMH.

MR. GRAHAM: The DMH attorney's name is Logan Royals. And then Dr. Friersen is here as well. I don't know how you want to conduct it, Your Honor.

THE COURT: I'll hear from the attorney first.

MR. ROYALS: Good morning, Your Honor. May it please the Court. Logan Royals for the department of mental health.

THE COURT: State your name again.

MR. ROYALS: Logan Royals, spelled just like the baseball team.

THE COURT: Okay.

MR. ROYALS: Here, representing Dr. Friersen.

Dr. Friersen is here today as an agent of the court for evaluation purposes. Our belief is that having another psychiatrist present for a collateral interview of this nature, an interview of a victim in this case, would be clinically inappropriate.

As the solicitors and the defense both indicated, this would be against DMH policy. And we really have a real concern about the chilling effect that it would have on the actual evaluation of Ms. Jones were another psychiatrist to be in the room present.

As they all indicated, Dr. Friersen is here today. If you'd like a chance to speak with him, we'd certainly be happy with that.

THE COURT: All right. I guess my -- I don't -- I need to hear more than that. I mean, this is going to be as an extreme unusual of circumstances we're going to face, or I am as a judge thus far in my career, with the circumstances and facts we've got. I mean, so this is not a typical victim. She's been very reluctant. She's represented by counsel. She's got a civil suit going. All, just ten things that make this a unique case.

What else other than we don't want another

person in the room? I mean, what else is there?

MR. ROYALS: Yes, sir. I mean, it's largely the fact that it would be clinically inappropriate. In most cases, especially for a collateral interview where it's not the actual defendants being interviewed, most clinicians indicate that somebody else in the room is not appropriate. The clinician's first duty is always for things like privacy. They are absolutely going to be getting any information that's credible to the Court and both parties would be privy to that.

But given that -- again, the sensitive nature of this case, we are very, very worried that Ms. Jones would be hesitant to discuss things that would be critical for the understanding of the evaluation later on and the presentation of the evaluation later on were another psychiatrist to be present in the room. Ms. Jones has been hesitant in most cases to give an interview with Dr. Friersen. It does look like --

THE COURT: She's been hesitant to give an interview with anybody.

MR. ROYALS: Precisely, Your Honor. And then we are worried that even if she is in the room, she might not -- she would feel that she could not speak

candidly were there another individual -- a psychiatrist for the defense in the room with her. That is our main concern. We want to do our best to present the best neutral information that we can to the Court, and we are worried that the presence of an outside psychiatrist would hinder our ability to do that.

THE COURT: I mean, give me -- maybe Dr. Friersen can give me a for-instance of why. She's going to be hesitant, period, in my opinion. And I've not met her, I've not had any interaction with her whatsoever, but saying it's going to be a chilling effect, she's hesitant and emotional and the -- she's appeared on television against her lawyer's advice, I think. I've seen her on television. And I know Mr. Harpootlian told me, I'm telling her to not talk with anybody, and then she's on television. So, I mean, she's a handful. But this case is a big case.

So, I mean, I don't understand why having a psychiatrist with an equal responsibility is going to hinder or improve or create an additional issue. You got to tell me more than you've told me. I mean, what you've told me, I know. Tell me something I don't know.

MR. ROYALS: Yes, sir. With permission, Dr. Friersen would like to speak.

MR. HUBBARD: And, Your Honor, as he speaks, if I could just again state, our concern would be it's the presence of someone who's adversarial on the other side for another person. That's my only concern, that if there's information that can help me as a minister of justice, both with my duty to the defendant and my duty to the community I represent, that's my concern, if there's any type of chilling effect on that because, ultimately, we're allowing somebody who's in an adversarial position in the room.

And I just want that on the record again, Your Honor, that -- my concern, because that is highly unusual. I've never done it in my career, so --

THE COURT: Well, I can't say I have either, so it's new ground for me.

All right. Tell me why that concerns you greatly other than a professional responsibility. I get that.

DR. FRIERSEN: Yes. Your Honor, I received yesterday a preliminary report from the defense expert. In that report, the defense expert had asked to interview Amber Jones as part of her

evaluation. And Ms. Jones declined to be interviewed by the defense expert.

If the Court orders the defense expert to be there, I think that has the potential to limit the comfortableness of Ms. Jones in discussing very sensitive and candid information that I would like to discuss with her, including issues of marital infidelity, issues of what happened on the phone call with her around the time this actually happened.

There's a myriad of very sensitive information that I want to discuss with her. And my fear is that having any outside party, but especially one that is a member of the defense team, is going to make her less comfortable in being forthcoming.

THE COURT: Okay. All right. That's a little more factual stuff other than saying it's professional responsibility. I was aware of that one, so that's why I needed to hear what you've just told me. Thank you very much, Dr. Friersen.

All right. Mr. Young, what -- let me hear from you.

MR. YOUNG: Yes, sir. She's already agreed to the presence of the defense psychiatrist through her attorneys. I mean, this is something that she's

agreed to. It's not like it's a surprise to her. So she has already made the decision that she would meet with both of them at one time and do one interview.

I've never -- of course, I've only been present for evaluations of the defendants, but every time I've ever been present for an evaluation at the department of mental health, there are other people in the room. I mean, it's a teaching hospital, there are residents, there are other doctors present, there are students that are present for other interviews. So I've never been in one where it was just the psychiatrist and the interviewee.

The other concern that the defense has is that, you know, if Ms. Jones says stuff that's not relevant to the criminal responsibility evaluation but is relevant to Brady, Giglio, Kyles, other discovery responsibilities of the State, that we wouldn't get that information unless Dr. Friersen decided that it was relevant to his report and included it in there without having some other person there listening to her.

And finally would be the requirement that Dr. Friersen, having been the only person who had interviewed her, would have to be here for her

testimony to correct anything -- if she says something that's different than what she told him, he's the only one that would be available to impeach her on that. So those are the defense concerns. Mainly, she's already agreed to the presence of the defense psychiatrists through her attorneys.

MR. HUBBARD: Since we're talking Brady, obviously that pulls me back in this again. I think it's far more likely, should there be any of that type of information, it will come out without them being present. The duty is not the doctor's, it's ours. That's part of our job, following up with the doctor to see what, in fact, was said. We have to do that with every witness anyway, just like when an officer interviews somebody.

Judge, I'm just concerned of what won't be said. You've already said this is a lady who, even with her attorney saying they're agreeing to something or trying to hold her back, she's got a mind of her own. And her attorney is not going to be sitting there saying please answer these questions. She's going to be very much aware there's an adversary in that room. I'm concerned about what is said and what is not said.

And this whole case, as you can see, is

revolving around this issue. My question is why wouldn't we want a doctor to say, in his professional opinion, this is how he needs to conduct his job? He's going to put out a report. We'll have the duty that we always have to follow up to see what else was said that we have a duty to turn over. That is the cleanest way.

And also, Judge, if we're getting after the truth, you know, this is the way to do it; for her to be comfortable to expose herself, which will be to their benefit. Judge, if there's going to be stuff they can hit her with, she's going to be more apt to say it if they're not there. That's my concern.

If a professional doctor with the years of experience that Dr. Friersen has says this is how I believe it needs to be conducted, I think we need to yield to him, Judge.

THE COURT: Let's go back to you.

MR. ROYALS: And, Your Honor, if I may, if the defense has or thinks there's a potential for information to come out during this evaluation that is not relevant to the evaluation but is relevant to the case, I believe there are better avenues for that to come out. Dr. Friersen, in this case, his

only role in this is to provide to the Court information that's necessary for criminal responsibility at the time of the occurrence. If there is other information that should come out, there's a more appropriate avenue than during a collateral interview of a victim in this case.

MR. YOUNG: Why not just try it? If she says, I'm uncomfortable, I don't want her here, that's fine, I'll take that. But why not just try it? If she says, I'm fine with it, then just go forward with it.

THE COURT: Well, I've already thought about that. I'm doing it in reverse order. I'm going to give him an interview solo with her like they're asking. If she'll agree to a second interview or to an interview with your psychiatrist, I think she needs to do that. I think we start their way with -- I would say it's probably likely she'll be interviewed a second time by maybe two. She may be softening up her stance of not saying anything.

But I think we go Dr. Friersen with her, and then a follow-up interview, perhaps, with others. That's what I think is going to be our best course of action with her, that way we get the benefit of both.

So that's what I'm going to do. I'm going to allow her to be interviewed by Dr. Friersen under his terms with him suggesting to her --

And, Dr. Friersen, I'm going to say, toward the end of the interview, if we need to have a follow-up interview, would you mind doing that and can we have others here too? Perhaps the State has an expert they want to have in there also. So it would be Dr. Friersen, State's expert, your expert, all interviewing her.

I'm going to go his way first with an opportunity for either or both of you to ask can we have another interview. And if she's not cooperative, perhaps we can talk with Mr. Harpootlian about getting her more cooperative. I think she's softening up and she's going to want to talk more. That's my opinion. We'll just have to see if I'm right or wrong on that.

MR. YOUNG: May I bring one inquiry through the Court to the department of mental health? And that is, is there a way that Dr. Dorny could observe the interview but not be in the room?

THE COURT: That thought occurred to me, looking at the mirror in the back.

MR. YOUNG: I don't know if they have the

facilities to do that or not. If they have either a one-way glass or a closed --

MR. ROYALS: Your Honor, I'm not aware of any facilities of that nature. No, Your Honor, we don't have the ability to do that.

THE COURT: Okay. Let's proceed forward on Dr. Friersen's terms first, and with the Court's suggestion to him that he try to open the door at the very end to a follow-up interview with, perhaps, others and a little bit larger audience. Perhaps her comfort zone will go ahead --

Dr. Friersen, do you feel that's practical?

DR. FRIERSEN: Yes, Your Honor. I'm glad to do that.

THE COURT: All right. That's what we're going to do.

MR. ROYALS: Thank you, Your Honor.

THE COURT: All right.

MR. YOUNG: Thank you, Your Honor.

THE COURT: All right. Are we ready to go forward even without --

MR. HUBBARD: Yes, sir. Yes, sir.

THE COURT: Let's do the questionnaire. What other motions, other than the lengthy motion, Mr. Young?

MR. YOUNG: Your Honor, I mean, we're at the Court's pleasure. I sent the Court and the State a list of motions. I think four or five of those have been heard and both the State and the defense have gone through the transcript and compared notes on which ones are still outstanding. And I have that list somewhere.

THE COURT: Let's do the questionnaire. I know that's outstanding. We were hitting on that one.

MR. YOUNG: Your Honor, in response to the State's suggestions to the defense questionnaire as staking out under Stanko, the defense filed Motion No. 84 in support of the defense's proposed questionnaire.

And the State specifically said that Stanko stood for the position that questions regarding the insanity defense were improper, stake-out questions, of course, Stanko actually says that we're not preventing questions regarding an insanity defense.

And further definitions of what is or is not a stake-out question, the defense had maintained a stake-out question was a question to ask a juror how they would vote if a particular set of facts were proven. The State said the defense was incorrect, that was not the definition of a stake-out question.

There's no South Carolina case that defines here's what a stake-out question is. If you trace Stanko back to Powers, and trace the footnote in Powers back to North Carolina, and the footnote in North Carolina back to McVeigh and a Richmond case, and both of those cases are very thoughtfully and well discussed in a United States District Court opinion, U.S. v. Johnson, which the defense has provided to the Court, the section dealing with what is and what is not a stake-out question along with the entirety of the opinion, none of the questions proposed in the defense questionnaire are stake-out questions that are in any way proper. Each question goes to uncover bias that potential jurors may have which would disqualify them from serving.

The question for the Court is not whether or not jurors can put aside biases, but do they have biases; and if they have biases, to expose those biases and decide whether or not that constitutionally impairs them from serving. The questionnaire is --

THE COURT: Both questions?

MR. YOUNG: Sir?

THE COURT: You said this question. I think it's both. Everybody has got a bias about

something.

MR. YOUNG: Yes, sir.

THE COURT: In spite of those, can you still be fair and impartial, as opposed to, is this particular bias so much of a bias for you, you can't constitutionally be fair. That's a separate question. But there's not going to be an unbiased juror as to no biases whatsoever.

MR. YOUNG: Right. The question is, do they have relevant biases to this case and these subjects.

THE COURT: Okay. We're on the same page. I wanted to make sure I was following you.

MR. YOUNG: And the questionnaire is the fastest way to do that. They answer the questions at home. They're going to follow the Court's instructions. If you tell them, don't do any research, most of them are going to listen to that. The ones that aren't going to listen to it weren't going to listen to it whether you tell them that in person or not. We have to trust people to do what they're going to do. I mean, I trust the jurors of Lexington to do what they're told to do and to be honest about their feelings about difficult subjects.

We are going to waste a lot of time in court if we don't get their feelings, particularly with regard to publicity and death penalty views, prior to them coming to court. That -- and using that method, using those detailed questionnaires is how we have managed to get fair and death-qualified jurors in under a week in cases like -- in high profile cases like Ernest Days and in Dylann Roof. And I've provided both of those questionnaires to the Court for review.

Both of those questionnaires had detailed statements regarding the allegations of the case and what people's views would be about the death penalty in that type of case. It is not a stake-out question and those are appropriate questions for the Court to learn.

We have proposed, along with the use of a questionnaire, that we could just go through the questionnaire and say, look, we don't need to waste any time on this person, they said that they've formed an opinion as to guilt, they said that they believe that the death penalty is the only appropriate punishment, we don't need to waste time bringing those people in here.

At the same time, people who say I have a moral

objection to the death penalty and won't give it any consideration, we don't need to waste time bringing those people in here either. In my experience, it breaks down to about 20 percent of jurors say death penalty is an appropriate punishment and 20 percent say that they would never give it any consideration. And that's having done voir dire in a dozen capital cases and thousands of jurors. The numbers just break the way they break.

I don't expect that Lexington is going to be any different than Beaufort, South Carolina or Brunswick, Georgia or anywhere else. I mean, that's generally how it breaks down.

And by not wasting time on the State trying to rehabilitate a juror who thinks the death penalty is the only appropriate punishment or the defense taking a long time trying to rehabilitate, get jurors to say that they could consider the death penalty, we save the Court a lot of time and we get where we need to be. Otherwise, jury selection ends up taking -- not doing that is when jury selection ends up taking weeks and months.

And hyperbolic rhetoric about, well, if we ask them -- if you tell them what case it is, we won't be able to get a jury, it's just not true. I've

always gotten a jury. I've never been involved in a case -- I mean, the courthouse shooter in Atlanta, we got a jury in Atlanta; the Dylann Roof, we got a jury in Charleston. You know, every high profile case that I've been involved in, we've gotten a jury. It took a lot of people, but we made it really easy by cutting them out on the front end; like, look, they said this on the questionnaire, don't bring them in. Let's just get to it and talk to the ones that we need to talk to, people who said I don't have an opinion and I could be fair.

THE COURT: All right. I'm going to hear from Mr. Hubbard. I'm going to come back. I've got a couple of questions about some of these questions.

MR. HUBBARD: Your Honor, you have a lot of discretion in this matter, and there's no question. Every judge sitting in your position can look around and see how judges have handled other cases. But, ultimately, they've all made their decision on what they have in front of them. You've started out with an observation that all judges do: Everybody brings a bias to the courtroom, for the State, against the State, whatever. They've heard things. They may have preconceived notions of how things work.

Here's the danger: In Stanko -- Stanko was

talking about the voir dire -- a judge was in control because it was all in front of him. They're asking you to go beyond that and ask the same type of questions where you have zero control.

We can trust jurors, Judge. Seriously? With no instructions? No oath? This is a capital case. It is absolutely imperative that if a jury's ever controlled and contained, it's this case.

They're asking you to ask sensitive questions, questions that don't say, where do you fall, A, B, or C, on the death penalty; are you always for or always against it, or can you be fair and impartial. They can't answer that unless they're here, with you in control. They're going further than that and saying, what do you think about the death penalty? Well, Judge, you know you're going to hear all kinds of stuff. And, dear Lord, if you talk about this specific case, you have nothing to control them going and researching it.

You can tell them in the questionnaire you're not supposed to do that. Well, Judge, that's going to prompt them to do exactly that. And when you get an answer back, you won't know how they got those answers. They may be absolutely appropriate when you bring them in this courtroom and they said,

exactly like you said, I can set those biases aside. But you're prompting them with a questionnaire, like they want to do, to actually explore those biases, maybe get more fully engrained, and jurors that could ultimately be fair to the defendant are now washed out. You would be out of control, no control over what the process is.

Stanko is important, Judge. Even in court with you in control, questions that they want to ask were not even allowed in voir dire, and the court said that's proper. Where staking out -- we can battle all over the map on what staking is. There is case after case on what's inappropriate to be asked because it's staking. It's not just the ultimate question of will you give death, will you give life; it is slowly cornering a juror, using their biases, to say you will always be on one side or the other so they can give a strike or push them in. And that's where you have to be in control.

Judge, I've been through a lot of these cases too. We've always used the standard because that's what gets them in. And you're going to knock some people out on the standard, people who can't be here, people who -- I know Hope's not here today, but she can tell you, we have always knocked people

out just using the standard. But these more sensitive questions, if they're to be asked at all, how they're asked is going to be critical. And you've got to be here because we will probably have a disagreement on it.

And, Judge, to just leave it to jurors, we won't get a jury. And I know you can look at Dylann Roof. Dylann Roof wasn't a capital murder case. It was a capital case, but it was not murder. It was a hate crime. So the crux of that case was race. And if you look at those questions, they delved into race. But that judge felt it was appropriate in that case and felt he could constrain those jurors using that questionnaire in that specific instance. And he had jurors from all over South Carolina, not just Charleston. It's different here.

And, Judge, I can tell you, I live in this community, this is the one case I get asked about, when's that case coming to trial? As a minister of justice speaking to a judge, I am deeply concerned that you handle this process and that we not just trust jurors to do it because, ultimately, although I'm seeking death on this man, I have a duty to protect him too. And I think, right out of the gate, we're going to be -- we're going to be messing

up right out of the gate. So I'm appealing to you to be in charge.

THE COURT: Before I go back and ask my questions about some of these questions, Mr. Young, let me pose this question to you: This is wasting the court's time. This case is expensive, it costs money. But how much money is enough or not enough or too much or too little? Time is the same thing. Are we wasting the court's time or are we utilizing the court's time?

So I understand let's minimize the length of time it takes to pick a jury, but are we screwing up by doing too much on the questionnaire? That's kind of my thinking. I heard you say let's don't waste the court's time, but I don't think us taking our time diligently to select a good jury, a proper and impartial jury, is a waste of time. Some jurors may try to waste our time, but I think we'll pick up on that pretty quick.

And I'm not denying your motion yet, but I'm just saying that's one of my thoughts as you were arguing, this will be a waste of the court's time and let's streamline it. I'm not interested in that. I want to do it right if we can do it right. Okay?

MR. YOUNG: Sure.

THE COURT: Now, query for you on a couple of your proposed questions.

MR. YOUNG: Can I respond to a couple of things the solicitor said?

THE COURT: Sure.

MR. YOUNG: Real quickly. There are no right or wrong answers to any of these questions, it's just how you feel. You don't need to control people to just be honest about how they feel. Matter of fact, people will be more likely to express their honest opinion about these subjects when they're allowed to do it on a questionnaire rather than having to do it in open court.

Stanko doesn't rule that any question is improper. It is in no way a limitation on voir dire. All it says is that the limitations placed in voir dire in this case did not render the trial fundamentally unfair. That is the ruling in Stanko, not that voir dire should be in any way limited or restricted.

I'm sorry, Your Honor. I just wanted to get that on the record. I'm happy to answer any questions.

THE COURT: You're kind of -- I don't know if

you're able to read my mind or not. But the question -- I'm going to question 23: What are you feelings about psychiatrists, psychologists, social workers? Why -- I guess, why is that question necessary or why is it --

MR. YOUNG: Because some people think that psychiatrists are quacks and they don't do anything and that they're just making stuff up. And if you feel that way, that's fine, but you wouldn't be an appropriate juror in a case where both the State and the defense are going to be calling mental health experts.

THE COURT: Okay. I was just curious.

All right. Questions on social media and asking their handles or usernames, tell me about that.

MR. YOUNG: I don't have a particular strong feeling about that. A lot of people comment on a bunch of the media -- I mean, I think the last time we collected the Facebook comments and the comments in the newspapers, it was somewhere around 7,300 different handles that people can make up to comment on articles. And if somebody were to abuse a handle to comment on an article he should hang or they had formed a position as to guilt or penalty, we should

know that. I'm happy to just ask them if they've ever commented on it. But, you know, trust and verify.

THE COURT: I want -- my feeling is right now, based on what y'all have presented to me, is I'm kind of split. But it seems to me that I would be more comfortable, the comfort zone for Judge Griffith, is that we send the questionnaire -- and I've not -- I'll be candid with you. I've not sat down and compared it to the traditional ones that have been used over and over in your pages 1 through 6, which are general questions, and not combine in do you know the parties involved.

I'm probably more concerned about I want to see the jurors and get a feeling with them about their knowledge of the case and their -- because sometimes the way people sit and you read their body language and you read their facial expressions, that's information too that everybody takes in, you just do.

And I'm kind of hesitant to send out information about the facts of the case and the -- on the questionnaire. I'm thinking we stay more general in the questionnaire, and when there's a bright line, I feel certain we're going to be able

to read through the returns as they come in and be able to say that's a very unlikely potential juror. I think both of y'all -- both sides are going to be able to read some of those. So that's kind of what I'm sitting at.

What can you do to convince me or to change my mind that I should send out facts of the case? I kind of feel like I want to be there and see them answer the questions and look at them and watch them. I'm a very visual reader of people.

MR. YOUNG: And I understand, Your Honor. And, obviously, it takes as long as it takes and --

THE COURT: Right. And that's how long it's going to take is --

MR. YOUNG: And that's fine. The concern that I have is that we have a lot of experts. And I think the defense has about 85, 90 witnesses coming from out of state that we need to do out-of-state subpoenas for, that we need to arrange travel for. There's -- it's an expert-heavy case that arrangements need to be made and schedules need to be made in advance. And that was my concern on going ahead and excusing jurors.

If we're going to take as long as we want to take to do jury selection, that's fine. Then my

request would be let's do jury selection and then pick a date to bring that panel and start the trial that would work for the witnesses' and experts' schedule.

If we can just do jury selection this summer and say, all right, well, we're going to go until we get a jury with the anticipation of we would try to start the trial, you know, sometime after that. I've been in cases with jury selection nine weeks, I've seen 12 weeks. And if you want to just go through it and go through it with everybody and take as long as it takes, that's fine. I just think we'd be in trial probably in August or September. That would be what it is. I'm just saying arranging transportation and flights for that many people --

THE COURT: And I'm not opposed to this. When we had the Lynch case, it was just me. But they had the Pacific Northwest, the Southwest, the Midwest, there were groups, and we got done on a Thursday afternoon, late. Okay? This is a changeover weekend, so everybody is down Friday, catch your breath, we'll start back Monday morning. That's just kind of how we did it. If we needed time, we had a little time, and it worked. I didn't have a jury to manage at all, which made it a lot easier.

But that's what we did.

I don't see this case -- I mean, certainly it's going to be different. But I don't see it being a problem for me to say, okay, now, the State has reached all of its witnesses from Alabama and now we've got to change them out and bring the ones in from Mississippi. I don't know that that's going to be the case, but best example I have right now. Okay? We're out of witnesses from that area, we're down for 36 hours, and then we travel them and move them, get everybody back staged up and pick it back up. That's just how we're going to have to do it.

I mean, this case presents that same -- what's the word for maneuvering people around -- logistics. The logistics are going to be the logistics. And we're going to have difficult ones at times and we'll just do our best.

But I think I told y'all in chambers that my idea is, as we discussed, if we're going to trust the jurors. I'm not going to keep them sitting in a hotel. I'm going to send them home with the instruction to just don't talk about the case, don't let anybody talk to you, that type of thing. I want them comfortable. So I'm not going to house them. My intention is not to house them, because I want to

sleep in my bed at night, I think they do too, I think you do too. I think that's just the way it's going to be.

So until they give me a reason to mistrust them, I'm likely to, with the instructions don't talk about the case, don't research the case, don't interact with anybody about the case, go home and have a good evening, see you back in the morning. That's going to be the methodology that I intend to use with the jury to manage them. So I don't want to keep them housed in a hotel somewhere away from their family. I think that creates more stress on them than they need and than we need.

So that's my intent or my hope. I'm not saying I won't change my mind, but that's what I'm hoping to do with this jury once we get them selected, we're going to manage them in that fashion. And it's going to be difficult, but housing them and holding them is just as difficult and it presents a different realm of issues dealing with them and being away from their families and all that.

So, anyway, if y'all have an opinion about that -- if I didn't say that in chambers, I thought I did.

MR. YOUNG: You did.

THE COURT: That's kind of my goal is to maintain them in their own quarters as best we can.

MR. HUBBARD: Your Honor, the State agrees with that too, because I think, ultimately -- there's been debates over the years how that affects a jury. I think we all want jurors who are fresh and clearheaded and not worried about stressors from home. So we're absolutely fine with that.

And I would just say, in striking this jury, I know this is the part you got to get right, we got to get right. But I do think you need that trial date in there too because a lot of these jurors are qualified, a lot of the issues you have when jurors aren't available is going to be on that date.

And I know you've already built in flexibility if it gets bumped, but that's just -- from my perspective, from all the cases I've done, and I know talking with Shawn and Suzanne, all the ones they've touched, that if you give them a date in mind, that's going to earmark your red flags that you need to address with them. So -- and then I think we get flexible at that point.

THE COURT: I think we put our time into -- you know, as far as day-to-day work picking a jury, we work a little longer day. Once we get into trial,

we're going to work a more normal day. I'm not going to work 7:00, 8:00, 9:00, 10:00 at night trying to get the case rammed down the jurors' throats. We're not doing that. That's just not good for anybody. Y'all can't survive that, certainly I couldn't. So we're not going to do that.

But we may go 6:00 or 7:00 trying to find panels of jurors to get them through there so we can manage them and get the responses back. So we may put more time on the front end with the jury, and then once we get to the presentation, we will be more methodical.

Again, these are hopes and directions, not rulings right now. That's just my -- kind of where I'm coming from. If y'all think that's wrong, you know, let me know and I'll reconsider. But that's kind of what I'm thinking. We'll work harder -- or a little bit longer day picking the jury and the panels and calling them back as best we can without undue burdening anybody. We're going to get a good panel as best we can.

MR. YOUNG: My only concern is I start running up extra fees if I don't pick up the kids by 6:00. And daycare is already more than my mortgage.

THE COURT: It's strange you say that. My oldest turns 24 on the 21st, my number two child turns 23 on the 17th, and my baby turns 20. And I was riding by the daycare this morning, golly, it wasn't but a week ago I was worried about that exact same issue. But now they're grown. They grow up like that. It's incredible.

MR. YOUNG: One final note, Your Honor, I want to make is that a lot of Dr. Foglia's testimony regarding capital juries and the Capital Jury Project and the research that they have done with jurors, I think, can be beneficial to the Court in making a final decision regarding questions about publicity and penalty views in a questionnaire. We'd ask the Court to be open to listen to that testimony prior to making a final ruling.

THE COURT: Okay. That part, yes, I will keep an open mind. I have not fleshed out a final version of anything, so I will certainly do that.

All right. After we hear that, perhaps you can point out any particular things you might want to. And, Mr. Hubbard, you do the same.

MR. HUBBARD: Yes, sir. I do have one thing, Your Honor. I don't mean to cut you off, but I do have one concern. We were put on notice they have

flown in an expert to talk bout the unconstitutionality of the statute. That causes us tremendous concern.

Judge, first of all, as you know, our state supreme court has made that ruling. You can't overrule them. So it's kind of a moot point for you. I get it that they want to make an objection, they want to preserve it. I don't know that hours and hours of testimony is the way to do it. I think to preserve it, they can just challenge the statute.

I don't even mind if they do a brief, because it's a legal argument, not a factual one. It's a legal argument. Do that. I don't even mind if they put their PowerPoint in that legal brief, you rule it's preserved. But I don't think it's for you, Judge, because, really, it's an appellate issue. And, frankly, it's going to be more of a federal appellate issue, not state. Our state supreme court has ruled, repeatedly, the statute is fine.

My concern in the immediate is that -- and I don't want to accuse them of anything, so I'm couching this carefully. There almost seems like a manipulative process where they're going to say, Judge, you could at any time end up being our jury, so we want to talk about this process and what

capital cases are and why it's bad and why it's wrong and why it's a violation when you could end up being not just the judge, but our juror.

Now, I have no doubt you're not going to be manipulated, but it's on that record, it's out there. And everything that you're doing, you're the gatekeeper to keep this whole process pristine, including any perception years from now about where was I judge on this? And to me, the counter would be as if we came in and said, Judge, let us show you why the death penalty is necessary and we got into other cases and the trauma on families and how murders are not all the same.

I'm just appealing to you as the gatekeeper to keep this process pristine; not because of the lack of faith in you, you wouldn't have the case if our court didn't deem that you were the person that should have this, and you've also been here before, we've experienced that.

As a gatekeeper, I would just appeal to you to say that if that's the gist of their argument, they just preserve it. We don't need testimony on that, Judge. They can go on for hours. What's our argument? The supreme court has spoken; it's a legal argument, there's not a factual issue here.

Now, if there's something else other the legality of -- or constitutionality of the death penalty, I don't know what that is, I haven't been apprised that there's going to be another subsection of an argument that might help you on picking juries. That's the first I've heard of that. If it's in the brief, I've missed it.

So I'm just kind of stunned. I've never walked into a case where we have an expert who's been flown in to argue that you need to put the kibosh on this case even though your higher-ups have said, no, this is a green light.

So I'm just appealing to you as gatekeeper so when they look over your shoulders and when the federal judges, whoever they are, look over your shoulders years from now and they don't know you, they know you kept it pristine.

THE COURT: Any response to that, Mr. Young?

MR. YOUNG: I don't know what I'm responding -- is that a motion from the State that we not be allowed to present the testimony of Dr. Foglia?

THE COURT: I think what he's saying is it's been decided by the supreme court and, factually, there's nothing in front of me to base a decision on yet. I haven't heard one bit of testimony about

this case. This is just about fairness or unfairness constitutionality of the potential sentence?

MR. YOUNG: Yes, sir. So in every case where you read about voir dire restrictions or improperly qualified jurors, the ultimate question for the reviewing court is, is there evidence in the record that would lend the court to find whether or not the process was fundamentally unfair.

The Capital Jury Project, the evidence -- the work that Dr. Foglia has done, all the articles that she's written, the thousands of jurors that she's interviewed, is that evidence about what can happen during jury selection in capital cases that makes the death penalty scheme not comport with the requirements of the United States Constitution.

This testimony, this evidence has never been reviewed by the South Carolina Supreme Court, despite the fact that South Carolina was one of the participate states where a number of jurors were interviewed and their attitudes were recorded. And that's what we're asking to present testimony about.

THE COURT: Well, I think that's part of what the State's saying, is since you're going to present this in a motion, am I just to take it under

advisement like a motion in limine or something that we're going to then proceed with the jury selection and, in the midst of that, you know, we got it wrong, you're correct, this system is flawed, we can't pick a fair jury.

I mean, you see what I'm saying? Is the cart ahead of the horse? I mean, I've not picked a jury, not interviewed a jury, we've not sent out the questionnaire yet. So what has happened in this case yet for me to base her argument or her presentation on?

MR. YOUNG: The social science is pretty clear that picking a constitutionally qualified jury, all 12 jurors, is impossible, that it can't be done, based on all the hoops that they have to be able to jump through in order to be constitutionally qualified. There's seven fundamental areas where jurors were not able to engage in their responsibilities under the constitution. And it would be our position that, based upon those errors, the death penalty scheme, as it exists and as it was supposed to exist after Furman, is unconstitutional.

MR. HUBBARD: Just a quick response. I'll tell you what we can do. They want this information in the record. Obviously, I don't think you can

overrule it. You can't throw the statute out. It has been ruled this is a proper statute. It doesn't matter exactly how it was attacked. Our supreme court has spoken.

What they're arguing is more policy. It's more of a legislative issue, frankly. If our legislators see that our system is -- could be better or it's flawed, they can address that. But as far as our high court, I would suggest, just as a compromise, let's take the PowerPoint, let's put it all -- packet it up, preserve it for appeal so it's preserved, so that if they want to argue it -- because they said it hasn't been heard by our high court. Let them hear it.

But, Judge, the difficulty you're in, is you're constrained. They've ruled. But by preserving it, it's really an appellate argument anyway. That's fine. I think that's the best compromise I can come up with in my mind, is they get what they want, but they'll be arguing in front of five judges -- justices instead of you because it's unfair to put it in front of you.

THE COURT: All right. I think all y'all understand the difficulty of that.

How long is this record you want to make?

MR. YOUNG: About three hours, Your Honor.

MR. HUBBARD: And, Judge, I'm just concerned again -- again, I trust you. This isn't personal to Judge Griffith --

THE COURT: Oh, I understand.

MR. HUBBARD: -- but I'm thinking as a gatekeeper, if you open the door, I think we've got a problem. And what I would ask you to do is, instead of building an oral record where you can be the juror, that's the whole problem. That's where it's different. If you do it the way I'm suggesting as a compromise, you've protected yourself as a juror.

And I think that -- day in and day out, you rule as a judge, but now you've got to protect yourself as a juror. I think that's opening up a gate where years from now, when they're looking over your shoulder, why did you accept something or reject something, maybe -- it opens up things where your judgment is now under attack.

You remember in Lynch how difficult it was? Every five seconds you were a judge, but you were a juror. I think you've got to be a gatekeeper to protect you as a juror.

THE COURT: The solution to that, if I remember

right, is, as a judge, I am tasked with the responsibility of not considering irrelevant -- considering only relevant admitted evidence, and the stuff that I suppressed, I didn't consider at all. And I very vividly remember the difficulty in doing that, but it was what I had to do.

MR. HUBBARD: Right.

THE COURT: Now, what's the difference --

MR. HUBBARD: There and here?

THE COURT: What you're suggesting here is they've got a brief written and PowerPoint, and I read it and watch the PowerPoint without testimony and then say, as expected, I decline to grant your motion to declare the death penalty unconstitutional and we move forward?

MR. HUBBARD: I'll be happy --

THE COURT: What's the difference?

MR. HUBBARD: Here's where I see the difference: In the trial, you have witness testimony and evidentiary issues being raised before you that pertain to the case; here, we're not in trial yet.

THE COURT: Well, I'm aware of that.

MR. HUBBARD: You've got a witness who's coming in, God knows what she's going to say. I don't

know. I mean, I can read over her PowerPoint, but I don't know what she's going to say. But this isn't about the case now --

THE COURT: Oh, I know. That's what I asked him.

MR. HUBBARD: That's the big difference. When you're a judge sitting as judge and jury, like you did in Lynch, we're all ruled in there, it is specifically about Lynch, Kenneth Lynch, what happened in Lynch. Here, it's about the system in general, and things, biases and prejudices, why the system is flawed. I think both as a judge and as a juror, potential juror, that's not for you. That's an appellate issue.

So I think the reason why it's different is -- I would let them put in all the written material, but protect yourself and keep that pristine by no testimony. But she can still put it -- if they want to put it in the form of a brief, they've got their PowerPoint rendered in writing. I don't care how they do that. I'm not asking them -- or trying to cut them off from being able to present, but just to you because this is different from Lynch.

We're not in the case. This isn't something about a search warrant in that case or whether a

witness can testify or the limitations. That's different. And then every judge that ever sits as factfinder has to do that. This is different. This is different.

MR. YOUNG: This is about, you know, death penalty and jury selection and whether or not it can be done in a manner consistent with the United States Constitution and binding authority on the court. We've already determined that we're going to engage in jury selection and we're going to ask jurors questions about their views and attitudes and whether or not they have biases and what biases need to be explored. All of this testimony is directly related to that process which is going to happen in this case. I don't know what the State means when they say protecting yourself as a juror --

THE COURT: What he's saying is this -- is, what do you expect me to do? I hear her testimony and go, you know what, you're right, it's impossible to pick a fair jury, so I'm declaring -- I mean, is that what you expect or hope?

MR. YOUNG: I mean, I'm not putting money on it. If I was a betting man, I wouldn't go odds on that. I mean, a penny would probably make me a millionaire on the bet that that would happen.

THE COURT: Let me ask you this: How can I grant your motion if you put up whatever it is -- and I don't have any idea what it is. It's just impossible to do and it should be declared unconstitutional when the answer is, in my mind already, well, let's give it a shot and pick a jury and try and see if we get it right. Isn't that the answer? That's kind of where I'm kind of agreeing with Mr. Hubbard is, until I try and fail, why not try and fail?

MR. YOUNG: Well, here are the areas where we need to be cognizant about and what we can and can't fail on. These are the areas where jurors have consistently not been qualified. These are the questions that you need to be aware of and ask jurors in order to determine whether or not they're qualified. These are the instructions --

THE COURT: That's different now. What you're talking about, that's a little different. That's considering the issues on the questionnaire rather than constitutionality of the death penalty.

MR. YOUNG: The motion asks -- I mean, it's a big ask. Like, the way that the scheme is set up, it can't be utilized correctly. But being aware of the number of errors in the system --

THE COURT: Which is why I called it a motion in limine.

MR. YOUNG: And that's probably a good term. But, Judge, we anticipate this coming down the track and we think that would be unfair. That's kind of what it is. We can guard against a number of these deficiencies if we're cognizant of them. If Your Honor is cognizant of them, you can use your instructions, you can use your language during voir dire. You can allow for certain particular questions to be asked during voir dire to avoid some of these problem areas.

Can we correct them all? I think the opinion from the expert is going to be no. But can we sort of minimize the risk? Yes. But in order to minimize the risk, we have to know what it is going in. And that's why we want to call Dr. Foglia to the stand.

MR. HUBBARD: One quick rejoinder, Judge. What she's got in her Power slide, the last slide is the giveaway. It's that no matter what you do on that questionnaire, no matter how you handle any of this, every capital case, you're likely to have jurors who decide the sentence during the guilt phase, no matter what you do. That's her conclusion as an

expert.

Every juror -- every case will likely have jurors who will not consider mitigation because they think death is the only acceptable punishment, who are more conviction- and punishment-prone than the norm, and who have been biased by the focus on the penalty during the jury selection.

Judge, basically, it's saying, again, no matter what you do. It's not about let's refine the process, the process is wrong. It goes on, you're likely to have jurors who do not understand the sentencing guidelines; likely to have jurors who believe the death penalty is mandatory, no matter what you do.

So talking about corrective action, she's not asking for that. The system is wrong, forget your instructions, the system is flawed, likely to have jurors who do not see themselves as primarily responsible for the sentence, likely to have jurors who are influenced by assumptions about race. I'm not sure how that fits in here, but anyway, likely to have jurors who vote for death because they erroneously assume early release of capital defendants.

Judge, all of this is about doesn't matter what

you do, this isn't to help refine the questionnaire process or voir dire; the system is so fundamentally flawed, Judge, you're powerless, no matter what you do, we're wasting our time and this man is going to be unduly convicted and sentenced to death. That's why this isn't for you, Judge.

I don't mind all this going up, as offensive as it is opinion-wise to me and as much as I believe otherwise, based on my experience and the experience of other prosecutors, don't mind that going up. I'm willing to compromise on that, say there's a middle ground here. But that is the process. For it to be served up and let you open that gate and say, Judge, hear this because it might help you, that's not the purpose of it. It's to undo it. I object to that.

MR. YOUNG: To allow Mr. Hubbard to say what Dr. Foglia said without allowing Dr. Foglia to testify --

MR. HUBBARD: It's their PowerPoint that they gave us from her.

MR. YOUNG: He said she says. Well, she hasn't taken the stand yet. We'd like to call her to the stand.

MR. HUBBARD: And, Judge, even their purpose was expressed in their motion. The motion, the end

of it is for you to declare the South Carolina death penalty scheme unconstitutional, that is the motion before you, and to preclude prosecution from seeking the death penalty. If there was some other motion on, like, how to refine the process, that might be something you can take under advisement. But you already know the answer on this one.

MR. YOUNG: Judge, South Carolina is a state in which if they're in court and have a court reporter, you make a motion. I move that the Court consider the Capital Jury Project in order to enhance the jury selection in the Tim Jones case and request to call Dr. Foglia for that purpose.

MR. HUBBARD: Then I would specifically object to her saying her opinion; that from the information they provided from her concludes with what I just read you; that it doesn't matter what you do, you can't enhance a system that is fundamentally flawed and no matter what you do, it's broken. So I ask again, it's a compromise. I'm not hearing it from the other side.

THE COURT: I'm hearing two things. I'm hearing you, but then what Mr. Young just said was to call an expert to assist in the jury selection and try to get a more fair jury, and here's some

guidelines to, perhaps, use, that's different than declare the penalty unfair, slightly different.

MR. HUBBARD: Right. And I agree. And that's why -- my concern was, Judge, that's to open up the door here. Everything they provided us, her testimony, the PowerPoint she's going to show you, has nothing to do with what they just said they're wanting to do. Nothing. It's not about enhancing this process, it's about her conclusion at the end of the day, it's fundamentally flawed and you can't fix it.

And that's my objection. It is, yeah, Judge, hear us because this might help you, it might help you understand that no matter what you do, it's wrong, it's flawed. And that's why, Judge, I'm fine with all of this. And if they want to videotape her testimony somehow and preserve that, fine. Just don't think it's here.

It's not designed -- her testimony is not designed for that purpose. And what they have in their PowerPoint, what she is going to now spend several hours showing you concludes with exactly what I have said, doesn't matter what you do. And I don't think the defense is going to say otherwise.

THE COURT: Okay. I'm going to say let's take

a break because I need to step off. So we'll take about 10 minutes and I'll come back and we'll figure out what we're going to do.

MR. YOUNG: Yes, sir.

(Brief recess.)

THE COURT: All right. You're still standing, Mr. Young. What else you got?

MR. YOUNG: No, Your Honor.

THE COURT: Here's what I think: I think for the purposes of me preparing the questionnaire that I believe would be appropriate, I can consider testimony as to issues of that. I think it's premature for me to say -- based upon the facts presented thus far about this case to say that that's going -- I guess I'm at a loss as to how I'm going to base a decision as a judge with no facts on this case that the penalty, because it's not been imposed yet, that it's unconstitutional. How am I going to do that?

MR. YOUNG: I don't know, Your Honor.

THE COURT: Now, here's what -- I think what I want to do, procedurally, is, I think, to the extent you want me to hear testimony regarding the questionnaire and determining or trying to eliminate unfair or biased jurors and of hopefully selecting

good jurors, qualified, usable jurors, I can consider that testimony in preparing the questionnaire which I finally issue shortly.

As to everything else, I think that would be, perhaps, outside of that, to the extent you want to make a record for the unconstitutionality of the sentence of the death penalty itself, that we accept that as a Court's exhibit and a proffer, so to speak, for purposes of your record. But that's what it would be. You understand?

MR. YOUNG: Yes, sir.

THE COURT: Can we do that?

MR. YOUNG: Yes, sir.

MR. HUBBARD: I have just a question for clarification. Of course, I don't have any problem with Your Honor having the PowerPoint presented, packed up, sent off for a higher court. The issue -- there's a motion on the books right now on whether the statute is constitutional.

I'd ask that you go ahead and rule on that. That's not something you can take under advisement, the statute is. Getting into the facts of this case, that's something different. There's nothing about this case that makes it unconstitutional. The law is, it's constitutional, and that comes from our

supreme court. So I'd ask for that ruling.

And then finally, I know Your Honor wants to get into how can their information assist you on a questionnaire. Ultimately, their information is really as to voir dire and everything. So my question is, how do we limit or what specifically is she going to present other than this is just opening the door where we go into all things about what jurors think and all that. Because then, I'm back at my original objection.

How does a -- I guess my question is this: How does a basic standard questionnaire that's been approved repeatedly, how is that -- what needs to be improved upon it as opposed to why this system is flawed and why, no matter what you do, you're going to fail. What are the limitations --

THE COURT: I don't know. And those are the exact questions during the break I was pondering.

MR. HUBBARD: Maybe we do this: Maybe they meet with their expert -- she's right here -- we take a quick break so we get this right, they propose what they want to delve into, and that way we'll know are they just rehashing what she's already presented, what you've already ruled on you're not going to hear, or is this something that

can genuinely be considered by you. Then you'll have something in front of you to know what you've got, you're not walking into an unknown. And that would expedite things. Even if it's a break so they can figure that out, that might expedite it.

THE COURT: All right. Considering what I've said and what Mr. Hubbard suggested, where does that leave you with what you want to present?

MR. YOUNG: Well, I mean, if you want us to proffer the testimony as to the motion in whole -- and specific parts of it are going to relate to the questionnaire and voir dire.

MR. HUBBARD: Proffer is exactly what they're doing anyway. So, no, that's the objection. You've already said you don't need to hear three hours of a proffer. They've got that right here. I think what you came back with, specific stuff that would assist you --

THE COURT: Yeah, that's what I did.

MR. HUBBARD: Now, that's not so much a proffer. They can meet with their expert while she's here and say answer that question you just posed. And I'd like to know, so from my standpoint, I'm still protecting myself and the integrity of the case in doing my job.

MR. YOUNG: Every case that's ruled upon limitations on the defense's ability to present evidence in capital cases said it was error. We're asking to present her testimony. If Your Honor doesn't want to consider it and wants us to just proffer it for the record, that's fine, we'll do that too.

THE COURT: All right. That's where I'm going with this. I'm going to let you present the testimony as a proffer. I don't believe that I can rule on that at this time, no matter what she says, because I can't consider juxtaposing because I haven't selected a jury, I haven't heard the case, I haven't heard any testimony about the events leading up to the accusations made against Tim Jones. I don't have any of that with me to consider it against or with or weigh it or any of that kind of stuff.

MR. YOUNG: I understand that. That's fair enough.

MR. HUBBARD: And my question -- I'm just back to this. I'm trying not to beat a dead horse, but to me, this goes to the very fundamentals of what we're asking both you to do and a jury to do, that it is -- in your role as that gatekeeper, if she

just proffers it, we're just letting this back in again. We've been kicking this around for nothing. We'll just have her testify. And no matter what it was, it was always going to be a proffer. It always was, because you don't have authority to overrule it, the death penalty.

So my position is they've got their proffer, so to speak, already written. Let's submit it and the high court will have it. They're protected. They're protected now.

THE COURT: He says they're not.

MR. HUBBARD: Well, Judge, I understand what he says because he wants you to hear it. And that goes back to my objection; you can't because you're both judge and jury and this is an outside matter. You've got to keep yourself pristine. But the high court, that's what they hear. That's the whole core of my objection. This so-called proffer is exactly what I don't think you can do. But by taking this in and letting it go up, that's fine. That's why you're back to your original thing, well, hey, let's get practical, what can help me as a judge in selecting a jury?

All I've asked is they get with their expert and let's not spend three hours -- let them get with

their expert and say here's seven things that would help Your Honor. I'd like to know what those are and maybe we can get that and then she can testify to it.

MR. YOUNG: There's seven areas with regard to jury selection that would help Your Honor in deciding about the questionnaire.

MR. HUBBARD: Well, those are the seven areas they say that makes the system -- no matter what you do, it's flawed.

MR. YOUNG: She never says no matter what you do. She says this process can be improved on. Let's ask her -- put her on the stand and ask her.

MR. HUBBARD: I'm taking what she gave us. Her conclusion is it doesn't matter, that's why it's unconstitutional. You're back to that again. It is unconstitutional because no matter what you do, you will get jurors, you're likely to get jurors who aren't going to listen to you.

THE COURT: I already know that.

MR. HUBBARD: You do. Sure.

THE COURT: That's just part of the system we live in.

MR. HUBBARD: Right. And so how has that helped you?

THE COURT: That's just part of the system. You get 12 jurors or citizens and try to eliminate their biases and their connections and can they be fair and impartial. That's the jury system.

MR. HUBBARD: I agree with you. And Mr. Young has said let's trust the jurors. I do. But it's the system that's under attack, not the jurors. So if helping you, the conclusion is, Judge, it doesn't matter, you can't put enough constraints on this, then we're in a fix and you're ultimately having the motion heard that you can't rule on. You can't --

THE COURT: I agree with you that the constitutionality of the punishment has been decided; something else, that's not an issue I think the trial court can rule on. I mean, I won't be asked to rule on it, but it's my understanding I've got to follow the law of the supreme court.

The supreme court says the death penalty is constitutional. It is for a jury to decide or a judge to decide, depending on the circumstances of the case, factual question, all that's out there.

MR. HUBBARD: And that's their motion. So if that's your position, which I think it has to be, Your Honor has ruled on their motion. Now, if there's a sub-tier to that motion, Judge, she's got

some things that can help us, that's not what they're just saying they're going to present right now. They're going back to the motion that you're basically ruling on.

THE COURT: Well, I mean, if we do it this way, I rule on the motion, constitutionality has been decided by the supreme court, and I'm going to follow the supreme court, and they say, Judge, we'd like to proffer this testimony nonetheless to preserve it for appeal, I think that's what he's asking for --

MR. HUBBARD: It is. It is. And I don't object other than, Judge, she's written it down in written form. I don't even mind if they videotape her interview, preserve that.

THE COURT: Well, we've got her here, let's do it that way. I don't necessarily disagree with you that that would more streamline it. But if they want to present her, I think that would be the most -- let's just get it done that way. I won't say it would be most efficient or most helpful or most harmful. The constitutionality -- the supreme court has told as trial judges it's constitutional. That's the law. I'm tasked with following the law.

Y'all have made that motion, I've made my

ruling. If you would like to proffer some testimony, call your witness.

MR. YOUNG: The defense calls Wanda Foglia to the stand.

WANDA FOGLIA

being first duly sworn, testified as follows:

THE WITNESS: I do.

THE CLERK: If you'll have a seat here, please. State your name and spell your last for the record.

THE WITNESS: Wanda Foglia, F-O-G-L-I-A.

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Good morning, Dr. Foglia.

THE COURT: Go ahead.

THE WITNESS: I was concerned about the slides.

THE COURT: Okay.

BY MR. YOUNG:

Q. Good morning, Dr. Foglia. Sorry. Let's start over.

A. Good morning.

Q. Dr. Foglia, can you tell the Court a little about who you are and your background and what it is that you do?

A. I'm a professor of law and justice studies at Rowan University in New Jersey. I also am the

coordinator for our graduate programs, our masters in criminal justice programs. I teach undergraduates as my main job. I do research in various areas, predominantly on the death penalty, since the 1990s, and I've have been involved with the Capital Jury Project since 1996.

Q. At one point in time, before getting involved with Capital Jury Project, were you a prosecutor?

A. Yes. I went to law school and -- in Philadelphia at the University of Pennsylvania, and I worked as a prosecutor in the Philadelphia District Attorney's Office.

Q. And did you teach for law enforcement before law school?

A. I did. After getting my law degree and then practicing law, I decided I wanted to go back and be a college professor, so I went back and got a Ph.D. And while I was studying for my Ph.D., I was a police academy instructor where I taught in the police academy, teaching them the law on use of force and search and seizure and that sort of thing.

Q. I'm going to show you what's been marked as Defendant's Exhibit 1 and ask if you recognize that.

A. I do.

Q. And what is that?

A. That's my CV.
Q. And is it complete and accurate?
A. Yes.
MR. YOUNG: Your Honor, at this time, the defense would move to admit Defendant's Exhibit No. 1.
THE COURT: For purposes of proffer, it will be admitted as an exhibit.
MR. GRAHAM: I mean, it's a proffer.
THE COURT: Right. I mean, it's all proffer. It will be admitted as an exhibit for purposes of this hearing.
MR. YOUNG: Yes, sir.
(Defendant's Exhibit No. 1 admitted into evidence.)
MR. YOUNG: And my understanding, the State doesn't have any objection to the admission of the CV, the articles, and the PowerPoint. Is what they were saying?
MR. GRAHAM: That's correct.
THE COURT: Right. Well, now, since it's a proffer -- keep going. We'll handle it that way. They don't have any objection to her CV.
BY MR. YOUNG:
Q. Dr. Foglia, I'll ask you, do you know what this

is and have you reviewed these articles?

A. Yes. These are the articles that I normally introduce when I testify in death penalty cases.

Q. And are these all articles that relate to the literature regarding the Capital Jury Project and the findings?

A. Many of them are Capital Jury Project -- are articles about the Capital Jury Project research. Some of them are articles that other researchers have done, either with real jurors or with mock jurors, that come to the same conclusions, which is something you do in scholarly research, is you look to see if the results of multiple studies all come up with the same problems, what we call convergent validity or replication.

MR. YOUNG: Your Honor, Defense would move to admit Defendant's Exhibit 2 into the record for the proffer.

THE COURT: All right. For purposes of proffer, we're not going to argue admissibility of everything. The State would have the opportunity, if this were in something other than a proffer stage, to object to all these things.

So to streamline, since this is a proffer, introduce every exhibit you want, but I'm not going

to preclude the State from saying we would object to that if it were in a different situation. I think that would be the most efficient, because if they have to argue every single thing as far as the proffer, then --

MR. YOUNG: My understanding was the State didn't have an objection to anything other than the live testimony.

MR. HUBBARD: Actually, the objection is we objected to the proffer. Your Honor has ruled on that. It's a proffer.

THE COURT: It is a proffer. Okay. Fair enough.

(Defendant's Exhibit No. 2 admitted into evidence.)

BY MR. YOUNG:

Q. Dr. Foglia, I'm going to hand you what's been marked as Defendant's Exhibit No. 3 and ask if you recognize that.

A. I do.

Q. Can you tell what that is for the record.

A. That is the PowerPoint slides that summarize some of what I'm going to testify about today.

MR. YOUNG: Your Honor, I'd make that part of the record, Defendant's Exhibit No. 3. And I have a

copy for Your Honor, if you want.

(Defendant's Exhibit No. 3 admitted into evidence.)

BY MR. YOUNG:

Q. All right. Dr. Foglia, let's talk about -- how did you get involved in this thing called the Capital Jury Project? And what is the Capital Jury Project?

A. When I was studying to get my Ph.D. in criminology, one of the people on my dissertation committee asked me if I wanted to get involved in the Capital Jury Project. My dissertation and the research I was doing at the time was on cognition in crime or how the way people think affects whether they commit crime or not. So he thought that -- this is focused on -- the Capital Jury Project is focused on how jurors think. So he thought that it was related to what I was doing and it was a good research opportunity.

So before getting involved in the Capital Jury Project, I published about nine articles on other topics. But then, once I got involved in the Capital Jury Project, my research got focused on death penalty studies and I concentrated on researching the death penalty area. And I've

published 21 articles on capital punishment.

The Capital Jury Project is a social science study of how jurors decide death penalty cases. It involves 14 different states and I get into more details on the specifics in later slides. I don't know if you're ready for me to get into the slides now.

Q. Have you been declared an expert in this field in other courts?

A. Yes. I have testified in 42 different cases in 17 cases, and in two federal cases, one in Colorado, one in Vermont. And I've always been accepted as an expert witness whenever I've been called to the stand.

Q. And what areas were you declared an expert witness in?

A. In criminology and capital jury decision-making.

MR. YOUNG: Your Honor, the defense would move that Dr. Foglia be considered an expert in criminology and capital jury decision-making.

THE COURT: She will be so qualified.

BY MR. YOUNG:

Q. Now, have courts -- have you testified as an

expert in courts in South Carolina?

A. Yes, I have.

Q. Have courts in general, the supreme court or other courts, used social science research in their policymaking decisions?

A. Yes. The supreme court has been relying on social science research now for decades. One of the most famous examples is illustrated here on slide 2. It was the case of Brown v. Board of Education where they relied on social science evidence about the harmful effects of segregation.

In a more recent case that involved the death penalty, the supreme court looked at social science evidence of the impact of jury selection. And the cite for the Lockhart v. McCree case is here in slide 3. And there, they were only considering three studies that had been decided since the law changed with Witherspoon.

But all those studies involved what we call mock jurors, where people who were asked to come and pretend they were jurors, listen to evidence and assume they were jurors, and indicate how they felt about the case or the issues. But the supreme court said that we need to know how actual jurors view these issues. And that was the motivation for the

Capital Jury Project.

So Dr. William Bowers, who was a research professor at Suny Albany before he died last year, he was the principal investigator for the entire Capital Jury Project. He gathered together topnotch death penalty researchers with J.D.s and Ph.D.s and expertise in the field to conduct this study. He was internationally known as a death penalty expert. He got the Vollmer award from the American Society of Criminology for his lifetime achievement in research.

Another person who was involved, Joseph Hoffman, who is a law professor at Indiana Law School, and he's very well-regarded. He was a law clerk for Rehnquist. He actually wrote -- he modeled the death penalty statute from Mitt Romney when he was the governor of New York.

So there were people with various views on the death penalty but with a lot of expertise in death penalty research who coordinated this study. I'm going to be talking mostly about the results of the initial study, which was initially called Phase I. Towards the end of my presentation, I'll mention something about a follow-up study that interviewed jurors who decided more recent cases and found that

the problems we found are still infecting the death penalty process.

So slide 4 just summarizes a little bit about the study. I call it a continuing program of research on decision-making because some people are still analyzing the data and writing articles about it. But the data collection for the first phase of the project is completed.

It started in 1991 by researchers who were at different universities throughout the country and it was funded by the National Science Foundation. And our findings are based on in-depth interviews of people who actually decided death penalty cases. And the interviews are -- use a structured interview instrument which is introduced as part of Exhibit 2, Article No. 27, and the interviewers were trained using a guide that is article 28.

And a lot of care was taken to make sure that the interviewers understood that they had to be very careful in asking the questions and stick to the script when they asked the questions to make sure they didn't bias the jurors in any way. Because everybody involved here are scholars and academics who wanted to be able to publish articles based on the findings, and the methodology has to be

scientifically rigorous in order to get your articles published.

So these interviewers asked the jurors about the guilt phase, about the guilt evidence, about the guilt deliberations, about the punishment evidence, about the punishment deliberations, and about their attitudes towards the death penalty.

And at this point, there were about 80 publications in various law reviews and social science, peer review journals that had analyzed different issues that have -- that were covered in our interview instrument. I'm going to be focusing on the legal issues, other people focused on the more social science issues.

And there's a website at the bottom of slide 5 that lists about 80 different articles, including doctoral dissertations. And every time a dissertation is written using these articles, the methodology is reviewed by a dissertation committee. Every time the articles get published, the methodology is reviewed and approved before it gets published. And a lot of the articles are available full text on that website.

Q. So you're saying there's a lot of peer review with regard to the data and the methodology?

A. Yes.

Q. Who funded the Capital Jury Project --

A. The National Science Foundation funded the project. And I have a slide on them because they're a very prestigious source of funding and a very important source of funding for social science.

The National Science Foundation is an independent federal agency, and they fund over a quarter of the federally funded academic research. And in the social sciences, in my area, they're a major source of federal support. And they have a very rigorous and objective merit review system.

When they accept an application, they send it out to six reviewers with expertise in the field, and they determine whether the research is rigorous enough and meet scientific standards to be worth funding.

Dr. Bowers got initial funding in 1991, and then he went back in 1994 and got additional funding to expand the study. And as the slide indicates, they've funded some very important research, including research that's resulted in 236 Nobel Prizes. So we feel very lucky to have them supporting our research.

Q. What was the initial sample for the Capital

Jury Project?

A. We initially started with, I believe, eight states, but then it was expanded to 14 states. And the goal was to get states that had the various types of death penalty statutes. Most states have balancing statutes where you balance aggravators and mitigators. Some states, like South Carolina, has what we call narrowing statutes, sometimes they're called threshold statutes, where the jury has to find a statutory aggravator and then consider the penalty.

And then Texas and Oregon have what are called special questions statutes where they have to ask -- answer specific questions. But the goal was to get states with different types of statutes and states from different areas of the country.

And we eventually ended up with 353 capital murder trials in these 14 states. And because it was easier to get the juror list when it was a death penalty case because the case was going up on appeal with death penalty cases, we actually have almost 60 percent. 58.8 percent, to be exact, of our cases were death penalty cases, and a little over 41 percent were cases that resulted in life or some lesser sentence.

The goal was to have an even mix of half death and half life in every state so we could compare how the process worked in different states. But as I said, we ended up with a few more jurors from death penalty cases.

Q. So I understand, like, the jurors all went through a capital case, 60 percent of them were in a case that resulted in a death sentence, the other percentage resulted in a life sentence, but they all went through a death penalty case, death penalty qualification?

A. Yes. They went through the qualification process, the guilt process. And, actually, to be very clear, we ended up with 1198 jurors who sat on cases that went through a guilt phase and a penalty phase. That was the way it was supposed to be. After the summary article, that I'll be talking about a lot today, was published, we realized that we had three jurors from a case that didn't go to sentencing phase. So I just want to explain one of the articles.

Say we have 1201 jurors, but actually we had to take out those three jurors because, technically, they didn't go through a sentencing phase. So the 1198 that I'm going to be talking about today went

through a guilt phase and a penalty phase. So once we selected a mix of death and life cases in each state -- and the goal was to try to get cases from throughout the state -- then we randomly chose four jurors from each case.

Q. Was South Carolina one of those states?

A. Yes, it was.

Q. And has the Capital Jury Project been cited by the supreme court?

A. Yes. Slide No. 8 cites two different cases where the U. S. Supreme Court relied on Capital Jury Project research. One of the cases is Schriro v. Summerlin which is where the supreme court decided Ring was not going to be retroactive. Ring says the judge can't be making the sentencing decision, it has to be made by a jury.

But in Schriro v. Summerlin, the supreme court said we can't call this a watershed rule based on the assumption that juries are clearly superior because the Capital Jury Project shows us that juries make a lot of mistakes as well.

The Simmons v. South Carolina case, which I'm sure everybody here is familiar with, is the case where the supreme court said that if the alternative to death is life without parole and the prosecution

argues future dangerousness, then you have to tell the jury that there will be no parole. And there, the U.S. Supreme Court relied on some of our evidence that it's important they understand that life means no parole because that can influence their decision.

The Schriro case cited for closed impartiality, which is one of the articles that I'll be testifying about today. And it is number 2 in Exhibit 2. And the Simmons case cites Eisenberg and Wells deadly confusion, which is an article I'll also be mentioning today, and that's article 15 in Exhibit 2.

So they've cited the Capital Jury Project for limited issues that they were deciding in these particular cases. They have never considered the full range of issues that I'm going to be talking about today.

Q. So what were the findings from the interviews with the jurors?

A. Well, the seven legal issues that I'm focusing on are presented here in slide 10. And I'm going to talk about each one of them in turn.

The first is what we call premature decision-making. We found that about half our

jurors decide the sentence during the guilt phase before they've heard the sentencing instructions or the sentencing evidence. So we call that premature decision-making. And that is related to the jury selection process, which is the focus in issue number two, because certain types of jurors are more likely to be premature decision-makers.

So issue two really involves three different problems with jury selection. First, it doesn't work very well. It fails to remove a lot of automatic death penalty jurors. It also creates bias against the defendant in two different ways.

The third issue is jurors fail -- a large percentage of jurors fail to comprehend the jury instructions. Fourth is a lot of jurors erroneously believe that the death penalty is mandatory once certain evidence is proven. Fifth is a lot of jurors -- most jurors fail to recognize that they're primarily responsible for the sentence.

The sixth issue is that all these rules that the supreme court has established for how a death penalty decision is supposed to be made has not taken the arbitrariness out of the process because race is still influencing the process. And then the seventh is the issue I just mentioned in the Simmons

case, where a substantial number of jurors underestimate how long someone will spend in prison if they don't get the death penalty.

I'm going to talk about each one of these in turn, but I wanted to emphasize that I spent a lot more time on the first two issues, and then the rest of the issues go a little more quickly. But there are a lot of details that relate to the first two issues that also relate most directly to the jury selection process.

And while I believe that it is likely that you're going to have problems like this in every capital case, I do believe that there are things that can be done to reduce the likelihood and improve the process. And I can focus on that as I go through these issues as well.

Q. Thank you. Let's talk about premature decision-making.

A. Okay. So Greg v. Georgia and companion cases approved a process where you have a guilt phase, and then after the guilt phase, you have a sentencing phase. And they specifically said that they were reversing themselves in Furman and finding that the death penalty could be constitutional as long as that sentencing decision was guided by statutory

guidance. So we asked the jurors if they thought they knew what the penalty should be at four different points in the process.

The first point was after the guilt evidence, but before sentencing had even begun. And actually --

THE COURT: Do I need to consider any of this proffer that's not relevant to South Carolina? I mean, we're talking about other states and other methodologies they use, which I can't use. I don't see the need to proffer that in this case.

This seems to be South Carolina law, but I don't want to hear testimony -- I mean, I'm not -- you can proffer it anyway, but I don't think there's any reason to present testimony that is not relevant to the law as it is in South Carolina, that there's another way to do it over here or over there, unless that's part of your motion.

MR. YOUNG: This is directly related to South Carolina --

THE COURT: Well, she keeps referring to, we talked to jurors from other cases and other states. Well, so what? It's not South Carolina. How is that helpful to me or how can I even consider that as far as constitutionality goes?

MR. YOUNG: Sure. And I guess I'll ask Dr. Foglia.

BY MR. YOUNG:

Q. Why is it important what jurors from other states other than just South Carolina show with regard to the Capital Jury Project?

A. Well, the data that I'm going to present lists all the states, including South Carolina. And, actually, what we found was that -- what we found was that the problems were similar in every state. But I'm going to be talking about evidence from South Carolina for every one of these issues.

THE COURT: Okay. Well, I don't -- the slide backwards shows how many trials were examined, 353, and there were 60 percent vote death and 40 percent -- or 41.1 percent invoked life. Were there any not guilties in any of those trials?

THE WITNESS: It wouldn't be included if it was a not guilty.

THE COURT: Why not?

THE WITNESS: Because we were only looking at cases that included both a guilt phase and a penalty phase. So if they were found not guilty, there was no penalty phase.

THE COURT: But then you found fair jurors.

THE WITNESS: Well, we're not saying that no --

THE COURT: Go back to that slide, because it seemed like there was a mistake in the math. I thought there was 354 total, 208 plus 146. Is that not 354?

THE WITNESS: Oh, I apologize.

THE COURT: I want you to know I'm paying attention.

THE WITNESS: Well, I appreciate that. No, I apologize. That's what I was talking about, that we originally had 354 and then we realized that in one of those cases, the defendant waived the sentencing phase and let the judge decide the sentence.

So in one of those -- number one, the summary article that I rely on a lot says we had 1201 jurors and 354 cases, and that's what that breakdown is from. And I didn't realize that I didn't change the sub-numbers.

THE COURT: So there were some not guilties in there.

THE WITNESS: No, they're not not guilties.

THE COURT: No, no. But there were some not guilties in capital cases.

THE WITNESS: Absolutely. But we were trying to find out how jurors made their sentencing

decision. So if a case was a not guilty, there was no sentencing decision.

THE COURT: Oh, I was confused. I thought this was going to impact how to pick a fair and impartial jury on a capital case, not a sentencing capital case. That's a different issue.

THE WITNESS: Well, you don't know until the end of the guilt phase whether it's going to be --

THE COURT: Right, which is what I said earlier: Until I've screwed it up, I may get it right and get a perfect jury and the perfect trial and a fair verdict reached. Unless the death penalty is the result, then it's inherently going to be unfair?

THE WITNESS: Well, some of the problems make a jury more guilt-prone, so that could affect the convictions portion. But many of the problems make them more death-prone.

THE COURT: Okay. Let's get to that. That will be more helpful to me.

THE WITNESS: So we ask them what they thought the death penalty should be at four different points. This was the first question: After the jury found the defendant guilty of capital murder, but before you heard any evidence or testimony about

what the punishment should be, did you then think the defendant should be given.... And they could say a death sentence, a life sentence, or whatever alternative was provided in the state at the time, or they could say undecided.

If they did say a death sentence or a life sentence, then we ask them: How strongly did you think so? And they could say absolutely convinced, pretty sure, or not too sure.

And then we asked them a similar question: What did you think the penalty should be after the sentencing phase but before sentencing deliberations? But, at least, at that point, they've heard the guidance and they've heard the evidence. And then we ask them: What was your first vote? What was your final vote?

So I'm focusing on -- for starters, I'm focusing on how they answered this question. So this is a table from article 1 in Exhibit 2 that is a summary article of the seven issues that I'm talking about. And you can see South Carolina -- whoops, sorry. You can see South Carolina is listed here with the other states.

And the first column is what percentage in each state had already decided this defendant deserves

death before the sentencing phase has even begun. It's 30 percent nationwide, and it's a little higher, 33.3 percent, in South Carolina. Another 19 percent nationwide had already decided the defendant deserved life. That's a little lower, 14.4 in South Carolina.

The third column of numbers is the percentage in each state that was undecided. And that's what they're supposed to be at this phase. They should be undecided about sentence. And then the last column shows you the number of jurors that were interviewed in each state.

And just in case you catch this, I keep saying that we interviewed jurors in 14 states, but, actually, there were only 13 states listed there because in Louisiana, we didn't meet our sampling goals. We were trying to get a mix of death and life cases in each state.

And in Louisiana, almost all the jurors were from death cases, so it didn't seem fair to compare to other states where there was a mix. And also, technically, you're supposed to have 30 subjects in a study to be able to do statistical analysis, and in Louisiana, we only had 29. So to be cautious, they're not included separately here, but South

Carolina is. And the percentages are very similar in South Carolina as they are nationwide.

Among the -- oh, the other thing I wanted to emphasize is about half the jurors have already decided the decision -- excuse me, have already decided the sentence before the sentencing phase has begun. And even though prematurely deciding life is not problematic from a defense perspective, it's still not the way the system is supposed to work.

The supreme court has said the way we take the arbitrariness out of the system is to guide their sentencing discretion. And about half the jurors are not being guided.

Of the 30 percent nationwide that prematurely decided death, we asked that follow-up question about how strongly did they think so, and 70 percent said they were absolutely convinced. Another 27 percent said they were pretty sure. So that left only three percent who said they were not too sure. So they really felt strongly about their position.

And the U.S. Supreme Court has made it clear how big a problem this is in Morgan v. Illinois. On Page 727, they say, quote: A juror who has formed an opinion cannot be impartial. And we're finding that about half the jurors have formed an opinion.

And this is not a new idea they came up with. They were actually quoting a 1879 case, Reynolds.

Another indication of how strongly they felt about their position is how consistent they were. So table 3 is from article 2 that was introduced in Summerlin. And it focuses on the premature decision-making issue in a lot more detail. Because the summary article is focusing on a lot of different issues, it didn't go into as much detail. But table 2 shows the patterns of decisions that jurors followed that were followed by at least five percent of the jurors.

So I mentioned earlier, we asked them what they thought the punishment should be at four different points. So the first group of numbers here is the jurors who prematurely decided death, the second group is the jurors who prematurely decided life, and then the last were the jurors who were undecided at the end of the guilt phase.

So jurors who thought that the punishment should be death at all four points about which we inquired are these D, D, D, D. So D is for death. So most of the jurors, 59 percent, never changed their mind. They decided the defendant deserved death at the end of the guilt phase and they never

changed their mind. Another 19 percent did change their mind at final vote, but they stayed consistent up until first vote, but they did change to life by final vote. And many of them volunteered that I still thought he deserved the death penalty, I just wanted to avoid a hung jury, so I changed to life. And then a small percentage, which are indicated in this last group, they became undecided, but then went back to death.

So most never changed their position and nearly 80 percent, if you add up these first two numbers, maintained their decision until first vote and only changed by final vote.

Additional insights into how these jurors made their decision come from the answer to this question exhibited on slide 16. This is table 4 from that same article that went into this issue in more detail. And we asked them: How did you make your guilt and punishment decision? And their options are listed here in the table. They could say together on the bases of similar considerations, separately on the bases of different considerations, or they could say, I don't know, I'm not sure, can't choose.

So the first column of numbers here are the

premature death jurors. And if you compare that to the undecided jurors, they were over twice as likely to say, I made my guilt and my punishment decision together on the bases of similar considerations. So it sounds like they're making your punishment decision on the basis of guilt evidence and that they're over twice as likely to do that compared to the undecided jurors.

And this slide, among some of the others, are an example of what we call internal consistency or internal validity. If they're making their decision during the guilt phase, then we would expect them to be more likely to say they made their -- strike that. Let me just rephrase that.

If they're making their punishment decision during the guilt phase, then we would be expecting them to say they made their guilt and punishment decision together on the bases of similar considerations and they are more likely to do so. So that gives us confidence that our results make sense.

Another example of this internal consistency is the answers to the question: When did you make your decision? And this, again, is from that article 2. And so we show the percentages for the premature

death jurors and the percentages for the premature life jurors. And we asked them: When did you first think you knew what the punishment should be? And among the premature death jurors, almost two percent said prior to opening statements, but most of them, over half, tell us, I knew what the punishment should be when I heard the guilt evidence.

And, again, the supreme court has made it clear that you're supposed to at least listen and consider the sentencing evidence, the evidence in aggravation and mitigation, and be guided by the sentencing instructions, which they had not heard yet.

This next slide shows how two different issues are related. More specifically, it shows how this tendency to prematurely decide the sentence relates to thinking death is the only acceptable punishment, and that's why it's relevant to selecting a jury because if you're not careful in how you select a jury, you're going to get a lot of jurors who think death is the only acceptable punishment for certain types of murder, and once I know it's that type of murder, I know the sentence. And that's not the way the system should work.

And I want to be clear throughout all this, I'm not saying they can never come up with a life

decision, I'm just saying it's harder for them to come up with a life decision than it should be if they were following the supreme court's guidance and the supreme court's holdings on how they're supposed to be making the decision.

So we asked them about seven different types of murder that would cover most capital murders. And this first column indicates: Did they say death was the only acceptable punishment for zero or one, or two to three, or four to five, or six to seven? And we asked them about these seven types of murder. And I'll talk about what they are specifically when I get to the jury selection portion.

But they were given the option of saying death is sometimes acceptable, which is what they should be saying, or saying it's the only acceptable punishment, or saying it's never acceptable.

So the premature death jurors are illustrated in this second column here. And of the premature death jurors, 37 percent said death was the only acceptable punishment for six or all seven of the types of murder that we asked about. And that's much higher than it was for -- the undecided jurors were only 19 percent, said that death was the only acceptable punishment for specific -- for six to

seven of the murders that we asked about. So what we're finding is if you think death is the only acceptable punishment for many types of capital murder, you're more likely to be a premature decisionmaker.

BY MR. YOUNG:

Q. There are categories of murders, like multiple murder or murder of children, where jurors think that, in that category of the case, death is automatic?

A. Is the only acceptable punishment.

Q. Or the only appropriate punishment?

A. Actually, we use the word acceptable. So we use very strong language. And they say it's the only acceptable punishment.

I'll talk about the seven different types of murder. One of them is multiple victims. We do not specifically ask about child victims. But we do ask about multiple victims and six other types, which I'll talk about in a little bit. They're on a slide.

We also found that the premature death jurors were quicker to decide guilt. So we asked them questions about their guilt position that are similar to those questions I just mentioned about

their sentencing position.

So the first question was: After you heard the judge's instructions to the jury for deciding guilt, but before you began deliberating with the other jurors, did you then think the defendant was... And they have the choice of saying guilty of capital murder, guilty but not of capital murder, not guilty, undecided.

So again, we break it down. The first column of numbers are the premature death jurors. These are the undecided jurors. These are the premature life jurors. And among the premature death jurors, over 80 percent had already decided, before deliberation began, that this defendant was guilty of capital murder. That's much higher than it was for the undecided, where it's only 60 percent.

They were also more likely to vote guilty of capital murder at first vote, 95 percent versus 85 percent, and they were less likely to be reluctant to go along with the jury's guilt decision.

All of these statistics from article 2 are based on a lower number of jurors, just in case anyone is comparing the actual numbers, because this article was published before all the data had been collected. But the patterns are very similar with

the slightly smaller sample as the patterns we found with the full sample of 1198 jurors.

We also find that the jurors are likely to have inappropriate discussions during guilt deliberations. And they're more likely to -- they have different kinds of discussions when they're premature death jurors. So we ask them this first question: Was there any discussion among the jurors about the meaning of proof beyond a reasonable doubt?

And, again, the premature death jurors are here in the first column, and 34 percent say no, we didn't discuss the standard beyond a reasonable doubt. And you would think that during the guilt phase, they'd be discussing the standard for guilt, but they were more likely to say no; 34 percent of them said, no, we didn't discuss that, compared to only 28 percent of the undecided jurors.

Then if you skip down to the third question, we asked if they discussed degree of guilt, which is another thing you would expect them to discuss during the guilt phase. And, again, the premature death jurors were more likely to say no, 64 percent versus 53 percent.

Then we asked them: In deciding guilt, did you

talk about the sentence? And there, the death jurors were more likely to say yes; 44 percent said, yes, we were discussing guilt during the guilt phase, which they're really not supposed to be doing at that point, compared to only 34 percent of the undecided jurors.

So everything I've been talking about so far is based on the interviews that we did as part of the Capital Jury Project. But another thing that you look for in the social sciences is what we call replication or convergent validity. We look to see if other people found similar patterns in their research.

So this was a study done by Costanzo and Costanzo in Oregon. And they also interviewed actual capital jurors, but they were not part of the Capital Jury Project, and they found very similar results. They found 26 percent of their jurors said they didn't need to hear evidence at the penalty phase because after hearing about the crime, they had already decided the defendant deserved to die. So this 26 percent is very similar to the 30 percent of premature decisionmakers that we found.

And there have been a lot of other studies that are cited here on slide 22 that have found similar

problems. They've been introduced as articles 1, 2, 3, 4, 5, 24. These were all the ones listed here that used CJP data. And then there were also studies that used real jurors who were not part of the CJP, and that would be Geimer and Amsterdam, which is number 8 in the packet of articles, and Costanzo and Costanzo, which is the one I just spoke about, which is article 33.

So nearly half the jurors are deciding the sentence during the guilt phase, and that would suggest that they're probably not as open to mitigating evidence as the supreme court says they need to be. That's the implication of our finding.

But Thomas Brewer actually proved that statistically. He proved that they were less receptive to mitigating evidence than people who remained undecided, as the supreme court says you're supposed to.

And at the bottom of this slide, there's something called a P-level, P less than .001. One of the things we use in the social sciences are these P-levels, and that's the probability of getting a result by chance. So you're always going to see differences between different groups, but is it a real difference or is it just chance variation?

So the standard is a P-level less than .05. So if the chances of getting that big of a difference are less than .05 or one in 20 or five percent, then we consider it a statistically significant difference.

Here, he found that the chances of finding this much of a difference between the premature death jurors and the other jurors was statistically significant at the .001 level. So there's less than a 1 in 1,000 chance that they would be that different just by chance variation.

So we asked the jurors -- he was using Capital Jury Project data. And we asked the jurors about a bunch of different mitigating factors. And we asked them: Would this make you less likely to vote for a death penalty? That's what a mitigating factor is supposed to do. Or would it have no effect or would it actually make you more likely to vote for a death penalty? Sometimes mitigation gets turned into aggravation.

And he found that the premature death jurors were less receptive to mitigating evidence compared to the ones who remained undecided. So he proved, statistically, that the supreme court was right, that they need to keep an open mind or they're not going to consider mitigation the way the law

requires them to.

Q. How did the South Carolina jurors do?

A. He did not break it down by state, but the pattern for all these problems is the same in every state. We initially thought we were going to be comparing states to see if some statutes worked better than other statutes. But we found that none of the statutes worked because the supreme court has established a very involved process for how jurors are supposed to make death penalty decisions.

And what we've found is it doesn't matter what you tell them, they do it -- many of them will do it their way and they don't do it the way the supreme court says they're supposed to.

Q. So they don't follow the law?

A. They don't follow the law. Again, I think that tweaking the process can minimize the number who don't follow the law, but it's a very difficult way that we're asking them to make these decisions. Not the way people naturally make such a weighted decision.

So this is just a summary of what I've been talking about. South Carolina was very similar to the national data. It was 48 percent in South Carolina and 49 percent nationwide said they had

already decided the punishment before the punishment phase had begun. Over two-thirds of the premature death jurors nationwide, 70 percent said they were absolutely convinced, another 27 percent said they were pretty sure.

So 97 percent said they felt strongly about their premature stance. Over half never changed their position. Those who took that premature stance were more likely to say they made their guilt and punishment decisions together on the bases of similar considerations and most likely to decide sentence during the guilt evidence, based on similar decisions and most likely to decide guilt evidence.

They also were more likely to think death was the only acceptable punishment, what the law calls ADP jurors, or automatic death penalty jurors. They were more likely to think the defendant was guilty and they were more likely to have inappropriate discussions during guilt deliberations.

Q. So let's talk about problems with the jury selection.

A. As I said before, there are actually three different problems with jury selection. And I'm going to focus on each of them in turn. The first one is that it doesn't work the way it's supposed to

work. Morgan v. Illinois made it clear that you have to eliminate jurors who will fail in good faith to consider the evidence of aggravating and mitigating circumstances. That's what the instructions require them to do. And if they're automatically going to vote for death, which a large percent of our jurors say they will, they're not going to consider mitigation the way the law requires.

And Morgan says if you get even one juror like that on your panel, you're not entitled to execute the sentence. And our data shows that you're likely to get a lot more than one.

So as I mentioned before, slide 28 shows the different types of murder that we asked about. And I originally said we asked about seven types of murder, but the seventh type was murder of a respected member of the community. And there was a lot of disagreement as to how the jurors interpreted that, so we ended up eliminating that one and just focusing on these six.

So it's a planned premeditated murder, killing that occurs during another crime, murder with multiple victims, by someone previously convicted of a murder, murder by a drug dealer, and killing of a

police officer or prison guard. And they can say the death penalty is the only acceptable punishment, and that means they're really not life qualified because they're not open to a life sentence. Or they could say it's unacceptable, which means they're not death qualified. Or they can give the correct answer, which is it's sometimes acceptable, depending on the nature of the aggravating and mitigating circumstances. That's what the law assumes they're doing.

This slide 29 again shows the results from that summary article that Dr. Bowers and I wrote which lists the states in the Capital Jury Project, including South Carolina. And, again, the percentages are very similar to the percentages that we found nationwide. So for Defendant with a prior murder conviction, planned premeditated murder, or murder with multiple victims, as we have here, over half the jurors nationwide and over half the jurors in South Carolina said death was the only acceptable punishment.

And then it's close to half for the killing of a police officer or prison guard and murder by a drug dealer. And then it drops down to about a quarter for murder during another crime, but that's

still almost one out of four jurors who shouldn't -- and these are jurors who made it through death qualification and sat on actual trials.

The next slide shows why we have some of these problems. This, again, was from that article 2 that went into more detail. So the numbers are slightly smaller and the percentages are slightly different, but it's still over half thought death was the only acceptable punishment. That's that first column of numbers here for the first three types of murder listed.

We're much better at death qualifying than we are at life qualifying. These huge percentages, over half, are not life qualifying. Very small percentages, less than three percent, said death was unacceptable, so they wouldn't actually be death qualified. And then you see, again, similar percentages in every instance. We're much better at getting rid of people who don't believe in the death penalty, but allowing in these large percentages of people who are not life qualified. We're much better at death qualifying than we are at life qualifying.

These percentages are all very low. You don't even get into double digits until you get down to

this last two, a rape with permanent injury to the victim and a planned premeditated murder where the victim survives. And they're not even capital cases. And that's the only area where you get larger percentages saying death is unacceptable.

One question that you could ask about this data is, well, did the juror you were interviewing actually sit on a case where they thought death was the only acceptable punishment? And there are a couple of ways of answering that.

First of all, nine percent of our jurors or almost 1 out of 10 said death was the only acceptable punishment for all types of convicted murderers. We didn't even say capital murders in that question, we just said convicted murderers. So almost 10 percent thought once you're convicted of murder, death is the only acceptable punishment, not even limiting themselves to capital murder.

Another percentage we found was that 17 percent, almost 1 out of 5, thought death was the only acceptable punishment for all seven of the murders that we asked about. And then 57 percent said death was the only acceptable punishment for planned premeditated murder, which does cover most capital crimes. And, furthermore, we actually know

what type of case they sat on for three types of murder.

And this first type is exhibited here in slide 31, and it relates to the type of murder involved in this case. So this slide lists the different types of murder and then breaks the sample down by cases where it actually involved multiple victims, that the first column of numbers, and then the rest of the sample. So where there were multiple victims, 52 percent said death is the only acceptable punishment. So they are sitting on a case where they thought death was the only acceptable punishment and they were not eliminated.

Q. So half the jurors that sat on a case with multiple victims already thought that death was the only acceptable punishment?

A. Exactly. And it's very similar to the rest of the samples. So -- and you can see the percentages are similar for all these types of crime. It doesn't matter what type of case they're sitting on, they're not rooted out when they're sitting on a case where they specifically think death is the only acceptable punishment.

And right after this question, we asked: Did sitting as a juror change your feelings about the

death penalty? Because we were curious, okay, is this how you feel after being a juror in this kind of case or did you come into the courtroom with these attitudes? And about 85 percent of our jurors said, my feelings did not change.

So they're coming into the courtroom with these attitudes, and that's why they need to be asked about specifics that are going to relate to the actual case to get at how they feel about the appropriate sentence or, actually, what an acceptable sentence for a specific type of case.

Q. Did y'all know what the instructions were in these cases? Like, do you know what the pretrial or penalty phase instructions from the judge were or the questions during voir dire on these cases or you just know these are jurors' attitudes?

A. We did not go back and look at the instructions that were given in specific cases. Most of these states have model instructions. And I've testified, as I said, in numerous different states, and all the instructions make an attempt to explain to the jury how they're supposed to make their decision. But a lot of times, the way they're written is very confusing. And when I get to the instructions part, I'll talk a little bit more about what you can do to

reduce the level of lack of comprehension.

But I know from teaching that you can tell people things over and over again and they can still not quite get it, especially when they're in a very unfamiliar environment and listening to a very upsetting case.

And sometimes many of the standard jury questions are things -- I shouldn't call them standard. But often they're asked questions like, will you follow the law? And I'll talk a little bit more about that later. But questions like that really don't get at these kinds of problems because they'll say, yeah, I'll follow the law. And I'm not saying they're lying. I think most of our jurors really were trying to do the right thing, but they don't really understand the law, even after the whole process is over. So they think they'll follow the law, but they don't realize that they're actually not following the law if they're refusing to consider mitigation.

Similarly, we knew when the victim was a police officer or prison guard -- and, again, the first column is cases where they were sitting on a case where an officer was killed and the second column is the rest of the sample. And, again, 45 percent of

the jurors who were actually sitting on a case involving an officer said death was the only acceptable punishment, which is pretty similar to the rest of the sample.

And the percentages, again, are similar all down the line. And, again, close to 80 percent said they felt this way before they came in, that their feelings did not change as a result of being a capital juror.

And the third type of case where we knew the type of killing was what some places call capital felony murder, a killing during another crime. That's what the CFM stands for. Again, here, it's actually a little higher. When it was a killing during another crime, 26 percent said death was the only acceptable punishment compared to 22 percent of the rest of the sample. Again, all the percentages are fairly similar and, again, 80 percent said their feelings had not changed.

So they came into jury selection with these attitudes, but the kinds of questioning that they experienced either did not root out those attitudes or, perhaps, they were rehabilitated, but they ended up getting onto a capital jury even though, according to the law, they shouldn't have been on a

capital jury.

Another analysis that shows problems with the people who are getting onto a capital jury is described in an article that was written by Sandys & McClelland and is article 21 in Exhibit 2. And they also show that substantial percentage of jurors are not giving meaningful consideration to mitigation. So, as I said, we asked them about a lot of mitigating factors. And they could say it had no effect, they could say it made me less likely to vote for death, which is what a mitigating factor is supposed to do, or they could say it made them more likely to vote for death.

So lingering doubt, which the research shows us is the most powerful mitigator, it's the strongest reason why a juror votes for something less than death. Almost one out of five jurors, 19 percent, said even lingering doubt was not mitigating in their mind. It did not make them less likely to vote for death. So these percentages are the percentages who said it either had no effect or, in some cases, made them more likely to vote for death, but it did not act as a mitigator.

Mental retardation, which is what we called it back then when we did the study, now disqualifies

you for the death penalty. But almost one out of five said it was not mitigating to them. Over half the jurors said being severely abused as a child was not mitigating to them. For a crime that was not premeditated but was during another crime, 65 percent said it was not mitigating. And that 65 percent includes 38 percent who said it had no effect, and then another 27 percent who said it actually made them more likely to vote for death. So many things that lawyers think are mitigating are not considered mitigating by a lot of these jurors because it doesn't make them less likely to vote for death.

In another article that explored this issue, Sandys and Trahan, which is introduced as number 34, looked at jurors who made it through jury selection in Kentucky. And they asked these jurors could they consider any sentence other than death. And 21 percent of them said that they couldn't consider any sentence other than death.

So they're what we call traditional ADPs. They should not have been on a jury. They were not life qualified, but they made it onto a jury. And of the remaining 79 percent, 19 percent of those said nothing was mitigating. So we gave them that list

of mitigators that I mentioned earlier. And for every one of those mitigators, they said, no, that would not make me less likely to give a death sentence. They found nothing mitigating. So they call them latent ADPs. They say they will consider a sentence less than death, but they don't consider anything actually mitigating.

As I mentioned before, it's much easier to death qualify than it is to life qualify because people who don't believe in the death penalty know they don't believe in the death penalty and they're often proud to tell you they don't believe in the death penalty.

But people who aren't life qualified may not even realize they're not life qualified because they don't understand what the law requires. They don't understand that the law requires them to consider mitigation. And a common way of rehabilitating them is to say, would you follow the law? And that's problematic because the socially desirable answer is, obviously, yes, especially when a judge is asking you will you follow the law.

So the socially desirable answer is yes. So they're likely to say yes, especially when they're in the courtroom on the spot. And as I said before,

a lot of times they don't understand that the law requires them to give meaningful consideration to mitigation. So they'll say, yes, I'll follow the law, and they may sincerely believe that, but our data shows a large percentage of them are not following the law. So it's very difficult to get at their true attitudes.

This next slide provides evidence supporting what I just said about jurors not understanding the law. Neises & Dillehay and Dillehay & Sandys did research with mock jurors that showed they did not understand what the law required. So they were asked: Would your attitudes during the death penalty interfere with your ability to perform your duties? And most of the jurors -- or most of the mock jurors, 79 percent and 90 percent, said, no, my attitudes would not interfere with my ability to apply the law. And so they're includable, they would be on a jury.

But then they were also asked: Would you always give the death penalty for first degree murder? And 81 percent of them in one study and 95 percent of the includables in the other study said yes, so really they were ADPs. So the question: Would your attitudes interfere with your ability to

do your duty missed 81 percent and 95 percent of the ADPs. And the second study has been introduced here as article 35.

And, again, this has been replicated in numerous studies. Slide 37 lists citations for articles that have been introduced here as 34, 1, 21, 4, 24, 44, an article by Bowers, Sandys, and Steiner that was written in '98, which has not been introduced, and article 2, and then the mock jury studies that I just mentioned, the second of which was introduced as 35. And they all find evidence that the standard death qualification process is failing to exclude large percentages of automatic death penalty jurors.

So the implications of all this is many jurors who shouldn't be sitting on capital cases because they're automatically going to vote for the death penalty once they find the defendant guilty are surviving jury selection and citing capital cases. And as I mentioned earlier, these types of jurors are also the ones who are more likely to make that premature death decision before they've even heard the mitigation or the guidance. So it underscores the importance of trying to eliminate them with effective jury selection.

The second and third issues are described on slide 39. So, as I said, the first problem is it doesn't eliminate the ADP jurors. And the second problem is that because we're so much better at death qualifying than we are at life qualifying, we end up with a jury that's composed of conviction-prone and punishment-prone jurors. That's called the composition effect. And that has been found in the article that I'm going to talk about in a moment that's been introduced as article 18, also 19, 20, and 21.

And the third problem is called the process effect. And that's evidence that shows that the process of being asked all those questions about punishment make many jurors think this defendant is probably guilty and this defendant probably deserves death. And that's called the process effect because it's the process itself creating the bias. And there's evidence of that that's been introduced by two articles by Haney that have been introduced as 16 and 17 in Exhibit 2.

So this first slide that's in slide 40 is a table on the composition effect. And there's been a lot of research on the composition effect. And some of it was introduced in Lockhart, but there's been a

lot more research since, including this study that tries to compare people who were -- who would be included on a jury -- we call them includables -- with those who would be excluded from a jury, or excludables.

And, over the years, the standard has changed, so I'm using this article because it compares Witherspoon includables with Witherspoon excludables -- excuse me. The first column of numbers are the excludables, the people who would be kept off of a jury because of the way they answer the Witherspoon questions, compares them with the people who would make it onto a jury.

And then it does the same thing with Witt. And, as you see here, it doesn't really matter whether you use the Witherspoon questions or the Witt questions, the people who are going to be kept off a jury are very different. The excludables are very different than the people who are in the second and fourth column, who would be included on a jury.

So these people were asked these jury selection questions, and then they were asked a variety of questions about the criminal justice system, about the death penalty, specifically, about what they consider mitigating and about what they consider

aggravating. I'm not going to go through all of these, but, for example, the first questions was: Do you think it's better to risk a guilty person going free to protect the innocent? Of the people who would be excluded from a jury because of the way they answered the Witherspoon questions, close to 66 percent agreed with that compared to only 39 percent of the includables. So that's a big difference and it's statistically significant. These stars here indicate whether it's significant at the .05 level, the .01 level or the .001 level.

So these are all considered -- if there are stars after the difference, it means there's a statistically significant difference between the people who get onto a jury versus those who are kept off of a jury based on these questions.

So each one of these, you can see that the pro-defense attitudes are much higher among the people who would be excluded and the pro-prosecution attitudes, like we should punish criminals harshly for the victims, the ones who would be excluded, only 59 percent agree with that compared to 85 percent of the ones who would be included.

So all down the line, you can see that the includables are more guilt-oriented and

prosecution-oriented. They have more positive attitudes towards the death penalty. They are less likely to find things mitigating, that's this third group of questions, and they are much more likely to find things aggravating than people who would be kept off a jury. And you can see the differences are the same whether you use the Witherspoon standard for these two columns or whether you compare the third and fourth columns using the Witt standard.

Q. The Witherspoon and Witt standards are, basically, people whose attitudes regarding the death penalty, I can't give consideration to the death penalty, I can't make that decision?

A. Well, Witherspoon was saying I can't give the death penalty, I'm unequivocally opposed to the death penalty. And then in Witt, the supreme court softened that a little bit and said you're only excluded if you're substantially impaired because of your attitudes. And then Morgan came back and -- was another case that came back and said you have to be able to consider mitigation, you can't be an automatic death penalty juror. So that's when the supreme court made it clear that we should be death qualifying and life qualifying.

And I was getting to the point that in this study, they went back and asked Morgan questions. And even when they further tried to eliminate people who had very strong opinions for the death penalty, they still found most of these differences, because it's just easier to death qualify than it is to life qualify.

Q. Okay.

A. And, again, numerous studies replicate this. I'm only giving a small sampling of the numerous studies that replicate this. Luginbuhl and Mittendorf and Butler and Moran found that people who would be death qualified are more likely to find evidence aggravating, they're less likely to find evidence mitigating, they're more likely to infer criminal intent. That was found in what has been introduced as article 38 in the Goodman-Delahunty, Green & Hsiao article.

And I know that's an issue in this case. And Allen, Mabry & McKelton, this last article cited on this slide, was a metaanalysis where they went back and they analyzed 14 different studies that looked at the impact of death qualification. And they found that when there were death-qualification-type questions, it increased the chances of a conviction

by 44 percent. So the people who were death qualified were 44 percent more likely to convict than people who would not be death qualified.

And then the last question -- or last issue raised by jury selection is what we call the process effect, that the process itself creates a bias. And slide 42 shows the first half of a table that was published in one of the Haney articles that have been introduced.

And what Haney did here was he took a group of people who would be qualified for jury duty and randomly assigned them to two different groups, what he calls the experimental group and the control group. And both groups watched the exact same videotaped evidence of a murder case. The only difference was the experimental group watched a short segment on death qualification and the control group didn't.

And then after they saw all the evidence, he asked them a bunch of questions. For instance, the first one is: What is the likelihood that the defendant is guilty of first degree murder? And, again, you see these P-levels in the -- sorry. You see these P-levels in the last column. If it says NS, that means it's not significant. There weren't

significant differences between the groups. But this gives the actual P-level, so it's less than .05 for this first one, it's actually .038.

So that means a statistically significant difference in the percentage that thought the defendant is likely to be guilty of first degree murder among those who saw death qualification compared to those who did not see death qualification. So among those who saw death qualification, close to 47 percent thought the defendant is probably guilty of first degree murder, compared to only 36 percent of those who didn't see the death qualification portion. And, again, they all saw the same evidence, but they were influenced by watching that death qualification process.

So in each case, you can see they're more likely to think the defendant was guilty. They're more likely to think the defendant will be convicted. They're more likely to think the defendant will be convicted of something.

And then these three here have a little B next to them. That indicates, as you will see with the footnote on the next slide, which is the second half of this table, indicates that the way the question was asked, the smaller number indicates a higher

belief in guilt. So, again, they're biased against the defendant.

And if you look at this next slide, which is just the second half of that same table, there's not much difference in this first one, the estimate of the defense attorney's personal attitude towards the death penalty, but they were more likely to think that the judge believed in the death penalty when they saw a death qualification and they were more likely to think that the law disapproved of people who oppose the death penalty.

So there are a few where there are no significant differences, but for most of these questions, the people who saw -- went through death qualification were biased against the defendant from that process.

Among these same mock jurors, Haney asked them: What do you think the sentence should be based on this evidence? So the experimental group, who actually saw the death qualification portion, was over twice as likely to say it should be a death sentence. So 20 out of 35, or 57 percent -- that 20 out of 35 would be 57 percent -- voted for death compared to those who did not see the death qualification portion. There, only 7 out of 32, or

22 percent, said the sentence should be death. So seeing the death qualification made them over twice as likely to vote for the death penalty.

So it's very, very important during the death qualification portion to emphasize life as much as emphasizing death and make it very clear that it means nothing that you're talking about penalty, it's just something that has to be done. Like the oxygen mask on the airplane, they don't really think that you're going to use them, but they need to tell you about it at the beginning because that's the only chance they're going to be able to. But that's something that just can't be emphasized enough because jurors tend to think that it means something that everybody is asking us all these questions about the death penalty.

And we actually asked our own jurors, how did you feel about those questions? Did all those questions about penalty during jury selection make you think the defendant must be or probably was guilty? Or did they make you think the most appropriate punishment must be or probably was death? And these percentages are small compared to a lot of the other percentages I'm talking about. It was a little over 11 percent said they thought

those questions meant the defendant must be or probably was guilty. And a little less then 10 percent, 9.2 percent, said that those questions made them think the most appropriate punishment must be or probably was death.

And these are jurors who were aware that they were being biased. Very often, we're not aware of when we're being biased. And they were also willing to admit it. And one of the things that I think should be emphasized, as we're looking at all these responses, is jurors were not trying to admit they made mistakes. They were trying to make it sound like they did things correctly. But still, we see large percentages are not approaching these cases the way the law says they should.

THE COURT: Can we have a quick break? I need to use the restroom and feel certain someone else does, at least I hope so.

MR. YOUNG: Yes, sir.

THE COURT: Take a few minutes. We'll come back in seven or eight minutes.

(Brief recess.)

THE COURT: We're back in order.

Mr. Young, continue on.

BY MR. YOUNG:

Q. Dr. Foglia, I was pulling out my glasses trying to read some of these slides.

MR. YOUNG: At this point in time, I'm going to move in Defense Exhibit No. 5, which is another copy of the PowerPoint, it's just each slide on an individual page.

THE COURT: You have triple slides per page and one the Court has?

MR. YOUNG: Yes, sir.

THE COURT: Fair enough.

(Defendant's Exhibit No. 5 admitted into evidence.)

BY MR. YOUNG:

Q. Dr. Foglia, you were summarizing the errors that jury selection issues raised with regard to capital juries.

A. Yes. I just wanted to say a couple other things about the process effect that might suggest ways of reducing the biasing effect.

In the two articles that Haney writes, he talks about why the process effect occurs. And he emphasizes this is a new situation for jurors, so they really pay attention to what the authorities in the room are saying, which would be the judge,

especially, and the attorneys as well. And if they're dwelling on punishment, that suggests to them that this defendant is guilty and deserves death. And, also, this talk about death desensitizes them to the idea of sentencing someone to death and also gives them -- when they see people getting dismissed who don't believe in the death penalty, it makes them feel that the law disapproves of people who don't believe in the death penalty.

So that's why it's better to do individual sequestered voir dire so they keep seeing -- they don't have to hear it over and over again and keep seeing people get excused. Doing it individually means they won't hear it over and over again, so they won't be desensitized.

Also, sometimes talking about their belief in the death penalty feel to them like they're publicly advocating the death penalty. So, again, it would be better if they're doing it privately instead of publicly, so privately and individual sequestered voir dire. And the reason this has such a big impact is because it's their first impression of the whole process and they -- it really can influence the way the they interpret the rest of the process.

So the next slide is just summarizing the three

problems. The first was the idea that jury selection fails to exclude the ADP jurors. Many jurors consider death the only acceptable punishment for six types of murder, that would include nearly every capital case. And it was over 50 percent for three of those types, including the kind of case you have here in South Carolina and in the national sample.

And the second issue is that because we're better at death qualifying, you end up with a jury that's composed of conviction- and punishment-prone people. And people who are death qualified are significantly more likely than the excludables to be more punitive to see fewer problems with the death penalty, they're less likely to see evidence as mitigating, and they're more likely to see evidence as aggravating. And our own jurors were asked some of the same questions that were asked in the Haney, et al. survey, and our jurors were also more punitive than the excludables.

And then finally, the process effect that focuses on the fact that the process itself influences the jurors. It makes -- those who experienced or just watched death qualification were significantly more likely to think the defendant was

guilty.

They're more likely to think the judge, the prosecutor, and even the defense attorney thought the defendant was guilty. They're more likely to think the judge and the prosecutor supported the death penalty, that the law disapproves of those who oppose the death penalty, and the percentage of first degree murder cases resulted in conviction was higher.

They were also twice as likely to vote for death. And then, as I said, possibly 10 percent of our jurors were conscious and willing to admit that they were biased by the process.

Q. Has anybody tried doing two juries, like one jury to decide guilt and then bring in a different jury?

A. In a case where I testified in New Mexico, the judge did find the death penalty unconstitutional as written and said the only way it would be constitutional was if they had two juries. But then the prosecution took death off the table and it didn't proceed. I do not know of any cases -- I believe there was a federal judge, actually, who said something similar, that they needed two juries. But I don't have personal knowledge of how that

worked.

Q. Okay.

A. One of the articles that's been introduced was an article written by Bloom where he talks about ways of addressing some of these issues. And a couple of the things that can at least reduce the problems I'm talking about is to avoid relying on the will-you-follow-the-law question.

As I said, it's obvious what the answer should be to that question. And they don't understand the law anyway. As I already mentioned, he recommends individual sequestered voir dire. Also, third, a helpful approach would be to emphasize life as much as you emphasize death so they don't think that this is all about whether they can impose death. It should also be about whether they can impose life.

Number four is to avoid having the judge rehabilitate jurors who say they're always going to impose death or they think death is the only acceptable punishment. Generally, it's better to ask open-ended questions and then take them at their word, because if they get challenged, they may backpedal, but, ultimately, what they told you in the first place is probably how they really feel.

It's also important not to make the prosecutor

the second authority in the room. And it's better to not ask those three questions: Would you always impose the death penalty? Would you never impose the death penalty? Or would you sometimes impose the death penalty? Most of us have been raised to believe you're never supposed to say never. And it's similar, you're never supposed to say always. You're always supposed to have an open mind.

And I looked at the proposed questions that were similar to this that the prosecutor had proposed, and I think that was really problematic because it just says murder. It doesn't say capital murder. And they need to understand that they're being asked to impose a sentence in a subset of the universe of murders. It's a capital murder; not an accident, not self-defense, so it needs to be clear that we're talking about capital murder.

And I think it's better to avoid that question entirely, but if the question is going to be used, it's better not to emphasize the always with never because that just makes someone sound closed-minded if they're going to say always and never and say they're not going to consider the evidence.

Q. Let me show you what I've marked as Defendant's Exhibit 4. Do you recognize that?

A. Yes, those were the version of the always, never, sometimes question that I was talking about.
Q. And this is the one that was proposed by the State?
A. Yes. And, as I said, it just refers to murder in general. For instance, the last sentence in the first paragraph says that death is the most appropriate punishment no matter what the circumstance of the case.

Well, that's a pretty strong statement. Would it be hard to say, no, I don't care what the circumstances are, I'm always going to give death? So I just think that the way it's worded, it would make it difficult for a reasonable person to choose that option.

And then the next one --

Q. I mean, one of the circumstances could be not guilty?
A. That's true.
Q. One of the circumstances could be self-defense or imperfect self-defense?
A. Exactly. That's one of the problems just using murder in general too. They have to know we're talking about a murder that's not an accident, doesn't involve self-defense, it's a very specific

type of murder.

Now, how do you feel about the punishment? And I just think it's better to ask an open question about it, how do you feel about the punishment, than to try to get them to box themselves into a position that, I think, sounds kind of unreasonable on its face: No matter what the circumstance, I'm always going to do this. I don't think it would be easy to choose that option.

Q. And the second type, type two, the jury would never consider death would have the same sort of absolute problems.

A. Yes, because it's saying they would not need to hear what the facts and circumstances in aggravation or mitigation in this particular case were.

Q. No matter what he or she heard?

A. Exactly; and say my mind is made up no matter what I hear. I mean, it's hard to say that's the kind of person you are. And so I think a lot of people will say they're the third type of juror even though, really, they're not.

Q. Now, in fairness, you also reviewed the defense's proposed question regarding the three types?

A. Yes, I did.

Q. And there was some problems with that one too?
A. Yes. Again, I just don't like this approach. I think an open-ended question is more likely to get at how the jury really feels. I think the defense version is better because it starts out by saying maybe it's a moral, maybe it's religious, maybe it's philosophical. So it opens the question by saying you could have good reasons for this position. So I think that's a little bit better. And the best thing about it is it makes it very clear this is the kind of murder we're talking about, it's not just murders in general.

The thing I like least about it is I don't think always and never should be in capital letters because, again, I think a lot of people would not want to box themselves in that way.

MR. YOUNG: And, for the record, Your Honor, that's Defense Question No. 67 on Defense Proposed Questionnaire.

(Defendant's Exhibit No. 4 admitted into evidence.)

BY MR. YOUNG:

Q. All right. Let's talk about jury instructions.
A. Okay. What we find is a large percent of the jurors just don't understand the instructions. So

the supreme court decided the death penalty was unconstitutional in Furman, the way it was being imposed, because it was too arbitrary. But then they came back in Gregg and companion cases and said, okay, if you guide the jurors' discretion, that can take the arbitrariness out of it. That was what they thought would happen.

And since that time, they passed a lot of -- they have decided a lot of cases that try to channel how the jurors make these sentencing decisions. Two examples are McKoy and Mills where they made it clear that the jurors did not have to be unanimous on findings of mitigation.

They've also made it clear repeatedly, including in Tennard and Dretke, that the eighth amendment requires that jurors be able to consider and give effect to a capital defendant's mitigation. So they've made it very clear that jurors have to consider mitigating evidence for the death penalty to be constitutional.

Q. And that's more than like, I'm not going to run out of the room while the defense presents it, it's more, I'm going to listen to it; right?

A. Yes. In fact, in Morgan, the supreme court says they have to give good faith consideration to

it and they have to make it -- and other cases talk about them making a reasoned moral judgment after they consider all the evidence.

So we ask them three different questions about mitigation. So the first question is here on slide 50: Among factors in favor of a life or lesser sentence, could the jury consider any mitigating factor that made the crime not as bad, only a specific list of mitigating factors mentioned by the judge, or they could say they didn't know. And, obviously, after Lockhart -- excuse me, after Lockett, the first answer is the correct answer.

And then we asked them a question about whether they had to be unanimous or not. And so they said: For a factor in favor of a life or lesser sentence to be considered, did... And they could say all jurors have to agree on that factor, or jurors did not have to agree unanimously on that factor, or I don't know.

And then the third was the standard of proof. So, again, this is focused on something that would make the defendant less blameworthy or mitigating evidence. And we asked: Does it have to be proved by beyond a reasonable doubt, by a preponderance of the evidence, only to a juror's personal

satisfaction, or don't know.

And for this one, we only counted them wrong if they said mitigation has to be proven beyond a reasonable doubt, because some states don't give a standard of proof for mitigation. So they could honestly say they don't really know what the standard of proof was supposed to be because they were never told. As long as they didn't think it was required that it be proven beyond a reasonable doubt, we counted them as correct here.

And then we only had one question on aggravation because aggravation varies from state to state -- actually, I take that back. We had three on aggravation, but I am only reporting the one question because the answers to the other questions on the standard of -- on the unanimity requirement and what you can consider varies from state to state.

Some states allow them to consider nonstatutory aggravators and other states don't. But no states require that aggravation -- let me rephrase that. Every state requires that aggravation be proven beyond a reasonable doubt.

So this next table, which is, again, from that summary article, gives the percentages of jurors who

failed to understand these requirements. So the first column of numbers is the number of jurors who failed to understand that they could consider any mitigating evidence. And nationwide, it was 45 percent. It was actually a little higher in South Carolina. So 52 percent of the jurors in South Carolina failed to understand that they were not limited in what mitigation they could consider. So that's something that really needs to be emphasized.

Q. So over half the jurors didn't know they could consider anything they want to as mitigation?

A. Correct. And, again, with regard to unanimity, almost two-thirds of the jurors nationwide, and again, higher in South Carolina at 79 percent of the jurors, failed to realize that they didn't have to be unanimous from mitigation.

Q. Seventy-nine percent of people in South Carolina jurors didn't know that they had a right to decide for themselves what was mitigation?

A. Exactly. And then when it came to the standard of proof, 49 percent nationwide and almost exactly the same, once you round it off, 49 percent in South Carolina, thought mitigation had to be proven beyond a reasonable doubt. So they're using the standard of proof they're familiar with from television, from

the guilt phase, from aggravating evidence and applying it to mitigating evidence, which makes it harder to find mitigating evidence than it should be if the jury was following the law. And then close to 30 percent nationwide and 22 percent in South Carolina failed to realize that aggravation had to be found beyond a reasonable doubt. So, actually, South Carolina does a little bit better on aggravation.

But, consistently, jurors understand how to treat aggravation better than they understand how to treat mitigation. The word aggravation is a more commonly understood term. We all know what aggravation means. And a lot of people don't really understand what mitigation even means. People are familiar with the unanimity requirement, they're familiar with the beyond a reasonable doubt requirement, and they tend to apply it to mitigating evidence as well, which they're not supposed to do if they're following the law.

A couple of the articles that have been introduced attempted with mock jurors to improve comprehension. And there have been numerous mock jury studies where they give the jurors the instructions or give the mock jurors the

instructions and then ask them questions. And, consistently, large percentages get the questions wrong. And, consistently, they have more trouble with mitigation than aggravation.

And the article by Diamond and the article by Otto, et al., talk about ways to try to improve comprehension. And Diamond actually had a linguist come in and rewrite the instructions to try to make them more comprehendible. And they try different approaches to try to make the instructions more understandable. And they were able to improve comprehension, but they still had percentages getting things wrong.

But the things they found that helped was giving jurors written copies of the instruction to take back in the jury room with them, making sure the instructions were as clear as possible, and specifically trying to debunk the common misconceptions; so emphasize that although you just used beyond a reasonable doubt for the guilt evidence, and although aggravation has to be proven beyond a reasonable doubt, mitigation is different; so to -- to specifically draw a contrast between the way we treat aggravation and the way we treat mitigation. And they found that that did help,

though, again, there were still some people that misunderstood. But it lowered the percentages that misunderstood.

And all these misunderstandings work against the defendant because they all make it harder to find mitigation than it should be under the law, and they make it easier to find aggravation if you don't understand it has to be proven beyond a reasonable doubt.

And, again, I'm just giving a small sample of the articles that found these kinds of problems. On slide 55, I give the citations for articles 10, 15 and 24, that all found these problems with Capital Jury Project jurors. And then on the next slide, there are some other examples that find the same problems.

The first group of citations involve mock jury studies, and these are articles that have been introduced as 11, 12, 13 and 14. And then the last two involved real jurors, but they were not part of the CJP, and these are articles 8 and 9.

And for the CJP jurors, if we include the jurors who said don't know, 94 percent, almost all our jurors, got something wrong. And I'll talk more about the overall percentages at the end.

So just to sum up the understanding issue, nearly half or more of the jurors nationwide failed to understand that they could consider any relevant mitigating evidence. It was 52 percent in South Carolina. They failed to understand that they didn't have to be unanimous. It was 79 percent in South Carolina. And they failed to understand that they did not have to find mitigation beyond a reasonable doubt. That was 49 percent in South Carolina. And then over a quarter failed to understand that aggravation had to be proven beyond a reasonable doubt, the lower in South Carolina at 22 percent.

So the implications of all this is that the constitutional mandate of Gregg and the other cases that were decided is not -- that mandate is not being followed if the jurors don't understand the guidance that's supposed to be guiding their discretion. And, as I said, all these misunderstandings make a death penalty more likely.

And related to their inability to understand the instructions is this next issue. Large percentage of jurors erroneously believe that once certain evidence is proven, the death penalty is mandatory. And the supreme court has made it very

clear right from the start, from 1976 when they decided Gregg and the companion cases, that the death penalty can never be mandatory. Woodson v. North Carolina said no state can ever require the death penalty solely on the proof of certain circumstances.

So two common factors that make people think that the death penalty is mandatory is if the defendant's conduct was heinous, vile, or depraved, or if the defendant would be dangerous in the future. So slide 62 here shows a table from that summary that was introduced as article 1. And it shows the -- shows the percentages that think the death penalty is required if the defendant's conduct is heinous, vile or depraved. And it was 44 percent nationwide, and lower in South Carolina, but still almost a third, 32 percent in South Carolina.

And in some of these states, heinous, vile, or depraved is a statutory aggravator. In other states, it's not even a statutory aggravator; but in every state, you get a substantial percentage thinking that proof of that makes the death penalty mandatory.

Likewise with would the defendant be dangerous in the future? Sometimes that's a statutory

aggravator, sometimes it's not. But it doesn't matter. In every state, sizable percentages say that makes the death penalty mandatory. It was over a third nationwide and 28 percent in South Carolina.

So, to sum this up, nearly a third of the jurors in South Carolina and approaching half nationwide thought the death penalty was required if the defendant's conduct was heinous, vile, or depraved. Similarly, 28 percent in South Carolina, 37 percent nationwide felt the law required the death penalty if the defendant would be dangerous in the future. So, overall, over half of our jurors thought death was required under at least one of these circumstances, and about 45 percent thought that the circumstance was proven in their case and it required the death penalty. So close to half of the jurors thought they were deciding mandatory cases.

Q. So this is required versus always appropriate?

A. That's right, they think it's required by the law.

Q. They didn't even have a choice, not that they would always give -- not ADP, but didn't even have a choice?

A. Exactly. If you go back to the question, it's:

After hearing the judge's instructions, did you believe that the law required? So, you're right, this is just what they thought the law required, not what they personally thought was correct.

Another common problem is jurors are reluctant to assume primary responsibility for the sentence, which is understandable because it's a weighty responsibility. And the supreme court recognized that in Caldwell vs. Mississippi, and they held that the sentence is unreliable if a jury does not understand that they have ultimate responsibility for the sentence.

So we asked the jurors about five different factors. And we said: Rank the following from most through least responsible for defendant's punishment. And they were supposed to give a 1 for the most responsible and a 5 for the least responsible. And, as you can see, we ask them about the law, the judge, the jury, the individual juror, and the defendant himself or herself.

And, again, from that summary article, we show here, in the first column of numbers, these are the percentages that said these various things were the most responsible. So 49 percent, close to half, said the defendant is most responsible for the

punishment. And then the second largest percentage is close to a third; 33 percent said the law was most responsible, which fits in with the idea that the law makes it mandatory. Only nine percent said the jury and only six percent said the individual juror, and 3.5 said it was the judge who's most responsible.

And I think you can argue that there are different ways of interpreting responsibility, so I think a better way at getting at this issue is reflected here in slide 68, which shows the responses of a -- the responses to a different question. And, here, we're asking about who the juror thought was most responsible for whether the defendant lived or died. They could say it was strictly the jury's responsibility and no one else's, and about 30 percent said that. And that's really what they're supposed to be saying.

They could say mostly the jury's responsibility, partly the jury's responsibility, which you can quibble about what that exactly means, but the last option is mostly the responsibility of the judge and appeals court. We make the first decision, but they make the final decision. And that is precisely the problem in the Caldwell case.

And 17 percent, or approaching 1 out of 5 jurors, thought it was mostly the responsibility of the judge or the appeals court. So a substantial percentage are not taking responsibility.

So pooling these last three issues together, the law is not guiding the jurors' discretion the way the supreme court has said it must do when they don't understand the instructions, when they mistakenly think that the death penalty is required by law, and when they don't appreciate their responsibility for the death penalty.

The sixth issue is that race still influences the process. And that was part of the reason the supreme court said the jury's discretion needs to be guided, is because they were concerned about arbitrariness and race affecting the process. And I know the defendant and the victims are all white in this case, but race is still an issue because one of the strongest findings is that defendants who kill white people are much more likely to get the death penalty than defendants who kill people of other races.

So slide 71 summarizes some of the different types of research that's been done on race. And, again, there's been a lot of research done on race

and I'm just presenting some samples of it. So the first bullet point here is what I was just talking about. The general accounting office did a review of studies across the country on the impact of race, and they found, in 82 percent of the studies, a defendant was more likely to get the death penalty if the victim was white. And then the chances were highest when the victim was white and defendant was black, which, again, I know it doesn't apply here, but it does not show that the guidance has not taken the arbitrariness out of the system, that race is still affecting the system.

Another very interesting approach was done by Somers & Ellsworth using mock jurors. And what they did was they presented people with the exact same evidence, but sometimes the defendant was black and the victim was white, and sometimes the defendant was white and the victim was black. And if they didn't mention race at all, there were no differences in conviction rates. But if they made it a -- strike that. I said that wrong.

If they didn't mention race at all, they were much more likely to convict when the defendant was black. When the defendant was black and the victim was white, 90 percent of those cases came back

with -- 90 percent of those mock jurors voted for conviction. When the racial combination was reversed and the defendant was white, it was only 70 percent.

So if you don't mention race, they're biased against black defendants. But when they actually mention race, when they made it a racial conflict, then that difference disappears. And their argument is that people know they're not supposed to appear racist anymore, so when you bring race to their attention, they self-police. And that suggests -- well, again, it's a limited relevance to this particular case because the defendant is white, but the victims are white also. So it may be useful to get jurors to think about race so they will be more likely to be conscious of it and self-police.

The other type of finding that is found is a study by Young where he found that racial prejudice is correlated with being death qualified. In other words, people who would make it through the death qualification process and believe in the death penalty are more likely to be prejudice.

Our own research found that regardless of the race of the defendant and the victim, black jurors and white jurors approach these cases differently.

So table 3 is about lingering doubt, it reflects the answers to several questions about lingering doubt. And what we did here is we divided the cases into cases where the defendant was white and the victim was white. That would be the first two columns of numbers. And the first column is the responses of the white jurors, the second column is the responses of the black jurors. And then we had cases where the defendant was black and the victim was white. And then, finally, we had cases where both the defendant and the victim were black.

And in each case, the black jurors gave different responses than the white jurors. So the first question is: What was the importance of lingering doubt about the defendant's guilt for you in deciding on punishment? White-on-white cases, 13 percent of the black jurors said it was very important compared to only five percent of the white jurors. When it was black-on-white, it was 24 percent versus six percent. When it was black-on-black, it was 70 percent versus zero.

So in each instance, the black jurors were more likely to have lingering doubt or think it was very important when they were making their sentencing decision. They were also likely to say that it was

very important when they were deciding who the actual killer was. They also -- actually, there wasn't that much difference on the white-on-white cases, but on the black-on-white and black-on-black cases, there were differences between the way the white and the black jurors approached the case on that last question.

Another example is in table 4 from article 7 that relates to whether they thought the defendant was sorry or remorseful. And this, again, is a very important mitigating circumstance. When jurors think the defendant is sorry, they're much more likely to give a life sentence as opposed to a death sentence. And, again, regardless of the race of the defendant and the victim, black jurors were much more likely to think the defendant was sorry.

So the first is: How well does sorry for what he did describe the defendant? White-on-white cases, 26 percent said very well, sorry described him very well compared to only 12 percent. And then black-on-white, it's 38 versus 14 percent. Black-on-black, it's 32 versus 4. And you see the same pattern down the line. Regardless of the race of the defendant and the victim, black jurors are more likely to have lingering doubt and be affected

by lingering doubt and they're more likely to think the defendant was sorry.

And the differences were most dramatic when the defendant was black and the victim was white. And these next couple slides -- and I'll go through these quickly because I know that's not the facts of this case. But this is the lingering doubt question again. The biggest difference is between black males and white males. And these jurors were -- we limited the analysis here to jurors -- I'm sorry. Let me rephrase that more clearly.

The analysis was limited to cases where there were blacks and whites on the very same case. And in cases where you had blacks and whites on the very same case and a black defendant and a white victim, you found that the black males were much more likely -- 60 percent said they thought the defendant might not be the one most responsible for the killing compared to only 10 percent of the white males.

Actually, I'm going backwards here because I skipped this one. But another lingering doubt question: What was the importance of lingering doubt about the defendant's guilt? Black males were much more likely to say it was very important; 28

percent versus zero percent of the white males.

Dangerous to other people. White males were much more likely to say that described the defendant very well, 63 percent compared to 27 percent of the black males. And, again, they're sitting on the same cases, so they're seeing the same defendants, but getting very different impressions.

How long do you think someone not given the death penalty for capital murder in this state usually spends in prison? The white males were much more likely to say zero to nine years -- 30 percent of the white males said zero to nine years compared to only eight percent of the black males. The black males were much more likely to give the correct response of 20-plus years, 62 percent, compared to only 40 percent of the white males.

These are qualitative responses that I gathered in Pennsylvania. The Pennsylvania Supreme Court asked me to do a report on gender and racial bias in death penalty cases in Pennsylvania. And I included this quote and a couple other quotes that we got from some of our jurors. This was from a black juror who ultimately voted for death, but he was upset by the way he saw some of the white jurors approach the case. I don't know if you want me to

read the whole thing.

Q. No.

A. But he focuses on that people think, oh, because he's black, it's automatic. He goes on to talk about how people have their opinions before they get into the courtroom, all they care about is going home for lunch. He was very upset about the way the white jurors approached the case, even though he did, ultimately, vote for death himself.

And this was a troubling comment that was made by a 58-year-old white male juror. There were four jurors from this case, only one of them even mentioned race, and that was this guy. The other three didn't even mention race. But he talks about he's big, he's like a gorilla, he's Rodney King; blacks are killing the blacks, it's brutal. So it sounded like he might have some racial bias.

So to sum up the race issue, regardless of the race of the defendant and the victim, black jurors are more likely to have lingering doubt and they're more likely to think the defendant was sorry. Then again, when the defendant is black and the victim is white, the differences are more dramatic.

One of the things we found which I didn't mention yet is what we call the white male juror

effect. Once you had five or more white male jurors on a jury, the chances of a death penalty dramatically increased. So if you had less than -- in the cases where there were less than five white males, only 23 percent of them resulted in death. But when there are five or more white males, over half, 63 percent resulted in death.

And you get the opposite effect with at least one black juror. With one black juror, the chances of a death penalty drop. If there are no black male jurors, 72 percent of the cases result in death. When you have at least one black male juror, it goes down to 43 percent.

And then the rest of this slide summarizes what I was saying we see with black-defendant-white-victim cases. Black males are seven times more likely to have lingering doubt, six times more likely to think the defendant was not most responsible, five times more likely to think the defendant was sorry, twice as likely to identify with the defendant or the family, half as likely to say the defendant -- that dangerous describes the defendant very well, and one-third is likely to give extremely low estimates of early release.

This next slide, 82, just provides some

examples of other studies that have found race influences the process. The first two have been admitted as articles 42 and 7. And then there are also non-CJP studies done: Young, Bowers & Pierce, and several studies done by Baldus, et al., and Gross & Mauro, and then the studies reviewed by the GAO. And they repeatedly find that race is still influencing the process.

So the last of the seven issues is that jurors don't believe life means life. And, as I mentioned at the beginning of my presentation, the supreme court has made it clear, and I know now in South Carolina you require that the jury be told, that life means there'll be no parole. And it's very important that that be emphasized, because if they think the defendant is going to get released early, they're more likely to vote for death.

So we ask them: How long did you think someone not given the death penalty for capital murder in this state usually spends in prison? And they could give a number of years. And then we broke it down by state again. This slide shows a table from that summary article that lists the states in the first column. And then the second column is the median estimate. So that means half the jurors thought

defendants would get out in less than this time, half the jurors thought the defendant would get out in a longer period of time. So it's the midpoint.

So if you look down the column, nationwide, the median was 15 years. So half the jurors nationwide thought defendants usually get out in 15 years or less. And in South Carolina, it's 17 years. Even though at the time the mandatory minimum was 30 years, half the jurors in South Carolina thought defendants usually get out in 17 years or less.

At this point, several states had life without parole, including California, which told them that life meant no parole, but you still see low median estimates. So, for instance, Alabama, that had life without parole, half the jurors thought the defendants got out in 15 years or less. And you see in every state, the median estimate is well below the mandatory minimum.

The next two slides are a bit complicated, they're the top half and the bottom half of the same table. And they are from another CJP article that's been introduced. And they break down the jurors based on what their stance was at those four different points that I talked about earlier at the end of the guilt phase, after sentencing, at first

vote, and at final vote. And they're broken down by what is their estimate of the years served by capital murders who don't get the death penalty.

So this first panel here is broken down by jurors who prematurely decided death, prematurely decided life, or were undecided at the end of the guilt phase. And if you look at the first column of numbers -- I'm sorry. If you look at the first column of numbers, 39 percent of the premature death jurors thought defendants usually get out in less than nine years. That's a much higher percentage than the premature life or the undecided jurors.

And there's a big difference between the percentage that go for death who give low estimates compared to the percentage who go for death among those who had the higher, more realistic estimates. And what I'm trying to show with this table is this fear of early release becomes important as the process goes on.

So right now, at the first phase, after the guilt phase but before sentencing, the difference between those with the short estimates and those with the long estimates is only 11 percentage points. It's the difference between 39 percent versus 28 percent. But then it gets a little bit

longer when you get to after the sentencing instructions. Those with the low estimates, over half, 51 percent go for death compared to only 39 percent of those with the longer estimates.

But when you get to the second half of the table, this is at first vote and at final vote. Those with the short estimates, zero to nine years, 67 percent of them vote for death at the first vote compared to only 46 percent of those with the longer estimates. And then by final vote, the difference is even more dramatic. So at first vote, the difference is 21 percentage points; at final vote, the difference is 26 percentage points.

So the issue of early release becomes more and more important as the process goes on and the jurors are deliberating about what the punishment should be, and it makes them more likely to vote for death. Those with the low estimates were much more likely to vote for death at the final vote, 69 percent versus 43 percent.

And one of the things that makes this very difficult is jurors have so much distrust of the system. And they hear about people who were convicted of murder getting released, and they don't realize, well, that person might have been convicted

of a murder that wasn't a capital murder or maybe they were convicted under an old statute. But they hear these news stories and they just don't trust the system.

So, as I said, in California, when we collected our data, California was already telling jurors life means no parole. And this juror who voted for death said he believed the defendant usually got released in 15 years, even though he observed that officially they say the sentence is, quote, life imprisonment. But even though now it says without possibility of parole, we were still concerned that some day he'd get out on parole. We didn't want him out again at all.

And another California juror who also ultimately voted for death said: I was undecided, I had a personal problem with the life sentence, but then the judge explained to me that if he gets a life sentence, there was absolutely no chance that he would get out. I thought he might get out. I still don't trust anybody about it.

So it's difficult to convince them that life really means life. But it needs to be emphasized because if they think defendants are going to get out, they're more likely to vote for death.

This is a table from an article that's also been introduced. And during this time period, overall support for the death penalty was between 76 and 80 percent. So if you just asked people, do you support the death penalty, 76 to 80 percent said, yes, I support it. But then when they asked if life without parole was an option, what do you think the penalty should be, the support for the death penalty dropped by 15 to 20 percent.

So even though it's 76 to 80 percent originally, you can see from this first column of numbers, it drops to 53 percent, 50 percent, 59 percent. Every year this question elicits less support, so when they believe life really means no parole, they're less supportive of the death penalty.

Now, the supreme court -- excuse me. The Gallup poll has stopped asking the question about life without parole versus the death penalty in the past couple years. The last time they asked that question was in 2014. In 2014, overall support for the death penalty was 63 percent. In 2014, when they were given the choice between life without parole or the death penalty, it dropped to 15 percent -- excuse me. It dropped to 50 percent. So

it dropped by 13 percent when they thought life without parole was an option. And, again, they haven't asked it in recent years, but there's no reason to think that pattern would change.

Support for the death penalty is actually a little lower now. The last time they did this poll, which was in November of this past year, support for the death penalty nationwide was 56 percent. Again, these results have been replicated in numerous studies. Those are cited here on slide 93 and have been introduced as articles, 1, 10, 24, 15, and 26. These are all analyses of CJP data. There have also been studies using non-CJP data that find similar problems, and they are depicted here on slide 94.

So, to sum this issue up, in every state, even in states that had life without parole at the time, as South Carolina does now, jurors were underestimating how long somebody usually spent in prison if they didn't get the death penalty. And both our statistical analysis and the jurors' own narrative comments in their own words, when they describe the process in their own words, they both demonstrate that these unrealistically low estimates make them more likely to vote for death.

So the implications of all of this is that

because there's so much distrust of the criminal justice system, it's easy for jurors to dismiss evidence that contradicts the assumptions they've formulated over the course of their lives. It's very hard to convince jurors that life really does mean life.

One question that could be asked is, have things improved since we collected our data? And as I mentioned at the outset, there has been a follow-up study that, so far, has only published the results of 153 interviews. And these were interviews with jurors who decided cases that were tried between 1999 and 2009. And we found that the percentages were remarkably similar to the percentages that we found in the original study.

So, for instance, when it came to premature death or deciding that the defendant deserved death before the sentencing phase had even begun, the follow-up study found 35 percent premature death jurors, which is a little higher, actually, than our 30 percent; premature life was a little bit lower, and undecided was about the same.

When we asked about how strongly the premature death jurors felt, they found 96 percent were absolutely convinced or pretty sure. In the

original study, we found 97 percent were absolutely convinced or pretty sure, so very similar percentages.

When it comes to thinking death is the only acceptable punishment, I've listed the six types of murder that we focused on. This column gives the percentages that we got in the original CJP. The last column is the new sample. Once you round off the answers, it's exactly the same for somebody with a prior murder.

It's lower in the new sample for a planned, premeditated murder, but it's still over half. It's a little lower for murder with multiple victims, but it's still almost half. Again, once you round it, it's exactly the same for the killing of a police officer or prison guard. The most significant drop is murder by a drug dealer and then there's also a bit of a drop for murder during another crime. But, again, we still see substantial percentages making the mistakes that I've been talking about.

When it comes to not understanding the instructions -- when it comes to considering any mitigating evidence, they're actually worse in the new sample. 64 percent got that wrong compared to only 45 percent in the original sample. And part of

the problem, I think, is a larger proportion of these jurors were from Texas where they don't put that much emphasis on mitigation in the way their statute is construed. Once you eliminate the Texas jurors, the percentages are almost exactly the same for the two groups.

Unanimity, they improved a little bit. Now it's only 63 percent, but it's still more than half, think they need to be unanimous for mitigation. Again, they're worse on the burden of proof for mitigation and they're a little bit better on the burden of proof for aggravation, but, again, substantial percentages are still getting this wrong.

When it comes to thinking the defendants -- excuse me. When it comes to thinking the law requires the death penalty once certain factors are proven, again, the percentages are very similar in the original and the new sample. It's almost exactly the same when it comes to whether Defendant's conduct was heinous, vile, or depraved, 44 percent versus 42 percent. It's actually worse when it comes to the defendant will be dangerous in the future.

And, again, that's the influence of Texas,

because it's a larger portion of Texas jurors in this new sample and they put a lot of emphasis on future dangerousness. And there, 45 percent think that requires the death penalty.

Q. Well, it's part of their special eligibility question; right?

A. Yes. When it comes to responsibility, they're actually less likely to think they're responsible in the new sample. It's only five percent saying the jury and one percent saying the individual juror. And it was a little higher with the original sample, still overall very low.

Again, I like this other question better because I think it gets more directly at the Caldwell issue. And it's pretty similar when it comes to the percentage thinking it was strictly the jury's responsibility. But it's actually gotten much worse for the percentage thinking it was mostly the responsibility of the judge and the appeals court. That jumps up to 33 percent compared to only 17 percent, which is still a large percentage.

One area where there has been some improvement is the estimate on how long someone usually spends in prison if they don't get the death penalty. In the original sample, it was 15 years. It's now up

to 25 years, but that still means half the jurors still think defendants usually get out in 25 years or less if they don't get the death penalty. And that's just not true anymore. Every state with the death penalty has life without parole, at this point, as an option for at least some of their capital offenses.

The last thing I want to emphasize is that these misunderstandings are really widespread. It's not just a handful of jurors who are getting everything wrong. It's a very large percentage of jurors who are getting things wrong. So half or more of the jurors are not following the constitution in six of the seven areas that I discussed. I don't include the race issue here because that's not really a legal issue in the sense that I have data showing that things jurors are doing are legally wrong. These are percentages of jurors who are doing things that are legally wrong.

So almost half are making premature decisions, about half think the death penalty is mandatory in at least one of those two circumstances, 59 percent underestimate the death penalty alternative, 81 percent think death is the only acceptable punishment for at least some type of capital

offense, 82 percentage don't feel responsible, and 83 percent don't understand the instructions. And that percentage is excluding the don't knows.

So 83 percent are people who gave us an answer that was actually incorrect. We didn't even include the don't knows. As I said earlier, if you include the don't knows, it's over 90 percent.

So the U.S. Supreme Court has said, in Parker, that a jury should be made up of 12 people who are impartial and unprejudiced, that's what a defendant is entitled to. And they actually say not 9, not 10, but 12 impartial, unprejudiced jurors. So we wanted to see what percentage of our 1198 jurors got everything right in the six different areas that I've been talking about, excluding the race issue.

So this chart here shows the number of errors and the percentage of jurors who made that number of errors. So we were actually surprised that not one of our jurors got everything right. They got something wrong in one of these six areas. Two percent only made a mistake in one area. And, again, these are jurors who are trying to convey the impression that they did this right. But none of them did everything right.

Q. And these are all jurors who sat and decided to

kill a person or don't kill a person?

A. Exactly. These are all jurors who went through both a guilt and a penalty phase and guilt and penalty deliberations.

The average number of mistakes, which also happen to be the median or midpoint and also happen to be the modal, which was the most common number of mistakes that were made, were making mistakes in four different areas.

So in Boyde vs. California, the supreme court established the reasonable likelihood standard. And what they're saying here is a defendant does not have to establish that it's more likely than not that the jurors decided the cases in an impermissible way, but it has to be more than a mere possibility. So it doesn't have to be more likely than not, but it has to be more than mere possibility. So they describe that intermediate standard as a reasonable likelihood. But, actually, our data shows it's more than a reasonable likelihood, it's actually more likely than not.

And just for the sake of argument, we did a calculation of what is the likelihood of getting 12 jurors who follow the law in every area but one. We couldn't calculate the probability of getting 12

jurors who got everything right because the probability, according to our data, is zero. And you can't do this kind of calculation if you're starting with the probability of zero.

So just for the sake of argument, we used the percentage for the jurors who got things wrong in only one area, and that was close to two percent; .019 only made a mistake in one area. And the way you do that calculation is you raise that almost two percent to the power of 12 and that gives you a number of a little over two out of not a million, not a billion, not a trillion, but a 1 with 21 zeros. That's the probability of getting 12 people who only make a mistake in one area, which even that is not permissible, according to the supreme court.

So the probability of getting all 12 completely following the law, in my opinion, is zero. Though, as I said at the outset, you can make the process a little more fair by trying to address some of these issues.

Although I never said there was nothing that could be done, I did conclude by saying that you are likely to get jurors who prematurely decide the sentence during the guilt phase, who won't consider mitigation because they think death is the only

acceptable punishment, or conviction-prone and punishment-prone and biased by the focus on the penalty during jury selection. You're likely to get juries who don't, under the instructions, who believe death is mandatory by law, and who don't see themselves primarily responsible. You're likely to get jurors who are influenced by race; in this case, placing more value on the race of white victims. And you are more likely to get jurors who erroneously assume that defendants who don't get death will be released early.

MR. YOUNG: Thank you very much, Dr. Foglia. Please answer any questions that the State may have.

MR. GRAHAM: No, Your Honor. This is a proffer. We don't have any questions.

THE COURT: Okay. Thank you very much.

MR. YOUNG: Just one more thing for the record, Your Honor. The State certainly had the opportunity for cross-examination.

THE COURT: Absolutely.

MR. YOUNG: Your Honor, do you want to take a quick break and I can take this stuff down? Or do you mind if I move this stuff down while you take about what we're going to do next?

THE COURT: Let's take a quick break and you

take it down and we'll figure out what we're going to do next.

I have prepared, for y'all's review, a form regarding changing Mr. Jones' housing.

MR. YOUNG: Your Honor, for the record, I'd move that Mr. Jones be transferred to Lexington County. I know he has a number of appointments, both with department of mental health experts and defense experts, and we would request he be ordered transferred to Lexington County Detention Center until trial.

THE COURT: We spoke in a status conference one time prior whether the prosecution's office had any objection to that request of him being housed in the state. At that time, the solicitors had no opinion whatsoever, it was more or less on the County. And I had spoken with the County about they've got to pay for his housing wherever he is. With all the pretrial preparations, interviews, evaluations, it seems simpler to keep him here.

So I'm going to sign an order directing the sheriff and the jail to keep him here. And if they want to be heard later on any objection, they can. But, for the time being, we're going to issue a very simple order saying because of the complications of

having to transport him, it's simplistic to keep him here, we're going to keep him here.

I was made aware he has no particular requirements of diet and medications, it's very simple, and his personal belongings are minimal. So we'll keep him here.

MR. YOUNG: And, Your Honor, I know that Mr. Jones has a little bit of concern because he did not pack up all of his stuff this morning. So I don't know if you intend to transport himself back this afternoon and allow him to pack up his stuff and then come back to Lexington or --

THE COURT: Well, I'll leave that to whatever is the easiest way to get it. If it needs to be retrieved or they need to transport him to retrieve it, whichever. Detective Sowards has been part of the transportation crew. I'll let him deal with the logistics of that for Lexington County.

Detective, if you need help to look up for whoever is supervising you, but otherwise, I want you to manage that.

THE DETECTIVE: That man in the corner over there.

THE COURT: Captain, it's up to you.

THE CAPTAIN: We'll take care of it, Judge.

THE COURT: Let's take a brief recess and see what else we got.

MR. YOUNG: Are we going to take a brief recess or are we taking a lunch break?

THE COURT: How much y'all got left? The court reporter asked for a lunch break an hour ago, she was hungry.

MR. YOUNG: I mean, we could go as long as you -- I've got a week's worth if you want to do it all. We can go as long as you want.

THE COURT: Mr. Graham, what you think?

MR. GRAHAM: I don't know. I mean, I think that what we -- they wanted to put their motion up. They've proffered that, so I think we've done that. I think now is the question of trying to finalize the jury questionnaire to send out. I think that's what our goal was originally to try to accomplish today.

THE COURT: Now, haven't the parties presented their respective positions on the questionnaire and it's up to me to say here's what I'm going to utilize as the questionnaire? Isn't that where we are right now?

MR. YOUNG: Yes, sir.

THE COURT: I think we are. Y'all want the

standard one, they want a little more to it. I think I'm somewhere in the middle. I intend to do that.

What other issues have we still left on the motions outstanding? There was one about the analysis of the spice or the -- y'all called them Scooby snacks.

MS. MAYES: There is, Your Honor.

MR. MADSEN: I think we were talking about working with the logistics to get it taken care of.

THE COURT: Because there was something to do with how much do we have left and was there enough of a sample to give a sample to maintain an original sample.

MR. MADSEN: Mr. Graham was able to find that out. There's over a gram in two packages. We'll utilize half just in case, for some reason, they want to go back and retest or something, so there'll be enough of a sample left.

THE COURT: Good enough. I like to hear that, that's good.

What else you got, Ms. Mayes?

MS. MAYES: Yes, sir, Your Honor. Regarding the proposed defense questionnaire, I know you had referenced earlier the first six pages, which is the

general information. On that, we have no objection to questions about the juror themselves or about a spouse. But their proposed questionnaire also included significant others, and that just became problematic for us, Your Honor. We think that's a bit invasive if we're getting into who they may be in a relationship with or who they're dating. So we'd like to limit that just to the juror and/or the spouse, which is the traditional method.

And then you had also inquired as to their question on social media. We don't have an objection to a general question as to whether or not the juror themselves may be active on social media, and if so, which sites are they active on. The objection would be to specifics, such as any handles that they've used now or in the past, because that gets very problematic to try and keep track of. A person very likely may not even recall any previous handles on previous accounts.

THE COURT: All right. Well, understanding that, now, what else -- do we need to take a lunch break and come back in 45 minutes and resolve? What else do we have left to do, other than some of that cleanup stuff? Do we have 15 more minutes of this or do we need to take a break and come back and

we've got more than that? Tell me what I'm --

MS. MAYES: My estimate would be less than 30 minutes, Your Honor.

MR. YOUNG: It depends on how many of these motions you want to take up.

THE COURT: Okay.

MR. GRAHAM: I didn't know we were taking up anything other than jury questionnaire today, I guess. I thought we were limited to the jury questionnaire and anything to do with the jury process, I guess. I don't know what other motions he's talking about.

THE COURT: All right. Let's stand down for a minute, that way Bethanie can relax.

(Brief recess.)

THE COURT: We're going to go back on the record and put a little bit of our sidebar conference on the record. The -- all the lawyers discussed with me the jury questionnaire. And I informed them that it was my intention to produce a written questionnaire which will be a combination of the two or, perhaps, three that I've seen, and I will e-mail that draft of what I would like to use as a questionnaire to all six attorneys, and whoever else wants to see it in our group, for comments.

That's what I intend to provide to the clerk of court to send out.

Prior to mailing it out, we will reconvene the week of the 28th of January here in Lexington, probably Thursday or Friday, for anything else to be put on the record regarding the questionnaire and any particular questions that either side wishes to make. And the Court will make any rulings on those issues at that time, that way the questionnaire will be finalized by the end of the week of the 28th for purposes of Ms. Frick and Comer and whoever else to get those mailings out.

That day also -- so it will be the 31st or the 1st of February, 31st of January, one of those two days will likely be an additional day to hear some additional motions. The defense has roughly two dozen motions to have yet to be heard, which will not be as lengthy as the ones we've heard today, so we'll take up some of those. And, perhaps, it will be easier for me to outline which ones we'll take up and which ones we'll postpone until later in February.

Additionally, there were some logistical issues we've worked out with Mr. Jones' transport and resuming being housed here in Lexington. And

Captain has got those resolved and I've signed an order to that effect. So he'll be transported back to Lee this afternoon and he'll be retrieved back to Lexington County sometime the week of the 23rd before his evaluation of 25th.

Is that right?

MR. YOUNG: Yes, sir.

THE COURT: Now, Mr. Young, you had said you had a couple short issues you wanted to put on there, representations, I think, more or less.

MR. YOUNG: Yes, sir. Your Honor had ordered us to provide the State with a copy of the data that forensics came and retrieved off of all of the electronics that was in the possession of the State. I've delivered an external hard drive to the State with all that data on it.

Your Honor, in order for us to produce a copy of the draft of Dr. Dorny's report --

THE COURT: Which we all received.

MR. YOUNG: -- we did not get it done on the 9th, but we got it done on the morning of the 10th. There was some formatting issues, but we've provided it with an up-to-date draft as it exists right now from Dr. Dorny.

THE COURT: I got a copy of the draft report

also.

MR. YOUNG: And I also sent it to Dr. Friersen. We resolved the issue of the spice testing. We're working out how to get the stuff mailed to the lab that we want to use. The State has agreed to provide us with a copy of the information, the direct information that they gave to Dr. Friersen --

THE COURT: And that was some images and/or things on the cell phone or computers or whatnot because there was so many, but they limited it to the ones they chose. He didn't want to be overwhelmed with 50,000 images, so y'all culled it down to several.

MR. GRAHAM: If I can, Your Honor, the defense and Dr. Friersen both were supplied with the phone extractions, the reader, and everything that's on there. And Dr. Friersen sent an e-mail to the State and also the defense saying if there's anything specifically you want me to look at, let me know what it is specifically.

So we went through and created a time line of about a week period before and after with certain things in it. And we also went and highlighted things throughout that are just representative, I guess, of what's on his phone. We provided that to

him this morning and we'll provide a copy to the defense of what we gave him. I mean, we gave him everything, but then we highlighted these other things.

THE COURT: All right. There's another thing --

MR. GRAHAM: And he also asked the defense to do that. And I don't know whether they're going to yet, but he did ask them to do the same.

THE COURT: So that will be coming to the defense sometime this afternoon, I think, is what y'all said.

Ms. Mayes, you had an issue about medical records.

MS. MAYES: Right. So we have received Dr. Dorny's report, or draft report, and also some other materials from defense experts. They have alluded to some type of car accident that occurred when the defendant was a teenager.

THE COURT: Had a head injury. I remember.

MS. MAYES: And we are attempting to obtain those medical records and we were inquiring as to whether they have the records. They've indicated they do not.

MR. GRAHAM: Yes, they gave us a copy already

of, I guess, a letter that came from the hospital saying that no files exist on that anymore as to him being treated. And Mr. Young also gave us a copy of a consent so that we can check the hospital and make sure there's nothing there. Obviously, if we find something, we'll turn it over to them, too.

MR. YOUNG: And I also gave them a copy of the criminal case records involving the accident. Tim was a passenger in the car, the driver was charged with felony DUI. Tim was listed as the victim in that accident. So I did have some records regarding the accident that we've provided them as well.

THE COURT: What else have you got outstanding? Mr. Young, back to you.

MR. YOUNG: Your Honor, I have one other issue. I'm requesting an order of protection for July 13th through the 22nd. I got a gift of a cruise for my family. I certainly hope that we're not still in trial, but I would ask the Court -- given the great expense and flying to Vancouver and then cruising to Alaska, the Court consider a protection request.

THE COURT: I will consider that. I feel confident we'll be done by then, but not there yet. So I think we can -- that's not going to be a problem for all of us. I think we'll be all right.

All right. What else before we adjourn for the day?

MR. GRAHAM: Nothing from the State.

MR. YOUNG: I guess we're not -- we're going to wait until we come back on the 28th to talk about the scheduling of the suppression hearing and the other evidentiary matters?

THE COURT: Yes, because they'll be back from the trip to the southeast, from Mississippi, Alabama and have, perhaps, some logistical issues worked out, right, everybody lined up to come up here to testify. Sure.

MR. YOUNG: And it remains our position we can decide that when the affidavit is provided.

THE COURT: Okay. Fair enough.

Anything else before we say good afternoon?

MR. YOUNG: No, sir.

THE COURT: All right. Safe travels.

-- END OF TRANSCRIPT OF RECORD --

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 11th of January, 2019.

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

March 1, 2019

s/Bethanie K. Creppon

Bethanie K. Creppon
Circuit Court Reporter

State of South Carolina)
) Court of General Sessions
County of Lexington)

2015-GS-32-0188, 0189,
0190, 0191, 0195

State of South Carolina)
vs.) Transcript of Record
)
Timothy Ray Jones, Jr.)
)
Defendant)

January 31, 2019
Lexington, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Jr., Judge

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

Solicitor Rick Hubbard
Deputy Solicitor Suzanne Mayes
Deputy Solicitor Shawn Graham
Attorneys for the State

Boyd Young, Esq.
Robert Madsen, Esq.
Attorneys for the Defendant

Joy E. Holston
Official Court Reporter

INDEX OF WITNESSES

(IC) - Denotes In Camera
(DW) - Denotes Defense Witness
(SW) - Denotes State's Witness

E X H I B I T S

Defendant's

NO.	DESCRIPTION	ID	EV	PAGE#
1	Letter 1/6/2017		X	22
2	Clinical Psychology		X	23
3	Juror Questionnaire		X	52

THE COURT: We have got two or three matters to take up this morning. We have got, I want to finalize the juror questionnaire form that I have been working on. We can do that in a moment. The issue we talked about on the phone and we talked back in-chambers was regarding the evaluation being conducted by Dr. Frierson. I think it would be best if I, Ms. Mayes, if you are okay with this, if I question Dr. Frierson as to, a couple of issues regarding his suggestive evaluation.

MS. MAYES: Yes, Your Honor.

THE COURT: So, can he come forward. I am going to bring you around and put you on the witness stand and put you under oath.

Dr. Richard Lesesne Frierson, being first duly sworn, testified as follows:

CLERK OF COURT: Please state your name and spell your last name for the record.

MR. FRIERSON: Richard Lesesne Frierson, F-R-I-E-R-S-O-N.

EXAMINATION BY THE COURT

By The Court:

Q Dr. Frierson, the Court has, I am sorry, the Department of Mental Health has tasked you with evaluating Mr. Jones for purposes of criminal responsibility evaluation. Do you, is that correct?

A Yes, sir.
Q Now, I am informed through counsel for the Department of Mental Health that you have a battery of tests you would like to do on Mr. Jones?
A Yes and no. I would like to have a neuropsychological evaluation and the Department of Mental Health has contracted with a neuropsychologist in the community to complete that as part of the overall criminal responsibility evaluation.
Q All right. It is also my understanding that you wish to perform a personality inventory evaluation on him also. Is that test necessary for you to complete the task placed upon you for purposes of this court proceeding?
A And which task are you referring to.
Q Well, let me ask you this. Maybe I am misinformed. I was informed that you wished to do some sort of personality evaluation on Mr. Jones. Is that correct?
A Well, are you talking about a psychological test for that purpose?
Q Yes.
A Are we talking about the MMPI?
Q Yes. Is that test necessary for you to perform your duties and your evaluation?
A It is necessary to perform a good evaluation and a thorough evaluation. So if I am not allowed to do that

then it would impact the quality of the evaluation.
Q Okay. If I ask you this question as to the quality impact. Do you have an opinion, based upon your experience, that if you answered that question as to the impact or the quality, what that test would provide for you, would the presence of Mr. Jones here in the courtroom, hearing your answer, would that impact the results of the tests?
A Essentially, yes.
Q All right. I would like that question.
THE COURT: Will you consult with your client, Mr. Young?
MR. YOUNG: We have.
THE COURT: You have?
MR. YOUNG: Yes sir, he is ready.
THE COURT: And is he okay with that?
MR. YOUNG: Yes, sir.
MR. HUBBARD: We would ask that he state it on the record, specifically to your questioning, that Mr. Jones actually be the one that you have a colloquy with him so the record his clear about his knowledge.
THE COURT: All right. Mr. Jones, do you understand what everyone is concerned with here today. We are talking conducting an evaluation for you and Dr. Frierson has a certain number of tests that he wishes to do. I am

informed that one of those tests, your attorneys and evaluators have concerns about whether it may impact their opinion. Do you understand that is what we are talking about?

MR. JONES: Yes, sir.

THE COURT: I want to ask more in depth why Dr. Frierson believes that test would be useful and impactful for him. And he thinks his explanation to me may impact the test, if it is ever given to you, if you hear his answer. Do you understand that?

MR. JONES: Yes, sir.

THE COURT: Now, are you okay with letting me hear Dr. Frierson's answer, more or less in-camera. And by that I mean without you being here in the courtroom for that question and answer with me and Dr. Frierson. Are you okay with that?

MR. JONES: Yes, I am.

THE COURT: Are you going to waive your right to be present for my questioning. It will just be me and not the attorneys.

MR. JONES: Yes, I am.

THE COURT: Anybody pressuring you to make that decision?

MR. JONES: No, sir.

THE COURT: Are you okay with stepping out of the

courtroom while I conduct this inquiry?

MR. JONES: Yes, I am.

THE COURT: Are you doing that voluntarily?

MR. JONES: Yes, I am.

THE COURT: You feel pretty good today?

MR. JONES: Yes.

THE COURT: Have you had enough time to talk with Mr. Young and Mr. Madsen?

MR. JONES: Yes, sir.

THE COURT: Very good. Okay.

MR. YOUNG: I would have some questions for Dr. Frierson. I would like to ask Dr. Frierson some questions as opposed to just the Court asking questions.

THE COURT: All right. And we okay with you doing that without Mr. Jones here?

MR. YOUNG: Yes, sir.

THE COURT: Okay, well, he can step out then.

(Whereupon, Mr. Jones stepped out of the courtroom.)

CONTINUE EXAMINATION

By The Court:

Q All right, Dr. Frierson, you need to tell me so that I am more educated. This personality evaluation we have been talking about loosely. What type of test do you envision would you like to give Mr. Jones?

A Well, I am personally not giving any of the tests.

This is the psychologist who has consulted with and we have already met and talked about this case. First of all, the test, the MMPI is not merely a personality test. And to say that is all it is is just characterizing the test itself. It is basically a diagnostic instrument in general. Yes, it does measure personality traits. That is not really my understanding as to why she wants to give that test. That test has what is called validity scales. It will compare how someone answers questions compared to someone else. Do they endorse more symptoms than those people, even mentally ill people would endorse. Do they try to hide sometimes or minimize sometimes compared to other people. Are they consistent in their answers across the test. Like if they answer this question one way. If a similar question is asked way later in the test, are they consistent in their answers. Those are called validity scales. And what they do is give an overall impression of this person's attitude towards testing in general. That, my understanding is, she wants to see that before she decides maybe what other tests to give. It could impact how she interprets other tests. The reason that I wanted the neuropsych to begin with is that Mr. Jones suffered a significant, well, I don't know if it is significant of yet, but certainly impressive on scan a head injury. He has a depressed skull fracture, clearly

that is what you can actually see when you look at it. There is scans that show that that impinged on part of his brain that has been crushed as a result of that. And I want to see on testing what impact that has on his cognitive abilities. Are there any particular areas that might have been affected. And also on, sometimes those types of injuries could cause changes in personality.

Q How are you going to change the personality without a baseline?

A Well, you are not. You are going to see what the characteristics are now. And then, that is not what I base my diagnosis on. I use that information as one source and I compare to what that shows to what people tell me about him, what his father and grandmother tell me about him and how he was as a child and did he have some sort of change after that. I have interviewed him, obviously, for several hours now. And I have read what they have already said about him and there is a lot of different things that are going through my mind that I haven't really finalized what it means. I think there is some sort of a gullibility about him. I also think there is a rigidity about the way he views some black and whiteness about things. And those, I don't know what my opinion is going to be because I have not done them. Okay. But those have potential of having implications for

certainly, conformed issues. I mean, I am just trying to dot my I's and cross my T's and try to give the Court the most thorough evaluation I can.

Q If you are not allowed to test him on the personality MMPI, will that affect your ability to give an opinion on that?

A I think I will be able to give an opinion, an opinion on the issue of, in my opinion did he know right from wrong. I think the foundation for that opinion would certainly be less than it would have been if I had been able to do that.

Q Okay.

THE COURT: Any questions from y'all. I think that is what we discussed.

MR. YOUNG: I have a couple of questions, yes sir.

THE COURT: Okay. I will let you know.

CROSS-EXAMINATION

By Mr. Young:

Q I just want to clarify something for the record real quick. Dr. Frierson, what is the MMPI stand for?

A The Minnesota Multiphasic Personality Inventory.

Q Okay. The personality diagnosis, a personality disorder, what does that mean and how do you evaluate that? Is there other instruments that are used besides this one tool?

A Well, they are all just similar. This is the only one that I am aware of that really has good validity scales which is the reason we wanted to give this particular test. And it is not, it is not merely a personality disorder test. I mean, it is almost like the name is misleading. It is also useful in making a diagnosis of a variety of mental illnesses other than personality disorders, mood disorders, bipolar disorder.

Q Schizophrenic disorder?

A Yes. It can have some usefulness in that, yes.

Q But specifically as it relates to a personality disorder. Is the best way to determine whether or not somebody has personality disorder to give them the screen tool?

A No.

Q Or is to review the thousands and thousands of pages of records and conduct multiple interviews?

A Yes. If I had to choose between the two I would choose to interview somebody.

Q Okay.

A And look at all the records. This is merely another data point.

Q Sure.

A And the more data points you have the better your evaluation.

Q And you have had--
A I don't know of any other expert in a death penalty case where there is going to be a question of insanity would want to go without a full psychological evaluation including this test. And I am aware that there are elements of it that is being misused and misused by the Solicitor's office in this particular County.
Q Right.
A Questions taken out of context. There is one, something along the lines of, I sometimes lie to get out of trouble.
Q Sure.
A Well, we all do that. And the most common answer is yes. That is just the normal human behavior. But is someone, let's say is severely depressed, they might interpret that question as being very negative and punitive and answer no. So a normal person might answer, okay. Take that out of context and the Solicitor tells the jury, ladies and gentlemen, he is a confessed liar because he answered yes on that question. It is highly misleading in taking that question out of context. And I am aware of those problems with, the test has been misused in the past. I am aware of that and I do not think that either side should be allowed to see individual answers to individual questions other than perhaps your own expert.

Q Right. It would be improper to give raw data to me?
A Yes.
Q Or the Solicitor?
A Yes.
Q But give it to Dr. Brawley, that would be appropriate?
A Yes.
Q A personality diagnosis, if somebody were to, I don't know, can you give me an example of a personality disorder?
A Antisocial personality disorder, borderline personality disorder, paranoid, avoidance.
Q If somebody were to be diagnosed with borderline. That means that that is an evaluation of a pattern of behavior, right?
A A pattern of how this person interacts with others around them.
Q And the pattern is sort of as of they are today, right. It doesn't tell us anything about August 28th, 2014?
A It doesn't tell me anything specifically about that point and time, no.
Q Which is the point and time that you were evaluating for criminal responsibility?
A Yes.

Q You have had, as far as you are aware, you have all the records that the defense has, you have been provided with thousands of pages?

A I have been provided with a lot. I have also mentioned, I think we have had a conversation today about things that I don't have that you told me that you have, you sent me.

Q Some draft reports from the neuroradiologist?

A I have Dr. Brawley's report and I have the neuroradiologist report.

Q Okay.

A But you said you had some other expert reports.

Q Yes, sir.

A That I have not seen.

Q Okay. And we are going to get those to you ASAP. I thought the email had gone through but it might have gotten blocked.

MR. YOUNG: That is all the questions that I have for Dr. Frierson.

EXAMINATION BY THE COURT

By The Court:

Q Let me ask you a question, Dr. Frierson. Is the fact that the neuropsych evaluation, the physician that would conduct that test, would it be someone else, it wouldn't be you?

A Right. It is not a physician, it is a psychologist with a PhD.
Q So if another psychologist did the test of the defense choosing, if they did the personality inventory and gave you the data to analyze you get the same result?
A You should.
Q Okay.
A But if you gave the raw data to two psychologists, their interpretation of raw data should be similar.
Q Okay. I understand.
A How the raw data is gathered, each person wants to make sure that it was gathered in an appropriate way. And so my psychologist would not have control on how Dr. Brawley administered or had the test administered.
Q Okay.
A But until you read in and fill in things, you want a quiet environment and there are certain things you tell the person before you give a test.
Q Okay. Fair enough.
THE COURT: Anything from the State?
MR. GRAHAM: Just a couple of questions.

CROSS-EXAMINATION

By Mr. Graham:
Q Dr. Frierson, in being tasked to determine full responsibility you are looking at both insanity and guilty

but mentally ill. Is that correct?
A Yes, sir.
Q If I understood what you said, the psychologist wants to do the MMPI, first based on that and then the psychologist would pick other testing. Is that correct?
A That's what she indicated, yes.
Q So what are the possible things that the MMPI could show?
A Well once again, the MMPI would show his attitude towards testing in general.
Q Any kind of testing?
A Any kind of testing. Well, you make an inference. There is an inference drawn that, is this person admitting when they have problems or they deny, or are they denying when they have problems or are they overreporting problems, are they trying to appear more impaired than they are. So that might influence what he chooses to do next.
Q Okay.
A It is like a screening test. And if that indicated that he looks like he is overreporting symptoms then she might want to go straight to giving a malingering instrument. Okay. If it doesn't then she may not and that can rule in or rule out that. But in a screening test that might show problems in certain areas that she

would use that to decide what more potential test to give to look at those specific problems.

Q And that would go towards both the, either insanity or guilty but mentally ill?

A It goes towards diagnosis and diagnosis is going to be crucial in deciding those issues of, for example, I think you all have had the competency reports. If he, merely, has a substance induced psychotic disorder, that can't be used as the basis of an insanity defense by our own case law. If he doesn't have that, if he has an underlying psychotic mental illness then that is a different story. Making a diagnostic conclusion is in part the first step at looking at, does he have a mental illness that qualifies for insanity defense which is why diagnosis is important. It is not merely did he know right from wrong. And if he didn't it becomes then why didn't he and is it because of a mental condition that was induced by drugs or is it because he has an underlying severe mental illness.

Q Which is relevant to the jury in the guilt and then if we get to the penalty, as to the penalty as well.

A Well, I am not concerned about the penalty phase. You are--

Q But just to understand what happened and why. So you can get a better picture and give you a better quality

opinion if you do this test?
A Yes.
Q If you don't it is like having your hand tied behind your back. Is that fair?
A Two fingers tied together, I don't know.
Q Okay. As an opinion as an expert, why would a defendant not want, I mean I am trying to understand what they are worried about, why don't they want this test done in your opinion?
A I don't know, I mean other than what I have already said, that it has been taken out of context in the past and used against a Defendant in a very unfair way in my opinion.
Q And that was going through taking the questions out of context?
A Yes.
Q Is there any other unfair way that you could think that the testing would be used?
A Not that I can think of.
Q Do you have any opinion as to, because I thought I heard you say earlier, why wouldn't the defense have done this testing themselves, why would they be advocating against the testing?
A I have no idea.
Q So in your professional opinion, to get the best

picture with the most quality this testing should be done?
A I defer to the neuropsychologist that we contract with and she mentioned there are diagnostic issues here that need to be sorted out. Is it going to be the sole thing that determines that, no. But it is a point of data that would be helpful. And the other thing, if I may. I think that the Department of Mental Health in general, let's forget about this case. To set a precedent where we need a Court order for an evaluation and for either side, either the defense or the prosecution to say you can't do this test. This is going down a slippery slope that would have impacted, this is allowed on future evaluations. And impacting of the quality of the order that DMH is able to produce.
Q So is the quality, the impact on the quality is of the same on a potential insanity defense as compared to a potential guilty but mentally ill defense or is there a difference of this testing that might apply differently to those two?
A No. It is all the same.
Q Thank you, Doctor.
THE COURT: Before we go forward. Dr. Frierson has not been, he has been named as the evaluator for the purposes of his expertise. We are not going to challenge his expertise. Are y'all stipulating he has been the

Court appointed, I mean the Court ordered evaluator for--

MR. YOUNG: We stipulate to his expertise, Your Honor.

THE COURT: Okay. So, we are skipping his expertise, I don't want to come back later and say, well, he never was qualified. I skipped that step thinking it was obvious that that is what we are doing.

MR. YOUNG: Yes, sir.

THE COURT: Mr. Young, you got a couple of more questions, you stood back up.

CROSS-EXAMINATION

By Mr. Young:

Q Dr. Frierson, I want to show you what has been marked as Defense exhibit number 1 and ask you if you recognize that?

A Yes.

Q And can you tell the Court what it is?

A This is a letter, Dr. Kruse objection to any sort of personality testing being done as part of our evaluation or any form of another, including but limited to. So I guess there would be other test she would object to. The MMPI or any form of the Hare Psychology Checklist which isn't even on her radar.

Q And at that time you and I had talked about what testing was going to be done and you had said Dr. Kruse

was going to decide that?
A Right.
Q And we just sort of said, all right, well we object to any personality including these two specific, right?
A And any other.
Q And any other personality test as well?
A Yes.
MR. YOUNG: Your Honor, for the record for today I offer Defense exhibit number 1.
THE COURT: Sure because you have made that motion to suppress that testing, that letter is notice, that is fine.
MR. YOUNG: Thank you.
(Whereupon, Defendant's Exhibit 1 was admitted into evidence.)
Q Dr. Frierson, the next issue was to mark as Defense exhibit 2 and ask if you recognize that?
A This would appear to be a copy of Dr. Brawley's report that was provided to us.
Q And you have a copy of it?
A Yes.
Q And you have had a chance to review it?
A Yes.
MR. YOUNG: Your Honor, at this time the Defense would offer Defense exhibit number 2, this is Dr.

Brawley's report.

THE COURT: For purposes of this hearing.

MR. YOUNG: For purposes of this hearing.

THE COURT: Okay.

(Whereupon, Defendant's Exhibit 2 was admitted into evidence.)

Q Dr. Frierson, did criminal responsibility evaluation is codified in South Carolina, it is sort of, does the McNaughton standard, is that correct?

A A modified McNaughton standard, 17-23-10.

Q It is 23 or 24?

A 24, I am sorry. 17-24-10.

Q And just for the record to be clear, 24-10, do you know it off the top of your head?

A The Defendant is not responsible for the time of commission of the act charged, lacked the ability to distinguish moral or legal right, moral or legal wrong to recognize the particular act charged as morally or legally wrong, something to that effect.

Q And when we say, knew right from wrong, there are two different rights from wrongs that have to be evaluated, right?

A Yes, we do look at moral and legal.

Q Somebody could know it was illegal but still think it was the right thing to do?

A That is not the exact same thing as my interpretation of morally but it is possible to know something is legally wrong and not know that it is morally wrong.
Q Yes, sir.
A Due to mental illness.
Q And that is, and the part of that statute is at the time of the commission of the act, right?
A Constituting, yes.
Q All right. Thank you.
THE COURT: You want to leave?
DR. FRIERSON: Yes, I have got work to do.
THE COURT: He is excused. Mr. Young, do you want to call Dr. Brawley?
MR. YOUNG: Yes, sir.
THE COURT: For purposes of your motion?
MR. YOUNG: Yes, sir.
THE COURT: Okay. And Mr. Jones is still not in the courtroom and he will stay out of the courtroom until I hear this.
MR. YOUNG: Yes, sir.
MR. HUBBARD: In an abundance of caution perhaps he needs to be asked about that, about his witness as well because I think the only question he answered was about Dr. Frierson.
THE COURT: I think that was right. I did only ask

about Dr. Frierson. Let's inquire one more time, bring him back in here, please.

(Whereupon, Mr. Jones enters the courtroom.)

THE COURT: Mr. Jones, we are going to, I want to hear some little bit of testimony from Dr. Brawley about the same issue, about what test may be necessary and their opinion to let you participate with. Are you okay with me hearing from her on those issues without you being in the courtroom?

MR. JONES: Yes, I am.

THE COURT: And you are doing that freely and voluntarily?

MR. JONES: Yes, sir.

THE COURT: Nobody back there telling you you got to do this?

MR. JONES: No.

THE COURT: You have had a chance to talk to these two lawyers about this decision?

MR. JONES: Yes, I have.

THE COURT: You are freely and voluntarily waiving your presence for me to hear briefly from Dr. Brawley?

MR. JONES: Yes, I am.

THE COURT: All right. Thank you, sir.

(Whereupon, Mr. Jones exits the courtroom.)

MR. YOUNG: The Defense calls Dr. Brawley.

DR. TORA BRAWLEY, being first duly sworn, testified as follows:

CLERK OF COURT: Please state your name and spell your last name.

DR. BRAWLEY: My name is Dr. Tora Brawley, B-R-A-W-L-E-Y.

DIRECT EXAMINATION

By Mr. Young:

Q Good morning, Dr. Brawley. Can you please tell the Court a little bit about yourself, what it is that you do, what your licenses are.

A I have been licensed in the State of South Carolina since 1998. Before that I was licensed in Texas in 1982. I am a neuropsychologist. I came to Columbia in 1999, I worked at the Department of Mental Health with Dr. Frierson for about two and a half years. And I am currently in private practice. I worked for a medical school for a while, since my son was born I am a sole private practice and I do mostly forensic work.

Q Have you testified as an expert in South Carolina?

A I have.

Q Do you know how many times?

A At least one-hundred.

MR. YOUNG: Your Honor, at this time we would ask to qualify Dr. Brawley as an expert in neuropsychology.

THE COURT: Any voir dire, Mr. Graham on her qualifications as a neuropsychologist? You don't want any voir dire?

MR. GRAHAM: Not for purposes of this hearing, no sir.

THE COURT: I didn't think so. She is so qualified.

Q Dr. Brawley, were you contracted by me to do some testing on Tim Jones?

A I was. You contacted me and said Dr. Schwartz-Watts, now Dr. Maddox was requesting testing.

Q And did you do that testing?

A I did.

Q And is your report reflected in Defense number 2?

A That is it.

Q Can you tell the Court a little bit about what testing you did?

A Well, first I do a personal interview, background information and then I did a battery and a neuropsychologist test, several different tests.

Q Did you do any personality test?

A I did not.

Q Why did you not do a personality test?

A I was asked to look at brain function, I was not asked to make a diagnosis on a personality disorder or any kind of psychiatric issues. So I did not give any

personality type tests.
Q And, to your knowledge, has any personality tests been given to Mr. Jones?
A Not to my knowledge.
Q Now, the test that you give, you gave a test about malingering?
A I did.
Q And what test did you give about that?
A I gave the test of memory malingering.
Q And is that commonly called a TOMM?
A Yes.
Q And there are instruments about malingering. What is malingering?
A Malingering is either exaggeration of symptoms or completely falsifying symptoms, overreporting.
Q Is that the, is that what, the same thing Dr. Frierson has been talking about on the MMPI as far as like somebody overreporting or underreporting symptoms?
A Yes. I think he is definitely interested in the validity index as it is based on me hearing his testimony that it is more about they want to see if he is malingering than if it is a personality issue.
Q Are there other malingering tests besides the TOMM or the MMPI that would test people informally?
A Yes.

Q Is one of those the SIRS?
A That looks for malingering for psychotic symptoms, if somebody is trying to make themselves look psychotic or schizophrenic.
Q Now, we had talked about personality testing involved in Tim's case before coming to court today?
A Correct.
Q And do you have an opinion as to whether or not personality testing or the MMPI would be appropriate in determining criminal responsibility for Mr. Jones?
A I am not an expert on criminal responsibility. I can tell you what my concerns are about the test. Dr. Frierson talked pretty thoroughly about one, about it being misused. I think it can be taken out of context. It can make the patient, and the problem with, and when I worked at DMH I ran into this a lot. Even though we are neutral, you know, we tell people we are Switzerland, (phonetic), the patients don't always view us as that way because it is the Solicitor who is requesting that they would come to the Cooper Building and go through an evaluation. So they are often on their guards to begin with, they want to show you sometimes to exaggerate their problems or just to make sure that you are seeing them. So it can lead to a bias in the way that they answer the testing because they view that as a contentious

circumstance. My biggest concern, though, with him is cognitive functioning. When I tested him he had serious cognitive deficit many of which were in the first percentile which means if I gave that same test to one-hundred people his same age, gender, everybody would do better than him. His processing speed was at the first percentile. His learning and memory skills were significantly impaired. So my concern would be that he wouldn't be able to validly complete this test and that could be misinterpreted.

Q And is there a concern with giving somebody an MMPI who has a significant head injury and--

A And I kind of feel like they are doing things a little bit backwards because I would want to do the cognitive testing first to see if he is capable of taking an MMPI. An MMPI, it is tedious, it is over 560 true/false questions. And with somebody who has got a slow processing speed that could take him hours. And, you know, I have significant concerns about his ability to validly complete it, not because he is trying to fake but because he has got cognitive impairments.

Q And if somebody doesn't complete how does that get scored by the tester? Does that have a negative impact on--

A Well, if you leave a lot of questions blank or things

like that. I mean if you have got confused, you know, these little bubbles you have got to fill in, bubble them in. You know, if you get off on your numbering then it could mess everything up and you could come up with, you know, a bad clinical report because you messed up on bubbling things in or, you know, following the line across to the right place. So given his cognitive functioning I have concerns about that.

Q Thank you. Please answer any questions that the State has.

CROSS-EXAMINATION

By Mr. Graham:

Q Good morning, Dr. Brawley.

A Good morning.

Q So my understanding, Dr. Schwartz-Watts Maddox contacted you and asked you to do certain testing?

A Mr. Young called me and said Dr. Watts has evaluated this patient and she is requesting a battery of tests.

Q The only test that you administered to him was cognition?

A Correct.

Q Is that correct?

A Correct.

Q You don't know why you were asked to do any personality testing?

A I don't, I am not a clinical psychologist. I do not do personality testing.
Q You don't know, you can't administer the MMPI or you can?
A I can but I don't. I haven't given the MMPI in years.
Q So if they wanted it done they could have asked you to do it?
A I would have told them they would have to find somebody else. I don't even own the testing, I just don't give it.
Q You don't know why they didn't ask you to do it though?
A No.
Q Or why they wanted it done. They just hired you for the purpose of cognition which is in layman's term, memory, right?
A Brain function.
Q Brain function and memory. Not to get into what Mr. Jones might have said to you but have you had, have you told him anything about the MMPI?
A I have not.
Q Okay. Are you aware of any other experts telling him anything about the MMPI?
A I have not, I am not.

Q So although you can give a test you haven't given it, why don't you give it?
A Because I, here is the other thing. I mean I worked with Dr. Frierson for several years. I think he is an excellent clinician and I think he is fully capable of diagnosing, with making a diagnosis without an MMPI. I just don't think it is needed and I don't think it is needed in a neuropsychological evaluation so I don't give it.
Q Okay. But if he says he needs it, you just don't think he does?
A He said his expert wants to do it and he is advocating for what his expert wants.
Q The person who administers the test, you said that your fear because, and correct me, but the fear you have is because of a cognitive limitations that you have found with Mr. Jones, he might not be able to complete the MMPI. And the fact that he didn't complete it would, could be construed against him, I guess, as a malingering issue?
A It certainly could and he could complete it but not complete it accurately just by being confused or by losing attention and concentration, you know, not being able to follow the questions. There are a lot of double negatives in the MMPI questions that can be a little confusing. I used to give the MMPI when I worked at the Department of

Neurology at Baylor College of Medicine. And I would give the patients a very thorough explanation of kind of how thought process, process needs to be when they are taking the test because it can be complicated and confusing.

Q But don't you think, isn't it fair to say that either Dr. Frierson or the neuropsychologist, I don't remember the name of the doctor who is going to administer the test, don't you think that being aware of what you found and then also what they determine about his cognitive function could take that into account. Why are you jumping to the conclusion that they would take that as a negative thing as opposed, as being analyzed inappropriately.

A I am not, I don't understand your question.

Q Well, if I understood you correctly you are saying your fear is that they are going to interpret that he probably won't complete the test or going to answer questions incorrectly because of cognitive issues, correct?

A Yes.

Q And that that will be taken against him?

A It could be.

Q Why are you jumping to the conclusion that the people who are administering the test and interpreting the test would not take into account what they see as a cognitive

limitation?
A They are not going to go by question by question, that is not how it is done. After you get the bubble sheet you enter in true/false, true/false for 566 and up comes an interpretive report that tells, you know, their, you know, they are malingering, they left too many items incomplete and it gives, you know, a full report too of the clinical scales as well. But it seemed to me they are mainly focused on the validity scales based on Dr. Frierson's testimony, they want to see if he is being honest, they want to see if he is, you know, trying to fake bad or to fake good. That is what they want to look at with that test and I just think there are other ways to get that information.
Q If I understand you correctly, your concern is the neuropsychologist and Dr. Frierson would not be able to appreciate the cognitive problems that you observed and would construe it against him, that is your fear?
A My concern is that he won't be able to validly complete the test.
Q And they will not be able to appreciate that?
A They could possibly not.
Q Thank you.
THE COURT: Mr. Young.
MR. YOUNG: Nothing else, Your Honor.

THE COURT: You may step down, Doctor.

(Whereupon, Dr. Brawley steps down from the witness stand.)

THE COURT: All right, regarding Dr. Frierson's evaluation, he is an expert, he is asking for certain tests to be done. I am not going to invade his expertise by saying you are not allowed to do certain tests. I don't think that is my job as to telling you how to try your case, which witnesses to call. Everybody, I mean experts are experts in fields because of their training, their experience, their education, observation, everything. And for me to say you shouldn't do a test because it might be misinterpreted, I don't think that is my province to do that. So if Dr. Frierson wants to do the test he can certainly request it through the neuropsychologist. I am concerned and, both sides, everybody, y'all have told me this, is that 500 questions, individual questions pulled out of context, that is hugely impactful. So I don't think any test given to Mr. Jones, that either side be allowed to use selective data, this is an opinion, not a fact. I don't want either side using any test, isolating questions, isn't it true that you answered the question in the following manner and misconstruing the data that is there. I just don't think that is fair to either side. So to the extent that I

understand the test, I don't want it utilized if it is taken. I understand during in-chambers the Defense said they may elect to claim the Fifth Amendment rights not to subject to Mr. Jones to the test. But if they do that is their choosing. If they don't I want the test to be utilized as a whole and not either side to be able to utilize selective data unless we have a hearing on any of those different questions. So what I, y'all's concerns, both sides, Doctors, both of them, the questions isolated create issues that I think we need to be aware of and stay away from. So I would say that y'all understand the concerns, both sides, State and Defense, that if he takes whatever test that if we are going to get into beyond the opinions and the data that came in there, that at that point we would have to, more like the Court suggesting, I am telling you my motion in limine ruling that I don't want selective questions isolated to ask of the experts as to why they gave their opinion. That will have to be addressed, I don't like the use of isolating the questions and the data. So I don't think that is fair to either side. If that is going to happen we are going to stop and probably have an in-camera hearing at that time.

MR. YOUNG: Please note our objection.

THE COURT: You got it.

MR. YOUNG: A couple of other ideas or suggestions

with regard to the testing should Mr. Jones choose to take it would be that any reference to the MMPI, any findings from the MMPI, any data from the MMPI be strictly limited to the criminal responsibility evaluation and not admissible in any other phase of the case, conclusions, findings, anything where it is related to the test. The Defense would request not to be admissible for any other purpose and that the jury would be given limiting instruction with regard to the MMPI, that it is only and solely for the purpose of determining criminal responsibility and not admissible in any other way or manner.

MR. HUBBARD: Judge, I have a response to that.

THE COURT: Okay.

MR. HUBBARD: Obviously, I am concerned because there is also guilty but mentally ill. And I have a greater concern about PCR issues. And that Dr. Frierson, we don't know what his answer is going to be, he made that clear, what conclusions he is going to draw we have zero idea. Where the psychologist, what she would determine, what other test she deems necessary. I am looking at PCR issues, that if this is not done and what I didn't hear throughout the whole process was anything from either one of the experts we are seeing today that there is something that is going to implicate the Fifth Amendment right

issues. Something that would incriminate Mr. Jones. There may, in fact, be something there that helps him, either on criminal responsibility but also if it doesn't address that, the capacity to conform which could be to his benefit. Certainly as to the penalty, could certainly be to his benefit and that won't be explored. I think the way Your Honor has styled it is if this test goes forward, the test is given, but the State and the Defense are deprived to going into the underlying questions. You protect the Defendant's Fifth Amendment rights in that regard because the evaluation is what it is. It doesn't go to his Fifth Amendment right. The questions, those are what at issue and Your Honor is protecting that. So I don't believe there is a Fifth Amendment issue at this point. I think the testing needs to go forward and also in looking at PCR issues down the road, when the two Defense attorneys present in this courtroom won't be around any more, it is going to be a couple of other attorneys saying this should have been done, that this is when we need to address it now.

THE COURT: Well, I can tell you this. Dr. Frierson has been tasked with doing the criminal responsibility evaluation. I am going to follow and allow him to do his job in his professional opinion and if he request the test, the test will be offered. If Mr. Jones elects to

not take it under his Fifth Amendment rights that will be the decision made then. I don't want to preclude or tell you got to do this and you have got to do that. Certainly it could be to his benefit to take it.

MR. HUBBARD: I would just ask this, Your Honor. That if they come back and say he is going to assert his Fifth that we have another hearing so that we can build a record to protect against a Post Conviction Relief claim five, ten years down the road. That if he chooses to do that that it be knowing, voluntary and intelligently done so that you have a colloquy with the Defendant himself on that decision because we are talking about the ability to know right from wrong but also, you have also tasked this Doctor with the capacity to conform, the Defendant's capacity to conform. So he understands right from wrong but because of some mental illness that the test would have determined there he couldn't conform his conduct to the requirements of the law. He has been tasked with that as well. So I would just say that should they, in talking to Mr. Jones, come back and say he is going to assert his Fifth we need to have another hearing so as an administer of justice I am doing my job in helping you establish a record so we don't do this again down the road.

THE COURT: And that will be post his electing the Fifth Amendment rights.

MR. HUBBARD: Correct.

THE COURT: Okay, fair enough. We can do that. So testing can be done, evaluation can be completed. The physician, psychologist, whomever ask for whatever test. If Mr. Jones elects his Fifth Amendment right not to take one of them then we will have a hearing following that but it is the best we can do.

MR. YOUNG: And my request is in evaluating how, Mr. Jones on proceeding, specifically a limiting instruction that the MMPI not be allowed to be admitted or to use in any way in any other portion of the trial other than--

THE COURT: I think that is difficult for me to do at the time but I don't want the, I mean here is the problem. These folks, the Department of Mental Health folks, they have not done an evaluation yet so they don't know what they are getting.

MR. YOUNG: They haven't done any neuropsych testing yet, yes sir.

THE COURT: What I am saying is, thus far Dr. Frierson says, I would like my psychologist to do this test and then we will review and make the opinion on competency, on conformity. I don't envision it coming in any other part of the trial.

MR. YOUNG: I don't envision it be relevant in any other portion of the trial.

THE COURT: I don't either but can we take that, I mean I don't know that I can rule right now and say, okay, it won't be brought in for any other purpose and if something comes up you have already ruled that it wouldn't come in under any circumstances and y'all need it. Then, wait a minute, we can receive it as a motion in limine that for the purposes thus far it is going to be used for the evaluation of Department of Mental Health. If it is to be used or someone wants to use it for any other purpose we have a hearing on that issue at that time, not knowing what is coming down the train track at me.

MR. YOUNG: I understand where Your Honor is on that and in light of that my second request would be that any report or results from the MMPI be sealed and provided to the Defense and to the Court for review prior to being turned over to the State.

THE COURT: I am not sure I understand that. Why do we need it, I mean the psychologist may need it, I am not sure why y'all can't share that.

MR. YOUNG: Like Dr. Brawley was saying, if there was a problem with the test, there was something that her opinion skewed the results we would request to be allowed to have that hearing on the challenges, findings before they were turned over to the State, challenge the validity of any findings from the MMPI, if they are challenged at

all. I don't know what they are going to be but we would ask to have that opportunity prior to any report or results from that testing be turned over to the State.

THE COURT: I guess what I am, Dr. Frierson does his evaluation, does the testing and all of it is done, whatever test he says. And then he has got to give an opinion, this is what I believe, Mr. Jones condition, he is, you know, he has got to say it. How can we not hear it, I guess I am not sure how, I am not sure what you want me to do. Dr. Frierson, if you are going to say something negatively about my client then don't say it out loud for the State to hear it yet. Let us see why you came to the wrong conclusions. Isn't that kind of hard for me to do. Maybe I am misunderstanding.

MR. YOUNG: I guess what, my request is in evaluating whether or not to take the MMPI, we would request that any results from the MMPI be sealed and provided to the Defense and the Court prior to being shared with Dr. Frierson or the State and determining the appropriateness of whether or not they are appropriate to be considered.

MR. HUBBARD: Your Honor, we would obviously object to that. I think Dr. Frierson would because she is working at his best. But secondarily the real objection is, the underlying question which you have already protected the defense on, so that if we do have a

subsequent hearing the State is in the position, we don't even know what the result is and we have got to defend it or attack it. How in the world do we do that. I know in South Carolina we are typically, a prosecutor is at a disadvantage not knowing what an expert is going to say. Judge, this is a Court appointed expert. The result doesn't have any bearing on, I think we have discussed that, it has very limited issue but a very important one. Is insanity in play, capacity to conform in play. And, Judge, at this point it is just trying to tie our hands. I think all we need is a result, get the result. You limit the, you don't let us go into those, the questions that would harm the Defendant. We get that.

THE COURT: One more time, Mr. Young, tell me again what you want because I am just not sure I can do that.

MR. YOUNG: Sure. I am asking that the results of the MMPI test be provided to the Defense and the Court, if you want a copy, to evaluate them prior to them being shared with Dr. Frierson or the State. And this is a protection that I am requesting in evaluating how to advise Mr. Jones say, look, do you take the test or not. If we had some additional questions like, we are going to get the results, we will make sure that they are valid, they are not skewed, did not happen to throw off the results--

THE COURT: Why don't I just appropriate you some money to get your own test done. You have got a psychologist, don't you. Why don't you do the test. I mean, I kind of asked Dr. Frierson that, if somebody else did it would that be okay.

MR. YOUNG: Yes, sir.

THE COURT: I mean, why not that. That way, since it is your doing you get to see it first. And then, Judge, i don't want you to see it and you throw it away. It is kind of like I was talking in-chambers. It is about the lie detector test. If you do your own and you know they can pass then you have got, it is not admissible at a trial or anything like that. But, I mean, how does that not protect you if he--

MR. HUBBARD: I do see a problem and here is why. What Dr. Frierson said is, that, you can't test and retest. This is kind of like, I lay the questions out there one time. He needs it as, the evaluator for the Court as opposed to somebody who is retained by one side or the other. So even if I went out and retained somebody, he wants his person so that when those questions are laid out in front of Mr. Jones for the first time, even if he is familiar with the test, but laid out for the first time with this psychologist, those are when the test answers are going to be most valuable and least tainted.

So I think that is the issue. But, Judge, I think we are still getting away from this whole idea. They want to know the results. If it hurts them they are going to assert the Fifth. But if its okay, then okay, well the State can have it too. Judge, this is a Court appointed expert.

THE COURT: I know. I got that. What I am concerned about, you pointed out about retesting. He has been evaluated by the Defense team.

MR. HUBBARD: They haven't done this test. And what Dr. Frierson, his whole point was and the whole reason why we are doing this out of Mr. Jones' presence is because it is such a sensitive test. You don't want to pretest somebody because then if you are going to test them again the validity of your answers are now in question. And that is why I think what he was saying, the whole reason why we are doing this with Mr. Jones being outside the courtroom right now was he was so concerned, he didn't even want to talk about possible questions. So have the test given by the Defense and then they decide whether they like it or not and whether we can go forward or not, really undercuts--

THE COURT: I think what Mr. Young was talking was, he wants to make certain it is done correctly and not incorrectly. Like Dr. Brawley said, what if Jones' screws

up and miss the bubbles and skips one and then the rest of the answers are skewed up. But don't we have risk anywhere we go?

MR. HUBBARD: We do but I tell you how it is handled. You have Dr. Frierson's expert do what she does best. She is an expert. Otherwise they can challenge her expertise. If Your Honor wants to make sure they get the raw data, I don't have any problem with that. So their experts can look at the raw data, don't have a problem because the test is now been given. So now there is no contamination. I don't need the raw data. Let their experts look at it and say, you know what, we believe this test was improperly given or that the conclusion was improper. If they need to have a hearing on it we can. But ultimately it comes down to good old cross-examination where I am okay if you take the gloves off of them, to let them go after the psychologist that Dr. Frierson chooses to do this evaluation, to question the validity of that test for her, what she did. Where they can use their expert to do that. I am fine with that. And all I am asking for from the State is being shown the result when Dr. Frierson does this test, we will know what the psychologist said and how he used it.

THE COURT: So your protection is, the State, Dr. Frierson keeps the raw data or his neuropsychologist keeps

the raw data to her herself but will share the results of the raw data to the Defense team.

MR. HUBBARD: I don't have any problem with that, Your Honor, so they can evaluate, that gives them cross-examination questions if they want to do that.

THE COURT: I kind of like that, if he takes the test. Y'all get the raw data, the prosecution team doesn't. That way you know they are not going to misuse it.

MR. HUBBARD: So the one thing I would say. Say we get into trial, we are in a hearing and they bring up the specific question. Obviously we get to follow-up on that but we still don't have the information.

THE COURT: Okay. I kind of like that proposal. So, Mr. Young, to make sure I understand. Before I rule you want to tell them anything else?

MR. YOUNG: No, Your Honor.

THE COURT: Here is what I think. Dr. Frierson does the evaluation, he can engage in a neurophysiologist to do whatever test they want. If the Defense wants to assert the Fifth they may. If that MMPI is done and it has an abundance of raw data the Defense will be given the raw data so they can evaluate because there are concerns about it. If not, the State does not get the raw data, Dr. Frierson does and Dr. Frierson's neuropsychologist does.

It won't be provided copies to everybody. Fair enough.

MR. HUBBARD: The only other concern that I would have too is that we need to know what his answer is going to be, is he asserting the Fifth or not.

THE COURT: I think they want to talk to him again.

MR. HUBBARD: Well, and I agree. One of the things I think they need and I want to put on this record that they need to address. The order Your Honor signed which comes straight from Court Administration has penalties for not cooperating. So I think as part of that question, whether he is asserting his Fifth or not, that needs to be and I am just saying this on the record, you know, as an administer of justice. I know these are two very qualified attorneys so I don't want them to take it personally. I would like the record to reflect that, at some point should he take the Fifth I would ask for a hearing where Your Honor engage in a colloquy with him and that colloquy, potential penalties if Your Honor can impose because of his assertion and that he needs to have already had that discussion with his attorneys prior to that.

THE COURT: All right. I think if he elects to claim, his Fifth Amendment rights will be advise of counsel and we will have a hearing and I can discuss that with him. I don't want to impact his decision to take it

or not for his fear of getting penalized.

MR. HUBBARD: I agree but I am thinking of terms of PCR where you say, well, I was told to assert my Fifth. It sounded certainly reasonable from two experienced attorneys but I have no clue there was a penalty here. And penalties ultimately are in your discretion. Your Honor can say there is no penalty at all. But what this order has is that the failure for the Defendant to cooperate and participate in the interview may result in cancellation of an interview.

THE COURT: Which it has.

MR. HUBBARD: And examiners being unable to offer an opinion and they should be able to testify that that is why. And the failure to cooperate would further result in case being called for trial without completion of the evaluation may result in the Defendant being prohibited from presenting expert testimony on the issue of insanity or waiver of the insanity defense. That is a standard part of the order. So I would want to be, I think he needs to understand there is a potential, not that Your Honor is saying you are going to--

THE COURT: Okay. I am not, let's see what he does. Y'all advise him on all the parameters of that evaluation order.

MR. YOUNG: Yes, sir.

THE COURT: Before he elects his rights or not.

MR. YOUNG: Yes, sir.

THE COURT: Now, my ruling is Dr. Frierson can do his evaluation, he can engage a neuropsychologist or anyone else of his choosing to perform whatever test. If Mr. Jones elects to claim the Fifth we will follow-up with another hearing after that election. The testing will be done except for what he claims the Fifth on. We will get that finished. I don't want it to prohibit the, if he decides to claim his Fifth Amendment rights on the MMPI I don't want that to stop the testing again. I want to go on and do the other nine of the ten tests. And then have the hearing on claiming the Fifth, what do we do, did he voluntarily do it with advice of counsel. Did he make his decision appropriately. We will have that colloquy after he elects and the other tests are done. Fair enough?

MR. YOUNG: Yes, sir.

THE COURT: All right. Let's take a short break. Let's take ten minutes and we will bring in Mr. Jones and finish up our morning.

(Whereupon, a short break was taken.)

(Whereupon, Mr. Jones enters the courtroom.)

THE COURT: Now, which issue are we addressing next, questionnaire?

MR. YOUNG: Yes, sir.

THE COURT: Y'all want to go forward with the questionnaire, Solicitor?

MR. HUBBARD: Yes, sir.

THE COURT: Let's deal with that. I paired down and ended up with a four-page questionnaire which I provided copies to you.

MR. YOUNG: Yes, sir.

THE COURT: Both sides via email. Mr. Young, you got some comments or suggestions or objections to what I have eliminated or objections to what I left in?

MR. YOUNG: Just eliminated. And I will go through these fairly quickly if I can and make a copy of the Defense proposed questionnaire as copy for the record as Defense number 3.

THE COURT: Absolutely.

(Whereupon, Defendant's Exhibit 3 was admitted into evidence.)

THE COURT: That is the long one, fourteen, fifteen page one?

MR. YOUNG: Fifteen, yes sir. That includes the publicity, the death penalty and hardship questions which are the sections that Your Honor had previously had said you were not going to include.

THE COURT: That is Defense exhibit, what, Joy?

MR. YOUNG: Number 3.

THE COURT: Number 3, for the Court's record. Okay.

MR. YOUNG: Yes, sir. Your Honor, I went through, Your Honor included questions 1 through 19 from the Defense proposed questionnaire. Your Honor did not include question number 20 which is, does your church, synagogue or place of worship have a position on the death penalty. Yes, no. If yes please give the details. I think this question is appropriate under the decision and the Defense has a pending motion related to the United States Supreme Court decision commonly referred to as Hobby Lobby whereby, you know, a corporation's religious views were allowed to, allow them to subvert Federal law in providing for contraception protections for employees. I think that religious views as it relates to the death penalty should be similarly viewed by the United States Supreme Court. I am happy to, more fully argue that motion when we have a hearing on it. But that would be my reasoning for requesting that question number 20 be included. I am happy to go through all of them or we can respond--

THE COURT: Lets do them one at a time. I don't want to include it in the questionnaire. I am not saying you wouldn't be allowed to not ask that during the voir dire, I mean.

MR. YOUNG: Yes, sir.

THE COURT: I don't want it in the questionnaire itself. Now, I did change question 17 to religious affiliation, name of your church. I took off address.

MR. YOUNG: No objection to that, Your Honor.

THE COURT: I didn't think address was necessary. So I took that portion of the question off. So it reads, religious affiliation, name of your church, synagogue, place of worship, if any. That is the question. It eliminates the location address.

MR. YOUNG: Yes, sir.

THE COURT: All right. Go forward.

MR. YOUNG: Number 21. Raise some other faith they don't have a strong opinion about. That was one of the questions that was posed by the Defense, that the Court is not included. Number 22, 23, 24, 25, 26 are all questions related to jurors opinions and attitudes about psychiatrist, psychologists, people with substance abuse conditions, mental health conditions. I think that those would all be appropriate areas for the Defense to explore in deciding how to exercise preemptory strikes or for cause challenges if the juror says, well, I think all psychiatrists are full of it. I think those people would be appropriately excused for cause. I think the quickest and most efficient way to do that would be in the form of the questionnaire so we don't have to waste time on it

when we are in court and we can concentrate on more important things.

THE COURT: All right. Mr. Hubbard you want to comment on that one?

MR. HUBBARD: It goes right back to case law we have given Your Honor that you can't, first of all, piecemeal specific issues about psychiatry and whether you believe it or not. It certainly is not appropriate, in a questionnaire, I think that is given cue to the prospective jurors when they are outside of your presence, outside of your rules. But I even would have an issue if that is all they are asking during the voir dire in the courtroom. Based on our case law they would have to go into everything. So anyway, Judge, just sticking to the questionnaire, Your Honor doesn't have the control of these folks to keep them from talking about these matters and exploring them. And also they might not have enough information to even make a decision. So I think it is premature.

THE COURT: Okay.

MR. YOUNG: Can I respond real quick.

THE COURT: Okay.

MR. YOUNG: The case law that they have given you, the only case that I am aware of that they have provided the Court is Stanko which clearly states this is not a

limitation on asking people about their feelings and attitudes about the insanity defense. That is the holding in Stanko. It never says you can't ask that, that is not, it is emphatically not what it says. And to say that it says that is to misrepresent what the holding in Stanko is.

MR. HUBBARD: No, no, no. The misrepresentation is that in Stanko said you had to explore all areas, you couldn't just choose one. So they said, yeah, that doesn't exclude you from going into something, you had to go into everything, you can't highlight one because that is guiding a juror. So that is getting way far afield of the questionnaire. I think it is absolutely inappropriate in a questionnaire. We can argue the others as we get down the road.

THE COURT: I don't want it in the questionnaire. Out of abundance of caution we can argue whether it is going to be appropriate in the voir dire or not. And we will take the time it needs to get through these things when we get the jurors in the Court House. So I understand your request for it. I will deny that request for those questions in the questionnaire.

MR. YOUNG: Yes, sir. The Court included number 27, 28, 29 and 30. The Court did not include proposed question number 31, specialized license plate. I don't

care about the question. I just, I had it in there because the Supreme Court one has bumper stickers in there. I don't care about bumper stickers either but that is sort of in the form questionnaire. I don't know why, it makes no sense to me. But that is what it is. The Court included number 32. The Court did not include number 33 and 34 which relate to jurors internet and what, Facebook, social media accounts, Twitter, Facebook and they commenting on blogs. Do they blog, do they belong, those type of questions. I think those informations the Defense needs in order to intelligently exercise the preemptory strikes. And that is why we would request that we explore it in the questionnaire and not have to take it up during court. That is number 33 and 34.

THE COURT: I am going to leave it out of the questionnaire. What else have you got?

MR. YOUNG: Number 35 is not included, general feelings about criminal justice system, police officers, prosecuting attorneys, criminal defense attorneys. Courts of jurors in South Carolina have been excluded, a case was reversed where a juror said that they would give more credibility to the testimony of a police officer over other witnesses based upon their status as a police officer. And we think that question should be included to the questionnaire. I am happy to restate it in that

fashion. I think it was restated later on in the questionnaire in that fashion. But if you ask a juror just how do you feel about the criminal justice system. Some people may say I think it is all BS, I hate the State, I hate cops, they all lie, whatever they want to say. We just need to know what their attitudes are in order to intelligently exercise preemptory strikes.

THE COURT: And that, likewise, I am using discretion. I don't want that in the questionnaire. I am not saying we, I am not saying we won't get into that during the voir dire. I don't want it on the questionnaire.

MR. YOUNG: Yes, sir. The Court included number 36, 37 and 38. The Court elected not to include question number 39. I will tell the Court I have had this happen where jurors were close acquainted to the victims of the homicides. And dealing with Capital cases and it is very emotional and very impactful for them. Rather than have to put them through that in open court I think it would be more appropriate to just deal with it in a questionnaire and that we can avoid putting anybody through that if it had a bearing on their ability to fairly decide the case.

THE COURT: I don't want to include that in the questionnaire. I took a great deal of time preparing it and deciding which ones to put in. I understand your

record. Just keep making your record. I am going to leave the questionnaire pretty close to where I got it.

MR. YOUNG: Your Honor included number 40, 41, 42 is a question I addressed about law enforcement which is opinions that would prevent you from evaluating the testimony of law enforcement officers fairly and impartially. It could be pro or con. It is easier to deal with the questionnaire than it is in open court.

THE COURT: I understand your request, I will leave it like I got it.

MR. YOUNG: Your Honor included question 44 about whether or not you had been a juror in a case but elected not to include question number 43 which is, have you ever served on the Grand Jury. We would just ask that the Court's question of, have you ever served on a jury or Grand Jury be included.

THE COURT: Any objection to that, adding just jury, petty or Grand?

MR. HUBBARD: You are going to do that in the venire when they get here. So I think it is going to be covered. You are going to ask it again so it would just be redundant. So I would just say, just ask it when they get here.

THE COURT: Add that in there. Petty or Grand, I will put it in there but I am going to ask it again. I

mean, it is going to get asked twice.

MR. YOUNG: Yes, sir. I bet a lot of things are.

THE COURT: Bet what?

MR. YOUNG: I said I bet a lot of things are going to be asked twice.

THE COURT: Oh yeah, maybe three times.

MR. YOUNG: Number 45 is have you ever been inside of a jail or prison. I find it helpful, when you ask jurors that and they are on the stand it involves a lengthy process like what were the circumstances, what were you doing, who was it. And we can avoid that long question and that long story that jurors tell. If they say, no, there is no reason to explore it and we don't have to go into it. If they say, yes, they will put the details down and we don't need to inquire further once we are in court.

THE COURT: It is going to get asked a second time, I am not going to put that question in there.

MR. YOUNG: 46, 47 are questions about the insanity defense which we have explained and exhausted. I think jurors have attitudes about it, they can put those attitudes in the questionnaire and we could not even have to talk to them if their attitudes are biased into the extent that they would be qualified and save valuable court time but not bring those jurors in.

THE COURT: That is possible but I don't want to

discuss that, I would rather do it personally.

MR. YOUNG: 48, 49, 50, 51, 52 are all questions regarding publicity and what they know about the case. I think it would be better to go ahead and address those in the questionnaire so that we could just avoid jurors that said, hey, I have got an opinion, I think he is guilty. Okay, that is great. Thanks for sharing your opinion, put it in the questionnaire, we don't need to talk to you. Just don't even need to bring those people in. And we could find that out in the questionnaire without you having to go through the colloquy before it comes out. Oh, by the way, I know about the case and I think he is guilty. Well, you could have just told us that upfront and save us some time.

THE COURT: I am going to leave it like I got it.

MR. YOUNG: 53 is about gruesome photographs and have had jurors say based on the photographs I can't be fair and impartial. We are going to be talking about those. Of course, Your Honor, we haven't heard the motion to exclude gruesome photographs yet that is pending before the Court. But depending on your ruling on that we would request that that be included.

THE COURT: We will talk about g1 that when they are there and get the sense of them in the courtroom. Certainly, I mean I have done that in CSC cases, talking

to jurors at that type of testimony, evidence going to be difficult to listen to. We will deal with that then.

MR. YOUNG: Yes, sir. 54 is events that were held with victims. There was a memorial fund that was collected. Have you contributed to that. I think that would, if they had it should cause the Court some concern about their qualifications. If they have attended those rallies or contributed to that memorial and we could find that out prior to them coming here.

THE COURT: I think we can ask when they get here.

MR. YOUNG: 55 is do you know any of the Solicitors and state their name. And if Solicitor Hubbard, you know, they were with Solicitor Hubbard every day and I am his pastor and we fish together and if he says it it is the gospel and I am never going to go against him. We should know about that on the questionnaire as opposed to waiting until they get here.

THE COURT: I like name recognition and face recognition at the same time. I am going to ask that question at least three times.

MR. YOUNG: The same thing with regard to 56, would be do you know any of the Defense attorneys involved. 57 would be Mr. Jones. 58 would be any of the victims or their family members. And, of course, 59 is a question and I know the Court is going to ask anyway, about do you

think he has been arrested and indicted that means he might be guilty as opposed to the presumption of innocence. I think that is an easy check box to get a juror in the door or out the door. It is hard to include that question if you know anything about the facts of the case.

THE COURT: That is not why we are not having it.

MR. YOUNG: Number 60, 61, 62, 63, 64, 65, 66 all relate to views about the death penalty. I know that we are going to explore them in the individual voir dire. I would just renew my request, I think it would save a lot of time if you put those questions in the questionnaire. With regard to number 67, I understand the Court's position on not including those other questions and the Court notes my objection and that is fine. With regard to 67, I know that the State has proposed a sheet of three types of jurors, the Defense has proposed a sheet of three types of jurors. And I just think we would all save a lot of time, even if you just add the three types of jurors. One of the Defense motions pending is like, if somebody says they are type one or type two juror throw them out, we don't have to talk to them. That would be by agreement with the statement. Any juror who says always the death penalty, any juror says do it, never at that point, we don't need to waste time trying to talk them out of their

own dependence. So I would renew my request for some form of that question be put in the questionnaire otherwise you are going to spend, you are going to spend a half hour with a juror before you get to this question. And, you know, it will turn out, all right, that is a waste of time. Could have been used on a juror who had an answer to the initial question that they were a type three juror.

THE COURT: Maybe so, we will spend that half hour.

MR. YOUNG: Yes, sir. 68, 69, 70, 71, 72 all relate to the opinions about death penalty or life without parole, I think it would be better in the questionnaire than in court. 73, 74 relate to United States Supreme Court Lockett. The jurors ability to fairly evaluate mitigation. I note that Judge Mullen, we had that questionnaire in the case of Blackwell, she was not a fan of it at first but later on I think it helped us get through voir dire quicker because we could go straight to it as opposed to getting to it in a round about way. 75 is in the same category. 76 relates to victim impact. Evidence and aggravation is evidence to explain to the Defense. And it is important for jurors to understand that it is not evidence and aggravation and we think that they should be made or informed about that decision as early as possible which would be included in the questionnaire. 77 and 78 and 79, 80, 81, 82, 83, 84 all

explain how the death penalty decision is made and the process that the jurors have to go through in order to make that decision. That is, it is a tedious thing to go through in an individual's request for voir dire. I am happy to do it but I think it would be easier to go through it on the questionnaire. Finally 85, 86, 87 all relate to hardships. If you know that a juror has vacation plans or flight plans or some other excuse as to why they should not have to come. I know we are going to get a lot of hardship requests without adding the question in there. I think you will just get some that you wouldn't have otherwise gotten. I don't know if the State has a particular objection to not including any hardship questions.

THE COURT: My problem with it is, if we put it in the questionnaire they may start making plans. I don't want to educate them.

MR. YOUNG: It reminds me, the Court still has my protection.

THE COURT: I will sign it July 1st.

MR. YOUNG: That is good, makes people sweat.

THE COURT: We will get this trial all done. We are going to be efficient with our use of time.

MR. YOUNG: That is all I have, Your Honor.

THE COURT: I did two other changes. I took off, Ms.

Frick suggested to me that she had experience when you ask about people's children, their name and their age and your spouse's age, not birthdate. So there is not a birthdate and privacy information. So I have changed the question for your spouse to only include their age, not their birthdate. And the children's name and age and not their, where they are going to school. She said that created a lot of problems for them giving information about their children. So it will be their name and their age. We can ask them more about later. So I have changed those two questions also. It is not hugely, dramatically different.

MR. YOUNG: No objection to those changes, Your Honor.

THE COURT: All right. Ms. Frick, subject to that one change we will be good to go on this.

MS. FRICK: Yes, sir. And did you want that added, where it says, number 24 says have you or your spouse ever been a juror in a civil or criminal case. Yes or no. And then come in with number 25 below it. Have you ever served on the Grand Jury. Yes or no. If so, when. Make it a separate question.

THE COURT: We can do several questions. It will be enough room to keep it on four pages. That will be fine.

MS. FRICK: And then move number 25 to 26 because there is still enough room.

THE COURT: And that would keep us on four pages which would be nice on the postage. That will be fine. Number 25 is on the Grand Jury. If so, when. That will accomplish that.

MR. YOUNG: Understood.

THE COURT: Very well. Now, my intention is to draw 500 names.

MR. YOUNG: I recommend 750.

THE COURT: Does the State have a position on it?

MR. HUBBARD: The State has no position. As many as Your Honor thinks, he thinks necessary. I don't even have a problem if Your Honor thinks we need, at some point issue more.

THE COURT: I think that is, Ms. Frick and I discussed, we will start with 500 and if we get a whole bunch of kickback we immediately, my letter asked for a very quick turnaround of the response.

MS. FRICK: You asked for it to be sent back with the jury information card, please return it within the three days.

THE COURT: I utilized another Judge's prior letter. That is my version.

MS. FRICK: I have got a copy, Judge.

THE COURT: I kind of like it. If y'all see something grammatically incorrect please tell me, my