Vol. II of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

JOEY CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001627

APPENDIX

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I also learned how to use the instrumentation necessary to do the analysis. That includes reading of journal articles about the types of evidence I was looking at, as well as books about the same materials and the times.

I also analyzed specific types of evidence. Like on the fibers, I analyzed hundreds to thousands of different fibers while I was in training. At the.

End of that training period I was given a mock case, where a case was made up. I was given evidence, just like I would receive in a normal case. I had to analyze it, write a report independent to the other analyst in the laboratory. Once that was successfully completed I was deemed competent to perform those analyses in the trace lab.

Q. Okay. What type of training, in addition to what you have already spoke about, have you received?

A. There is also outside training. I didn't discuss that. There is outside training in terms of instrumentation and actually in-depth knowledge about fiber courses.

Q. Have you ever been qualified as an expert in court before?

A. Yes, ma'am, I have.

Q. And what have you been qualified in the field of in the prior times that you have been in court?

A. I have been qualified twenty-two times for gunshot residue, paint analysis, and fire debris analysis.

Q. Have you worked on previous cases involving fiber analysis or fiber evidence in the past?

A. Yes, ma'am, I have.

Q. About how many?

A. Working with the other analysts during training, it was somewhere between a dozen and twenty fiber cases. We just don't get many fiber cases in. And since that time I have about worked about twenty to twenty-five fibers cases by myself.

MS. JORDAN: Your Honor, at this time the State moves him to be qualified as an expert in the field of fiber analysis.

THE COURT: Voir dire with regard to qualifications?

MR. HARBIN: No, sir.

THE COURT: All right, the court will qualify the witness as an expert in the field of fiber analysis.

Again, ladies and gentlemen, as a qualified expert he is allowed to give an opinion.

BY MS. JORDAN:

Q. As part of this investigation into the death of Winter Wingard did you process or were you present when several items were processed at SLED?

A. Yes, ma'am, I received a SLED case, our lab number L11-00998, and I did work with several items of evidence in

this case.

Q. Okay. I'm going to specifically turn your attention to what we have all now have seen as the Wolverine boots, which are State's Exhibit No. 14, and ask if you recognize these items?

Would you like a pair of gloves?

A. Yes, please.

What I was looking for, because when I receive evidence in the lab we add our names or our initials to the box, along with a date where we seal up the evidence, and also, when possible, on the items of evidence itself. I have looked at the box and the items here and I recognize these because they have my initials and the dates on them.

Q. Thank you.

When these were received, were they packaged individually, just that pair of boots in one box?

A. Those boots were in that box alone, yes, ma'am.

Q. What type of process do you have -- like do you have a controlled area where you work to ensure that items are not contaminated or cross-contaminated?

A. Yes, ma'am. We have a processing room where we pull out one item, an item of evidence, alone. We clean up the area prior to opening anything. We lay butcher paper out on the table, once it's been cleaned. And then, like I said, one individual item of evidence is pulled out at a time.

Q. Explain how lifts are done on items when you are trying to obtain fibers from them.

A. It kind of depends on the type of items that I'm looking at, as far as how I'm going to collect a fiber standard from it.

These particular boots, I looked across the boots to see where there would be different types of fibers to be found on that boot and using a scalpel or razor blade I cut different areas out of this boot for that process.

Q. So as to the boots, were you able to pull off multiple fibers?

A. Yes, ma'am.

Q. Okay. What did you -- did you also look at -- or explain to the jury --

I'm going to show you State's Exhibit No. 139 and ask if you can identify this container?

A. I can. Again, it has my initials, the lab number, and the date in which this was taken or sealed.

Q. Okay. Did you take multiple fibers in this case?

A. Yes, ma'am, there were multiple, many, many fibers in this case.

Q. Can you explain to the jury the process by which you used to analyze the fibers from the Wolverine boots?

A. Yes, ma'am.

When we analyze fibers, the first thing we look for is

an identification of the type of fiber, whether it is cotton, polyester, nylon, acrylic. That's done by using an instrument called a polarized light microscope. That allows us to see how specific types of light interact with that particular fiber. And by those interactions we can come up with that identification.

The other things we look at under that type of a scope is we are able to see -- we are able to take cross-sections of the sample and see whether the fiber is round, or triangular shaped, or hollow sections in the middle of it.

We can also see something on the exterior of that fiber called a delustering. When synthetic fibers are made, they are really, really shiny, and so manufacturers add something known as a delusterant to it to take away that shininess. Some fibers get a lot of delusterants. Some fibers get a moderate amount, and some don't have any at all, depending on what the ultimate use for that fiber may be. So underneath that scope we are able to see delusterants.

Once we have made those types of identifications with the polarized light microscope we take it to a second instrument called a Fourier Transform Infrared Spectrometer. It's a mouthful. We call it an FTIR. That confirms the type of fibers that we are looking at, again whether we are looking at cotton, polyester, nylon, or acrylic.

When we are comparing two fibers, if they all have the

same type of fiber, the same cross-section, the same delusterants, the same relative size on the diameters of the fibers, then at that point we make another comparison on something called a microspectrophotometer, and what that does is analyze the behaviors of the dyes in the fiber and that gives us one more determination for making a comparison.

Q. So it's a multi-step process to be able to identify the fibers?

A. It's a multi-step process to be able to identify and make a comparison, yes, ma'am.

Q. Okay. And you said it earlier, you took multiple samples from the boots?

A. Yes, ma'am.

Q. Okay. So is it true that you look for, I guess, for physical, chemical, and optical characteristics when you are trying to determine the consistency or what type of fiber it is?

A. Yes, ma'am, the chemical, again, is going to be whether we are looking at a cotton, or a nylon, or acrylic. That's a chemical property involved in that portion of it.

The physical properties are going to be the things like the cross-section, the diameter, how much delusterant it has.

And the optical properties have to do with how it

behaves underneath the -- underneath the microscope and the absorption of the dyes.

Q. Okay. I'm going to now show you -- and I won't ask you to open it, because the jury has already seen what's contained inside of State's Exhibits 88 and -- I'm sorry, 68 and 69, which are a top strand of barbed wire and a second strand of barbed wire. I will just caution you they are sharp points.

A. State's Exhibit 68 and 69, they both bear the lab number, item number, and the initials of Ms. Betty Butler.

Q. Okay. Is she -- can you explain to the jury what her job was at SLED, or is at SLED?

A. Yes, ma'am. Ms. Betty butler is assigned to the evidence processing room or the evidence processing department, where they often get different items of materials to look for body fluids, hairs, fibers, those types of things.

When it comes to fibers, they have the ability to look at them, pull fibers off and then send that evidence to the trace lab.

Q. And were you present when the barbed wires were processed for fibers?

A. Yes, ma'am, I was.

Q. And it's also my understanding that you received three other strands of barbed wire?

A. I believe there were five total, yes, ma'am.
Q. Okay. I'm just going to focus on strands 1 and 2 that you have in front of you.
Were you or Ms. Butler able to find any fibers on the first and second strands of the barbed wire?
A. May I refer to my notes just for a second?
Q. Yes, sir. And it's SLED 27 and 28, if that's helpful.
A. Yes, ma'am, fibers were found on both.
Q. Okay. Can you describe to the jury the process in which you looked -- or you or Ms. Butler together looked for fibers on the barbed wire?
A. Yes, ma'am. We were, again, in a room that had been cleaned prior to opening the items.
The items were opened. She pulled -- she pulled the barbed wire out of the bags here and she visually looked at them using a magnifying glass that she had available in the room. And when we believed that we saw a fiber, using a pair of tweezers those fibers were pulled off of that barbed wire, placed onto adhesive tape. And when we were completed with the individual item, that tape was then put onto a clear piece of plastic, sealed up so that no additional fibers would be added to it, and then later taken up to my lab where I would do my analysis.
Q. Did y'all also do that with strand 2 that you had?
A. Yes, ma'am, we did.

Q. I'm going to show you what's been jointly marked as State's Exhibit No. 137 and ask if you can identify what is contained within there?

A. All right. State's Exhibit 137 contains a glass slide that has portions of fibers that were found on these two items, on State's Exhibits 68 and 69.

Q. So that contains what you referred to as the lifts from -- or the collections from those two strands?

A. This was a portion of those collections, yes, ma'am.

Q. Please describe the fibers that you were able to find on strand 1.

A. On strand 1 I found a black/blue polyester fiber. What that black/blue means is these fibers also had a characteristic known as pleochroism. And what that means is that when I look at the fiber through the microscope, it's on a rotatable stage. As I twist that stage or as I rotate that stage, these fibers have a special characteristic where they actually can change colors on their orientations with the light. So that was the reason for this being a black/blue.

So I found the black/blue polyester fiber. I found a yellow or a colorless natural fiber, and a blue natural fiber, and a black cotton fiber.

Q. And you said it earlier that you had to use a microscope to view these fibers?

A. Yes, ma'am. The characteristics we were looking for cannot be seen or determined with the naked eye.

Q. Were you able to determine if any of those fibers, the different kinds of fibers from strand 1, were consistent with any fibers that were pulled from the Wolverine boots?

A. Yes, ma'am, I was.

Q. Okay. Which fibers from the Wolverine boots and which area did you remove the fibers from from the Wolverine boots to compare to that collection?

A. May I pull the boot out and show?

Q. Yes, sir, I will do that for you.

A. All right. Again, I said I had taken multiple locations from this. I took some from the shoelace. I took some from the stitching that's in here.

The area I found that matched with some of this from kind of the inside of the heel portion here. There is a fabric in here. That portion was found to be consistent in those optical and chemical properties with the fibers or some of the fibers I found on that first strand of barbed wire.

Q. Okay. Now, is that the blue and black polyester fibers?

A. Yes, ma'am.

Q. Okay. When you say consistent with, are you able to tell the jury that you can state with one hundred percent

accuracy that they came from those boots?
A. No, ma'am, these boots are made in large quantities and so I cannot say it's this boot, as opposed to any of the other boots that were made at that time.
Q. Okay. So you used the words consistent with?
A. Yes, ma'am.
Q. Okay. So it's -- is it safe to say that the fibers are not like fingerprints that we just heard about?
A. No, ma'am, they are not like fingerprints, where they can be identified individually to a single fiber. These are made in large batches.

However, as we start to look at all of those different properties that we discussed, it starts to limit the application where those fibers were being produced or used.
Q. Okay. So you were able to pull fibers off of the first strand of barbed wire that you could state are consistent with fibers in the Wolverine boots?
A. Yes, ma'am.
Q. Explain to the jury, too, as to State's -- or the first strand of barbed wire and the second strand of barbed wire, which are State's 68 and 69, how you found the fibers? Like how many fibers did you locate?
A. Okay. As far as the black/blue polyester fibers, there were many, many of those fibers. I did not count them, but they were in clumps. There were large clumps of those. As

opposed to the colorless yellow and the blue natural and the black cotton fibers, those were more individual fibers that were located, once we looked across the barbed wire.

Q. Okay. What's the significance of what you call as clumping of the fibers?

A. The clumping of the fibers is significant because it's a larger number of fibers there and that indicates to me more that there was a direct contact between the source and that barbed wire, as opposed to fibers being blown across a field and just randomly winding up on that barbed wire.

Q. And you were able also to find two other types of fibers on strand 1?

A. Yes, ma'am.

Q. Were you able --

A. Well, three.

Q. Were you able to state that those were consistent with anything on the Wolverine boots?

A. No, ma'am.

Q. Explain to the jury strand 2 and the fibers that you pulled from it.

A. On strand 2 the only fibers I found were the black/blue polyester fibers.

Q. And just for clarification, the black and blue are ones that are consistent with -- I believe you have it marked as State's 33.3.3, which is the sample from the Wolverine.

boots?

A. Yes, ma'am.

Q. Okay. Were you able to determine if any of those fibers were consistent with the fibers pulled from the Wolverine boots?

A. Yes, ma'am. Again, the black/blue polyester fibers that I found on my lab number 28, or item number 28, were consistent with the fibers that I had removed from the upper portion of that Wolverine boot.

Q. Okay. And I believe that you specifically state that they either originated from the fibers from the boots or another source of fibers possessing the same distinctive physical, chemical and optical characteristics?

A. Yes, ma'am.

The actual report, may I read it.

Q. Yes, sir.

A. Okay. The actual report says black/blue polyester fibers were found. The unknown fibers on item number 28.2 either originated from the fiber standard, item 33.3, or another source of fibers possessing the same distinct physical, chemical and optical characteristics.

Q. Okay. And as to barbed wire strand 2, did you find those fibers in a clumping pattern, as you talked about earlier?

A. Yes, ma'am, those were in clumps as well.

Q. And the significance of clumping is?
A. Again, the numbers that were there, the clumping that was there, indicates to me that there was direct contact between the source of those fibers and the barbed wire.
Q. Is that as comparing to something that maybe just blew past --
A. Yes, ma'am.
Q. -- the barbed wire?
Okay. And just, again, you are only able to say those fibers are consistent with the Wolverine boots?
A. Correct, or any other source having the same physical, chemical, and optical characteristics.
Q. But the Wolverine boots are essential source of those fibers that were found on the barbed wire at Mikes Creek Road?
A. Yes, sir.
MS. JORDAN: Your Honor, if I may have a moment?
THE COURT: Yes, ma'am.
(Off the record)
(Back on the record)
BY MS. JORDAN:
Q. You also took a -- you just described how you took a sample from one area of the boot, but you are not even able to say what specific boot or what area of the boots those fibers could potentially come from, are you?

A. No, ma'am, I can't say whether it was the left boot or the right boot. They both have the same chemical, physical and optical characteristics.

Q. I'm going to take you back real quick. Did you receive a coat from CSI Investigator Jimmy Henson in this case?

A. Yes, ma'am, I did.

Q. Okay. Did you also receive a coat from the coroner, Dennis Fowler, in this case?

A. Yes, ma'am, I did.

Q. Why did you receive those?

A. I requested those so that we could have a -- or have an example of what the investigators on the scene would have been wearing that night so that we could potentially rule that out as a source of these black and blue polyester fibers.

Q. And were you able to rule that out?

A. Yes, ma'am.

Q. And these fibers that you found were in a clumping pattern?

A. Yes, ma'am.

Q. Okay. Please answer any questions that Mr. Harbin may have.

THE COURT: Mr. Harbin?

MR. HARBIN: Thank you, Your Honor.

May it please the court?

CROSS EXAMINATION BY MR. HARBIN:

Q. Good afternoon.

You were asked to compare several other items, is that correct?

A. That is correct.

Q. That being a pair of Brahma boots?

A. Yes.

Q. And I can kind of run through these quickly.

That was not a match or consistent with?

A. No, sir.

Q. One black McCabe T-shirt, and correct me if I'm wrong, but that was not consistent with the fibers?

A. No, sir.

Q. The same thing with the St. John's bay thermal shirt?

A. No, sir.

Q. And also compared with the red drunkn munky hooded sweatshirt as well. That was not a match?

A. No, sir.

Q. The white Gildan T-shirt not a match?

A. No, sir.

Q. And gray Premier sweat pants not a match?

A. No, sir.

Q. That's all I have. Thank you.

A. Yes, sir.

THE COURT: Anything further, Ms. Jordan?

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MS. JORDAN: No, sir.

May this witness be excused?

THE COURT: Any objection?

MR. HARBIN: No, sir.

THE COURT: All right, you may step down. You are excused. Thank you for coming.

THE WITNESS: Yes, sir.

THE COURT: Counsel, come up for a moment, please, and let's talk about scheduling.

(Whereupon, the lawyers approached the bench for an off-the-record discussion)

THE COURT: All right. Ladies and gentlemen of the jury, I was just conferring with counsel about scheduling matters and I believe there is one matter that they want to go forward with this afternoon.

Ms. Leskanic, what is that?

MS. LESKANIC: This is Court's Exhibit 2, Your Honor, and stipulation number two. If the court could read that to the jury. It's a stipulation by myself, Ms. Jordan and the defense.

THE COURT: All right.

Ladies and gentlemen of the jury, the parties, the solicitor's office and the defense attorney, Mr. Chase Harbin, and the defendant, Mr. Joey Clark, have agreed to the following stipulation and you are to accept these as

facts in this case:

As to State's Exhibit No. 22, the State and the defense stipulate that the exhibit contains Winter Wingard's Alltel cellphone records for telephone calls only for the time period in question in this case.

As to State's Exhibit No. 23, the State and the defense stipulate that the exhibit contains Joey Clark's AT&T cellphone records for telephone calls only for the time period involved in this case.

And as to State's Exhibit No. 24, the State and defense stipulate that the exhibit contains Joey Clark's AT&T text (SMS) records only for the time period in question in this case.

And those stipulations are now a part of the record and to be accepted by you as uncontested facts in this matter.

All right. Again, after having conferred with counsel at the bench, it's everybody view that the best thing to do would be to adjourn for the afternoon and resume in the morning.

Is that correct on behalf of the State?

MS. LESKANIC: Yes, Your Honor.

THE COURT: Is this all right with you, Mr. Harbin?

MR. HARBIN: Yes.

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THE COURT: All right, ladies and gentlemen, we are going to recess for the rest of the afternoon. I'm going to allow you to go to your homes and families.

I will tell you again, and as I have told you throughout this case, do not discuss the case with anyone while you are away from the courthouse. You have got to decide the case based upon what you hear in this courtroom and not on the basis of what anyone else might say. So do not discuss the case with them.. You can tell them that you are serving on a jury, but you can't tell them anything about the case.

Again, when you are reassembling in the jury room tomorrow morning at 9:30 do not discuss the case among yourselves. It's still premature for you to begin any discussion about the case.

And do not read any news articles or listen to any broadcasts media reports about the case, and do not make any investigation into the matter whatsoever on your own or do any research on your own. Simply forget about this matter over the evening recess. Get some rest, come back refreshed in the morning at 9:30 and we will be ready to go forward.

Thank you. You are free to go.

(The following takes place outside the presence of the jury panel)

THE COURT: All right. And while we are waiting

for the jury to get to their automobiles and clear the parking lot, Mr. Harbin, what I would like to do is to go over the defendant's Fifth Amendment Rights with him at this time.

MR. HARBIN: Yes, sir.

THE COURT: Mr. Clark, let me ask you if you will stand for me, please.

Mr. Clark, you may be called as a witness to testify in your own behalf.

I now advise you that you have the right to invoke the protections given to you by the fifth Amendment to the Constitution of the United States and the similar counterpart provision of the Constitution of the State of South Carolina.

The Fifth Amendment to the Constitution of the United States provides, in part, that no person shall be compelled in any criminal case to be a witness against himself.

This provision of constitutional law means that you cannot be compelled or required to testify in this case. This is a right and a privilege which the law extends to you. It is a personal privilege and no one can waive this right except you.

You have the right not to testify, but you also have the right to testify.

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The court will grant you the right to consult with your lawyer before you make a decision.

If you elect not to testify, your failure to testify cannot be used by the State as an inference of guilt and your failure to testify cannot be considered by the jury in its deliberations and I would so instruct the jury.

If you elect to testify and waive the privileges given to you by the Fifth Amendment to the Constitution of United States and the state counterpart, I advise you that you will then assume the role of a witness in this case and you then waive or give up your constitutional privilege against self-incrimination.

This means if you voluntarily take the witness stand and testify, you would then subject yourself to the same rules that govern other witnesses in this case and you may be examined and cross-examined on any relevant issue in this case and you may be impeached to the same extent as any other witness, all of which is subject to the rules of law and the Rules of Evidence.

I further advise you that if you elect to take the witness stand and testify, that this decision on your part must be made freely, voluntarily, intelligently and with knowledge of the protections given to you by the Fifth Amendment to the Constitution and with knowledge of the consequences of your election to testify.

Now, I'm not going to require that you make a decision at this time as to whether you do or do not wish to testify in this case, but I will -- I'm only giving you an opportunity to do talk with your lawyer, but my only question to you now is do you understand what I have explained to you about your Fifth Amendment Rights?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions that you want to ask me about your Fifth Amendment Rights?

THE DEFENDANT: No, sir.

THE COURT: All right. I would recommend, of course, that you discuss this matter thoroughly with your lawyer, and at the appropriate time I will have you make a decision and give a decision, which would be put on the record, as to whether you wish to exercise right to not testify, as granted by the Constitution, or whether you wish to waive that right and testify, but that's not appropriate at this time, but we will address that at the appropriate time.

In the meantime you need to be sure that you understand my discussions with your lawyer what your rights are, do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you. You may be seated.

THE DEFENDANT: Thank you, Your Honor.

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THE COURT: Now, in connection with that, counsel, I am always of the view that one of the factors that impacts upon whether a defendant is going to testify or not are Rule 609 matters. Have y'all discussed these matters and have you agreed upon what is or is not impeachable under 609, or do we need to address those?

MS. LESKANIC: We have not discussed them yet, Your Honor. We would be happy to, either now or at a break.

THE COURT: All right, show him what you think is impeachable under 609, and if y'all disagree on it, I will address it right now, because I think that does impact upon a defendant's decision as to whether he should or should not testify.

(Off the record)

(Back on the record)

THE COURT: All right, Madam Solicitor.

MS. LESKANIC: Based on the review of his prior record, there would not be any prior convictions that we would ask him about directly. Certainly only if the door is opened to something.

THE COURT: All right. So there are no matters of 609 impeachment that you plan to get into, unless he opens the door?

MS. LESKANIC: Yes, Your Honor, that's correct.

THE COURT: But not just by taking the stand?

MS. LESKANIC: No, sir, absolutely not.

THE COURT: All right. Okay.

Well, that resolves that issue and we will make the decision about whether or not he wishes to testify sometime at the end of the State's case.

MR. HARBIN: Yes, sir.

THE COURT: All right. Anything else?

MS. LESKANIC: Not from the State, Your Honor.

THE COURT: Anything else today?

MR. HARBIN: No, sir.

THE COURT: All right. Let's check the exhibits and make sure they are all together and that nobody has put anything in their briefcase and taken them home and be prepared to go forward tomorrow morning at 9:30.

I think the jury has probably had time to clear the parking lot. Thank you. See you tomorrow.

MS. LESKANIC: Thank you, Your Honor.

MR. HARBIN: Thank you, Your Honor.

(Whereupon, proceedings were adjourned until March 20, 2014)

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHEROKEE)

THE STATE)
)
-vs-) TRANSCRIPT OF RECORD
) 2013-GS-11-01167
JOEY LYNN CLARK,)
) MARCH 20, 2014
DEFENDANT. GAFFNEY, SOUTH CAROLINA

(VOLUME III)

B E F O R E:

THE HONORABLE HOWARD P. KING, JUDGE. ; And a Jury.

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

KIMBERLY L. LESKANIC, ASSISTANT SOLICITOR
JENNIFER JORDAN, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

H. CHASE HARBIN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

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(PROCEEDINGS, MARCH 20, 2014)

THE COURT: All right. Good morning, ladies and gentlemen.

We are back on the record with regard to the matter of the State versus Joey Clark.

Mr. Clark is present with his attorney.

The State is present and represented by the Seventh Circuit Solicitor's Office.

Anything before we bring the jury in on behalf of the State?

MS. LESKANIC: No, Your Honor.

THE COURT: On behalf of defense?

MR. HARBIN: No, sir.

THE COURT: All right, let's bring the jury in, please.

(The following takes place in the presence of the jury panel)

THE COURT: All right. Good morning, ladies and gentlemen, and thank you for your promptness in being back here and we are now ready to proceed.

I need to ask you, as I have every time that you have been away from the courthouse, if anyone has tried to talk with you or contact you about this case in any manner whatsoever over the evening recess, I would need to know about it now.

(No response).

THE COURT: Negative response and that's good.

If anyone has ready any news stories or seen any broadcast media reports about this case over the evening recess, I would need to know about that now.

(No response).

THE COURT: And again a negative response and that's good.

All right, we are still in the presentation of the State's case.

Madam Solicitor, you may call your next witness.

MS. JORDAN: Thank you, Your Honor.

The State calls Catherine Leisy.

SLED AGENT CATHERINE LEISY, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN:

Q. Please state your name for the record.

A. Catherine Leisy, L-E-I-S-Y.

Q. Where are you currently employed?

A. I work for the South Carolina Law Enforcement Division, more commonly referred to as SLED.

Q. Could you take a few moments and tell the jury a little bit about your educational background?

A. I have a Bachelor of Science Degree in Genetic Engineering from Cedar Crest College in Allentown,

Pennsylvania.

Prior to my appointment at SLED I spent approximately four years working as a forensic DNA analyst at a private testing facility in Maryland.

I have now been at SLED for approximately eight years as a forensic scientist assigned to the DNA and serology unit.

At SLED I have had to undergo in-house training on all the different types of techniques and analysis we perform. That training was supervised by other court-qualified analysts.

I'm also required to participate in annual continuing education, which requires me to attend seminars or training sessions related to new techniques available in the forensic DNA testing.

Q. Okay. Have you ever previously been qualified --

Or could you tell the jury about your training in the area of just DNA?

A. Again, altogether I have approximately twelve years worth of experience performing DNA testing.

My responsibilities at SLED include processing forensic cases, generating reports based on the results and conclusions drawn and testifying for those reports, if necessary.

I'm also responsible for quality control duties within

the lab, as well as training of new ones.

Q. Have you ever been previously qualified as an expert in the field of forensic DNA identification?

A. I have.

Q. Approximately how many times?

A. Approximately fifty occasions in various jurisdictions throughout the State of South Carolina, as well as California, Massachusetts, New Jersey, Florida, the District of Columbia, and the United States District Court.

MS. JORDAN: Your Honor, at this time we ask to have Ms. Leisy qualified as an expert in the field of forensic DNA identification.

THE COURT: Voir dire with regard to qualifications, Mr. Harbin?

MR. HARBIN: No, sir.

THE COURT: All right. The court would qualify the witness as an expert in the field of forensic DNA analysis.

Again, ladies and gentlemen, you will recall that witnesses qualified as an expert may be allowed to give an opinion, and I have qualified this witness as an expert in the field of forensic DNA analysis. All right.

MS. JORDAN: Thank you, Your Honor.

BY MS. JORDAN:

Q. Ms. Leisy, could you tell the jury just basically what

DNA is?

A. DNA stands for Deoxyribonucleic Acid. It's the genetic material found in all of our body cells, with the exception of our red blood cells. DNA is packaged from the structures called chromosomes, which contain our genes. And genes are simply strands of DNA that give us our different characteristics, such as our height or the eye color. We inherit one copy of DNA from our mother and one copy from our father. Therefore, we have two copies of every gene. And approximately 99.9 percent of an individual's DNA is identical to that of everyone else's. It's the variation of that remaining .1 percent that allows us to tell different people apart.

Q. How do you process that in your lab?

A. The first step in the DNA process is extraction. This is where we remove DNA from either a swab or a cutting that's been taken from a particular item of evidence.

Once we have the DNA removed from that item, we perform a test that gives us an estimate of how much DNA is present. It lets us know if there is enough human DNA present to go forward to try and develop a DNA profile. We do this by using a technique called PCR or STR testing.

PCR stands for polymerase chain reaction. It's a technique that allows us to make copies of the locations in our DNA that we are interested in testing. Those locations

are known as STR's, or short tandem repeats. An STR is just the location in our DNA where a short unit of DNA repeats a certain number of times. And it's the number of times this unit repeats that allows us to tell two people apart.

So, for instance, if I were to develop my own DNA profile, if that one of the STR locations I test the DNA that I inherited from mom has 10 repeat units and the DNA that I inherited from my dad has 14 repeat units, my DNA types would be 10/14. We are simply counting the number of repeat units that are present.

The overall collection of DNA types at 15 STR locations is what gives us a DNA profile. If we are able to develop a DNA profile from an item of evidence, we can compare it to the DNA profile of a known individual to try and determine whether or not that individual contributed DNA to the evidence.

Q. Did you work on a case involving the victim Winter Wingard?

A. I did.

Q. Okay. And in working on that case you processed multiple items?

A. Yes, I did.

Q. I'm going to break them down by the reports that you have completed for this case.

It's my understanding you have done three separate

reports?

A. Yes, ma'am.

Q. I'm going on refer to the report dated November 12th, 2013.

I'm going to show you State's 140, 141, 142, and 143. Those correlate with SLED numbers 33.1, 33.2, 33.4, and 33.5.

Do you recognize those four items?

A. I do. I recognize the SLED case number, as well as the unit item number and my initials on each envelope.

Q. Okay. I'm going to have you go through, if you don't mind, each item, and I'll state what the item is and then have you tell the jury where the swab is from.

How did you receive those swabs?

A. All the evidence I received for testing is transferred to my custody in a plastic concealed pouch that is dated and initialed by the individual who sealed the pouch. The fact that the pouch is still intact when it arrives in my custody, it shows that the items have not been tampered with in any way.

Q. And these SLED numbers have items, there are 33.1 through 33.4 -- I'm sorry, through 33.5. Do those correspond to another item within SLED's case number for this case?

A. No, each particular item within the case would be given

a unique identification number, so there would only be, for example, one 33.1 in the case.

Q. And swabs that you have before you are from the Wolverine pair of boots that we have already heard about. Now, did you receive the Wolverine boots, or did you just receive the swabs from the boots?

A. I did not take physical custody of the boots. The swabs were taken and then passed on to me for processing.

Q. Okay. Starting with State's 140, which is a swab from the sole of the right boot of the Wolverine boots, could you tell the jury what you found from that swab?

A. The DNA profile developed from the swab from the sole of the right boot is a mixture of at least three individuals. Joey Clark and Winter Wingard cannot be excluded as possible contributors to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 16, and no conclusive statement can be made regarding the inclusion or exclusion of Joyce Patrick as a possible contributor.

Q. Would 1 in 16, what does that show?

A. Essentially it means that if you randomly selected 16 people to test and compare their DNA profile to this mixture, you would expect maybe one of those individuals to be a possible contributor. It just shows how likely it is

if you randomly select an individual, that they could be a possible contributor to the mixture.

Q. Okay. And with numbers like that, does the probability increase with an increase in that second number?

A. With a number of approximately of 1 in 16, as you get to a larger number than 16, it becomes less likely that someone would contribute. It makes a stronger statement as far as their inclusion or exclusion.

Q. Okay. Moving to item 141, State's Exhibit 141, which is the swab from the sole of the left Wolverine boot, would you tell the jury about your analysis of that item?

A. The DNA profile developed from the swab from the sole of the left boot is a mixture of at least two individuals. The DNA profile developed from the major contributor to the this mixture matches the DNA profile of Joey Clark. The probability of randomly selecting an unrelated individual having the DNA profile matching the major contributor to this mixture is 1 in approximately 3.3 million, and no conclusive statement can be made regarding the inclusion or exclusion of Winter Wingard as a possible contributor. Joyce Patrick is excluded as a possible minor contributor.

Q. What do you mean when you talk about a major and a minor contributor, because I know they may hear that throughout the morning.

A. When we refer to a mixture, what we mean is that there

is DNA from more than one individual present on that particular item. If one of the individuals contributed significantly more DNA than the others, we have what we called a major profile. It just means that we can essentially single out that individual's profile and use it in direct comparison with another one.

Q. Now, I was going to ask you what in reference to this sole of the boots, could someone's DNA come -- does that definitively mean their DNA came into contact or their body come into contact with that boot?

A. Not necessarily, no.

Q. So there are various ways that it can happen?

A. There are.

Q. But you are not ruling out potential ways the body coming into contact with the -- or the boots coming into contact with the skin?

A. That would be one potential cause of transfer of DNA from that individual to the boots, yes.

Q. I'll move to State's 142, which is a swab from the interior of the left Wolverine boot. Could you tell the jury about your analysis of that?

A. The DNA profile developed from the swab from the interior of the left boot is a mixture of at least three individuals. Joey Clark and Winter Wingard cannot be excluded as possible contributor to this mixture. The

probability of randomly selecting an unrelated individual who could have contributed is approximately 1 in 3,500, and no conclusive statement can be made regarding the inclusion or exclusion of Joyce Patrick as a possible contributor.

Q. Now, as you previously stated, I'm assuming that the 1 in 3,500 means that if you randomly selected 3,500 people, the chances of them matching that DNA would be one of those people?

A. If you randomly selected 3,500 people, you would expect approximately one of those individuals to be considered a possible contributor.

Q. Are you able to assign any percentage to a number around 3,500?

A. When you are dealing with statistics, such as 1 in 3,500, you would expect to be able to exclude greater than 99 percent of the population.

Q. Okay. So 99 percent of the population could not have contributed to this mixture?

A. You would expect to be able to exclude roughly 99 percent.

Q. Yes, ma'am. Thank you.

As to State's 143, which is the swab from the interior of the right Wolverine boot, could you tell the jury about your analysis of that?

A. The DNA profile developed from the swab from the

interior of the right boot is a mixture of at least two individuals. Joey Clark and Winter Wingard cannot be excluded as possible contributors to this mixture, and Joyce Patrick is excluded as a possible contributor to the mixture.

Q. Okay. When you say they cannot be excluded as possible contributors, why are you making that determination in certain instances and making a different -- you know, making the identification in other instances?

A. Again, when we have what we call the major contributor, or an individual who left significantly more DNA, we can essentially pull our their profile from the mixture and use it in direct comparison to the known individual.

For a mixture where there is not a major contributor, all I can do is compare the overall mixture that was developed to the profile of a known individual.

If there is consistency between the DNA type of that individual and the DNA type of mixture, I can say it's possible that they contributed, but I cannot make a matched statement, as I could with a major contributor.

Q. Now I'm going to move to your report dated December 16th, 2013.

I'm going to show you what's previously been marked and admitted as State's Exhibit 131, which I believe corresponds to SLED 16.2, 16.3, 16.4, 16.5, and 16.6.

A. That's correct, this does contain the correct SLED case number of the pouch containing the items taken for SLED item 16.

Q. Okay. My understanding that those are -- or could you verify to the jury that those are cuttings that were taken from a sweatshirt?

A. They were identified as cuttings taken from the sweatshirt on the front, left area of the pocket; the front of the sweatshirt above the design; the front left, sleeve of the cuff; the rear, left hem; and the left side of the hood.

Q. It's my understanding, just to clarify to the jury, that you did not receive the red sweatshirt from the crime scene? You received the swabs from it?

A. That's correct. I only received the cuttings that were taken from the sweatshirt.

Q. Okay. Could you have explain to the jury how those cuttings were taken from the sweatshirt?

A. When we receive an item, such as a sweatshirt, it goes through our evidence processing department. Our evidence processing technicians will examine articles of clothing, looking for potential bodily fluids that may be present, as well as possibly testing the item for what we refer to as touch or ownership DNA, which is DNA that would be deposited on the item after it came in contact with the skin.

If items of interest may be needed for testing, they will take cuttings or swabbings of that item and then send it on to DNA department for further processing.

Q. When you talk about touch DNA, is there any difference between say touch DNA and an oral swab, or any items along that line?

A. When we refer to touch DNA, typically what we mean is any time that your skin comes in contact with an item. If I were to run my hand along the railing, some of my skins cells would be transferred to that railing. That would be touch DNA present on the railing.

Other samples that we typically process may be oral swabs, which are cotton swabs collected directly from inside the mouth. We.

May be able to test blood standards, blood swabs, but when we refer to touch specifically about contact of the skin to a particular item.

Q. And is there any difference between the amount of weight that you would give to touch DNA versus swabs, or any other form of DNA?

A. No, there isn't. It's just as valid a method of transfer as any other form of sample.

Q. Were you able as to State's 131 make a determination as to the DNA profile on all of the cuttings included in 131?

A. The DNA profile developed from all five cuttings that I

received from the sweatshirt matches the DNA profile of Winter Wingard. And the probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately 1 in 110 trillion.

Q. At this point I'm going to move your next, not in order, but your final SLED lab report dated June 28th, 2011.

Did you have a chance -- did you have the occasion to have a DNA standard from Joey Clark and a DNA standard from Winter Wingard?

A. There were standards from both of those individuals submitted for testing.

Q. I apologize. I should have asked you that at the very beginning. So you did have their standards for comparison?

A. Yes, ma'am.

Q. And is it also true that you had the standards of a Joyce Beverly Patrick?

A. I did.

Q. Okay. Once again I just want to make sure. With all the items that I'm about to go through with you, these are items when you received the swabs or the sexual assault kit?

A. That's correct.

Q. And then you processed the items from that point?

A. Yes, ma'am.

Q. Okay. Did they come to you following SLED protocol from the forensic technician and everyone who had it before?

A. They did. They were transferred to me again in a heat sealed plastic pouch, properly labeled, with the case identification information and the date and initials when it was sealed.

Q. Okay. I'm going to start out with what is our 109, but it's SLED's 11.

I'm going to show you what's previously been marked and admitted as SLED's 109 -- or State's 109, which is a swab from the driver's side door near the radio volume knob and ask if you can identify that?

A. This is the container containing the swab again identified as swab from driver's side of dash near radio. I recognize the SLED case number and item number, as well as my initials on the envelope.

Q. Okay. While we are talking about items from inside the vehicle, I'm also going to hand you State's 110, which is yet again a swab from the passenger side front door glass of a vehicle.

A. I also recognize this item again, based on the SLED case and item numbers, as well as my initials.

Q. As to the DNA profiles in 109 and State's 110, were you able to make an identification as to the swab from inside of the GMC vehicle?

A. The DNA profile developed from both of the swabs from inside the vehicle matches the DNA profile of Winter

Wingard.

Q. Were you able to assign a probability to the standard that you have?

A. I was. Again, the probability of randomly selecting an unrelated individual having a DNA matching these items would be approximately 1 in 110 trillion.

Q. And that's to Winter Wingard on both swabs?

A. That's correct.

Q. Okay. I am now going to move to what's been marked as State's 132 and 133, but it's SLED's 15.1 and 15.2.1.

I'm going to ask you if you can identify State's 132 and 133?

A. I do recognize these items, again based on the SLED lab number and item number, as well as my initials.

Q. Okay. And 132 is a swab from a leaf, and 133 is a hair from a leaf?

A. Correct, 15.2.1?

Q. Yes, ma'am.

A. Correct.

Q. Okay. Were you able to make a DNA profile on those two items?

A. I was. The DNA profile developed from the leaf and from the hair from the leaf again matches the DNA profile of Winter Wingard.

Q. Okay. Were you able to assign a probability to that

also?
A. The same statistic applies to the DNA. The probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately 1 in 110 trillion.
Q. Thank you.
And I'm going to move to State's 134, SLED 19.1. I'll pass this item to you which is described as a swab from a briar.
A. I recognize this item, based again on the SLED item and lab numbers, as well as my initials.
Q. Okay. As to the swab from the briar on State's 134, were you able to develop a DNA profile from that item?
A. I was.
Q. Could you please tell the jury what that was?
A. The DNA profile developed from the swab from the briar identified as SLED 19.1 is a mixture of at least two individuals. The DNA profile developed from the major contributor to this mixture also matches the DNA profile of Winter Wingard. And the partial DNA profile developed from the minor contributor is insufficient for reliable interpretation.
Q. Okay. Just tell the jury what you mean by insufficient for reliable interpretation.
A. There were a small number of minor peaks present that

did not consist -- that were not consistent with Winter Wingard. There was not enough information from that minor contributor for me to do a comparison between that minor contributor and any known individual.

Q. Okay. I'm going to quickly reference several items and just ask if you can tell the jury with reference to these items if you were able to find any DNA or any human DNA on these items.

A. Yes, ma'am.

Q. The first one I'm going to talk about SLED 20.1, swabs from a briar?

A. Yes, ma'am.

Q. Were you able to come up with any DNA analysis on that?

A. There was no human DNA obtained from that particular item.

Q. Okay. It's my understanding that you also processed other items that came back with the no human DNA?

A. That's correct.

Q. Could you go through the list of those items?

A. The items that came back as no human DNA obtained in this case were SLED item 22.1, swabs from briar; SLED items 25.1 and 26.1, which were swabs from tree limb; SLED item 28.1, which was swabs from barbed wire; SLED item 39, which was swabs from a car remote; and SLED item L10-13550-5.2, a swab from debris from the left forearm of Winter Wingard.

Q. And I'm just going to show you briefly as to these items. What do you mean by no human DNA?
A. After performing the extraction process where we were trying to remove DNA from the item, we run a test that gives us an estimate of how much DNA is present. For these items the test showed that there was no human DNA detected. At that point we stopped processing it. It's not likely that we would be able to generate a DNA profile based on that as a result.
Q. You just mentioned this one, but I want you to have you identify it as State's Exhibit 82, which is a swab from a car remote of the GMC?
A. I recognize this item based on the SLED case and item number, as well my initials.
Q. And is that an item that's contained within SLED's 39?
A. It is.
Q. And that is one in which you found no human DNA?
A. That's correct.
Q. I'm going to now move to the swab from the GMC key, which is State's 83, SLED 40, and hand you State's 83 and ask if you recognize this item?
A. I do recognize the item, again, based on the SLED case and item number, as well as my initials.
Q. Okay. Could you tell the jury if you were able to develop a DNA profile from that item, which was a swab from

the GMC key?
A. I was able to develop a partial DNA profile from this particular item. However, it is insufficient for reliable interpretation.
Q. And it's just as you stated earlier, you were just not able to make an analysis based upon -- or develop a DNA profile based upon what you had?
A. That's correct, it's just not enough information for me to be comfortable making a known comparison between a partial profile and any known individual.
Q. Okay. I'm going to move now to State's 135, which is SLED number 21.1, a swab from a briar. I'm going to hand you 135, a swab from the briar, and ask if you recognize that item?
A. I do again recognize SLED case item numbers and my initials.
Q. Were you able to develop a DNA profile off of that item?
A. I was.
Q. Could you tell the jury about the DNA profile on the swab from the briar?
A. The DNA profile developed from the swab from the briar identified as SLED 21.1 is a mixture the at least three individuals. The DNA profile developed from the major contributor to this mixture also matches the DNA profile of

Winter Wingard. Joey Clark cannot be excluded as a possible minor contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 96. Joyce Patrick is excluded as a possible minor contributor to this mixture.

Q. As to Joey Clark, the basis that he cannot be excluded as a possible contributor on the swab from the briar, explain to the jury what you mean by 1 in 96.

A. Again, approximately the probability of randomly selecting an unrelated individual who could have been a minor contributor is approximately 1 in 96. So if you had a group of approximately 100 people, you would expect possibly one of those people to be included as a possible contributor.

Q. Are you able to give a percentage to a 1 in 96 probability?

A. Again, it's just a measure of how common or rare it would be to find an individual who could have contributed, but with a number like this, you would still expect close to 99 percent of the population to be excluded as a possible contributor.

Q. Okay. So as to the minor on State's 21.1, 99 percent of population would be excluded?

A. Approximately that's what you would expect, if you

randomly selected individuals in the comparison profile.
Q. Okay. I'm going to move now to what is marked as State's 136, SLED 23.1, which is a swab from a tree limb.
A. I recognize SLED 23.1 based on the SLED case and item numbers, as well as my initials on it.
Q. Okay. As to the swab from the tree limb, could you tell this jury if you were able to develop a DNA profile?
A. The DNA profile developed from the swab from the tree limb is a mixture of at least three individuals. Winter Wingard and Joey Clark cannot be excluded as possible contributors to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to the mixture is approximately 1 in 3,700, and Joyce Patrick is excluded as a possible contributor to the mixture.
Q. Okay. I'm going to do as I have done previously. Explain to the jury 1 in 3,700?
A. Again, if you had a group of approximately 3,700 people, you would expect one of them to be a possible contributor to this particular mixture.
Q. Are you able to do a SLED -- or give a certain percentage to a 1 in 3,700?
A. You would expect approximately 99 percent of the population, if you randomly tested individuals, to be excluded from this particular mixture.

Q. So 99 percent of the population in 1 in 3,700 would be excluded?
A. We would expect to be excluded, yes.
Q. And that mixture on the tree limb is -- you can't exclude Winter Wingard or Joey Clark?
A. That's correct.
Q. Okay. And 99 percent probability you can exclude the rest of the population?
A. Again, you would expect 99 percent of the population would be excluded, based on the comparison with this mixture.
Q. Okay. And I'm going to stop and talk to you about these two items real quick, because when Mr. Harbin gets up he will talk to you about this.

With the briar and the tree limb swabs, you referenced that there is at least three individuals there, and you talk about the potential of not to exclude Joey and not to exclude Winter?
A. Correct.
Q. Can you talk to the jury about that third possibility?
A. Based on the mixtures obtained, there are DNA present that could not have been contributed by Winter Wingard, Joey Clark, or Joyce Patrick. It indicates that there is at least one individual present in these mixtures that I don't have that DNA standard to compare to.

Q. Okay. Does that in any way, that third possibility out there, does that in any way negate the DNA profile that you contributed to Winter Wingard and the defendant in this case?

A. It doesn't affect the comparison between Winter Wingard and Joey Clark. Again, there was one major profile matching Winter Wingard.

With regard to Mr. Clark, I simply can't exclude him as a possible contributor, but the fact that there is at least one unknown does not affect that comparison.

Q. Okay. And you are an expert in this area. If you had a scenario where you have an investigator from a crime scene out on the scene and they may have come into contact with the tree limb, or with the briar, or anything else out there, and I know that you can't say with a one hundred percent certainty, but could you say that is a possibility that their DNA could have been mixed in there?

A. If there was physical contact between an individual and those particular items, there could have been transfer to those items.

Q. Okay. Let's move to the last set of items that we have and talk to you about a sexual assault kit that was performed on Winter Wingard.

Did you receive a sexual assault kit in this case?

A. I did.

Q. And who was it attributed to?
A. It was identified as being taken from Winter Wingard.
Q. Okay. As part of that kit did you receive --
I'm going to show you State's 128 and 127. And along with that I'm going to hand you some slides that we have marked as 138, and these are with case number 10-13550, and ask if you could identify these items?
A. Based on these SLED case and item numbers, these are the vaginal swabs and vaginal, oral, and rectal smears that were collected from that rape kit.
Q. Okay. I'm going to take some time and just focus on the vaginal swabs for a moment.
When you received all of these items, were they all contained within their heat-sealed packet?
A. Yes, they were.
Q. And just for clarification, when you examined all these items, did you do all of them at one time?
A. No, only one item would be opened at one time. Each item is processed individually to prevent any type of cross-contamination or to prevent an item being returned to the wrong container.
Q. And in this case you actually tested swabs at various times since Winter Wingard's death?
A. That's correct.
Q. You have standards and procedures to go through to make

sure there is no contamination or cross-contamination of the items that you have out for analyzation?

A. We do. We are required to sterilize our work space, as well as any instruments that we use. We are constantly changing gloves to maintain sterile environment. And, again, only one item can be open at a time to prevent contamination of DNA transfer from one item to another during the testing process.

Q. Okay. As to the vaginal swab and the slides that you have in front of you with your SLED 2010 case number and 4.3 and 4.4, could you tell the jury about your DNA analysis of those items?

A. For the vaginal swabs in this case I ran a preliminary test looking for the possible presence of a protein called P-30. P-30 is found at very high concentrations in semen. Semen is of interest to us in sexual assault cases because that's what would be left by the male assailant in a possible rape case. We try to develop DNA profile from that semen in order to identify the contributor.

Q. As to the oral swab from Winter Wingard, were you able to -- I'm sorry, as to the vaginal swab with regard to Winter Wingard, were you able to detect any semen?

A. The test that I ran came back negative, indicating there was no semen present on the swab.

Q. Okay. So as to those swabs outside of Winter Wingard,

did you locate any other foreign DNA?

A. There is no DNA testing, per say, performed on these swabs, because the initial test was negative, I did not carry those swabs forward for testing.

Q. I'm going to move now to what's been marked as State's No. 130 and 129, and it also goes with the slides you already have in front of you, and these are SLED numbers 4.5 and 4.6 under the 2010 lab.

A. I recognize these based on the case number and the individual item numbers, as well as my initials. They were the oral swabs from the CSC kit.

Q. As to those oral swabs, could you tell the jury how you processed those oral swabs and what you were looking for?

A. I ran the same preliminary test looking for possible presence of P-30. The test was positive on these two sets of swabs, indicating the possible presence of semen. That indicated to me that those swabs should you go forward for DNA testing, and I was able to develop DNA profiles from those items.

Q. Okay. And the protein is what tells you that leads you in the direction that it's sperm?

A. It leads to the direction that it's semen. P-30 is found in very high concentrations in semen and it is an indication to us that that item may be useful in detecting any possible presence of male DNA.

Q. Okay. As to item 4.5, one of the oral swabs, what did you find?

A. The DNA profile developed from the sperm fraction of the oral swab that I analyzed as item 4.5 is a mixture of at least two individuals. The DNA profile developed from the major contributor to this mixture matches the DNA profile of Joey Clark. The probability of randomly selecting an unrelated individual having a DNA profile matching this major contributor is approximately 1 in 120 quadrillion. Winter Wingard cannot be excluded as a possible minor contributor to this mixture. And a minor DNA type that is not attributable to Winter Wingard is also present in this mixture. Joyce Patrick is excluded as a possible contributor to this mixture.

Q. Okay. Explain to the jury what you mean when there is a minor DNA type that's not attributable to Winter?

A. Again, this particular item had a major contributor. That profile matches the profile of Mr. Clark.

The remaining minor type are all consistent with Ms. Wingard, as we would expect that as it was taken from her mouth. However, there is one DNA type present in this mixture that could not have been contributed by either Ms. Wingard or Mr. Clark.

Q. Okay. As to that, with just a minor contributor, you know that the major is Joey Clark, and that is the 1 in 120

quadrillion.

As to the minor, could you talk to the jury a little bit about what's known as an artificial -- or a technical artifact or stutter?

A. When we refer to stutter, again, it's a technical artifact. It's just a by-product of the testing that we do.

As I spoke earlier, we make copies of the STR locations that we test. We are counting the number of repeat units that we have on each copy of our DNA. This test is not one hundred percent efficient. Sometimes we do have copies made that are of one repeat unit short of the actual DNA that is present. This is what we refer to as a stutter peak. It appears one repeat unit shorter of the actual DNA peak and has a much weaker signal. So if my types are 10/14 and there is a very weak 13 present, that's what we call the stutter position. It's possible that there were copies made of my 14 that just didn't fully copy every time through. We recognize that and it's been show in validation and developmental processes in this type of testing. If we believe it's stutter, we can cross it off and choose not to interpret it.

In this particular case, this one DNA type was above what we call stutter cutoff, so I don't know for certain whether or not it is stutter, or whether it's an additional contributor, but the particular type can't be attributed to

those two individuals, so it appropriate for me to document it.

Q. Okay. So because it's above that threshold, you do document it?

A. Correct.

Q. And it doesn't rule in or rule out that there was -- that is stutter, you can't say the -- you can't say with certainty that it's not stutter, or it is stutter?

A. I can't say for certain, no.

Q. Okay. But in your experience in doing all the DNA tests that you have, is it more likely to be stutter than it is to be a third individual?

A. I can't necessarily make that determination. It could be either one. It's a very limited amount of minor information, but I can't say for certain whether it's a technical or factual, whether it is a DNA type contributed by another victim.

Q. And the issues with the minor DNA profile, do they have any impact on the major profile relating to Mr. Clark?

A. They do not.

Q. Okay. We are going to go and talk now about the last little swab that you have in front of you and that one is SLED 4.6.

A. The DNA profile developed from oral swab identified as SLED 4.6 is also a mixture of at least two individuals. The

DNA profile developed from the major contributor to this mixture also matches the DNA profile of Joey Clark. Winter Wingard cannot be excluded as a possible minor contributor to this mixture. Again, there is one minor DNA type that is not attributable to Winter Wingard or Joey Clark, and Joyce Patrick is excluded as a possible contributor to the mixture.

Q. Okay. As it relates to Joey Clark's DNA profile matching the major contributor, do you have a probability in terms of a percentage with him?

A. The same statistic would apply as item 4.5. The probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor is approximately 1 in 120 quadrillion.

Q. And as with SLED 4.5, the potential issue with stutter or a third individual mixture into the minor DNA profile does not impact the DNA profile of the major?

A. That's correct.

Q. Okay. So it does not change the fact that Joey Clark is 1 in 120 quadrillion?

A. That's correct.

Q. Okay. I'm going to briefly just hit on a few things before I turn it over to Mr. Harbin. Talk to me about transfer.

A. When we refer to transfer, it really means the movement

of DNA from someone's body, be it their skin cells or bodily fluid, and that transfer of that DNA to another surface, be it a material surface, be it when it's collected on the swab. It's just the movement of DNA from a person to a particular item.

Q. Okay. Are you able to determine when you look at items of evidence whether or not that DNA is transferred, or if it was on that person? Are you able to attribute how it gets there?

A. No. The type of testing that we do does not allow us to determine how a particular sample was deposited.

MS. JORDAN: Your Honor, if I may have a moment?

THE COURT: Yes, ma'am.

(Off the record)

(Back on the record)

BY MS. JORDAN:

Q. We have heard talk about probabilities and statistics and everything in this case, but when you talk about Winter Wingard's DNA being in the -- I believe it's the 110 trillion in relationship to the swab inside the vehicle and some other items at the scene, and then Joey Clark's DNA when it relates to the oral swabs and the semen, when you say 120 quadrillion, are you able at that point to rule out and say definitively it's Joey Clark's or it's Winter Wingard's?

A. Well, these particular items, when we can make a complete match between an individual and a major contributor, such as the match of Joey Clark's profile to that from the oral swabs, I can say within a reasonable degree of scientific certainty that Mr. Clark is the major contributor to those swabs, as I can say within a reasonable degree of scientific certainty that Ms. Wingard is the contributor of the DNA developed from inside the car.

Q. So it's not the 99 percent probability that we have heard with the 1 in 96, or the 1 in 3,700, it is that person, to a reasonable degree?

A. Right, with forensic DNA testing this type of match is what we consider an identification.

Q. And just briefly, again, as to the stutter, do you see stutter often --

A. It's very common --

Q. -- or artifacts?

A. It's very common with every sample that we run there is a possibility of stutter. It's a very normal occurrence in this type of test.

Q. Okay. And if it hits a certain threshold, you report that?

A. That's correct.

Q. Okay. Please answer any questions that Mr. Harbin may have.

THE COURT: Cross-examination, Mr. Harbin?

MR. HARBIN: Thank you, Your Honor.

If it please the court?

CROSS EXAMINATION BY MR. HARBIN:

Q. Good morning, Ms. Leisy.

A. Good morning.

Q. Okay. I'm going to start and I'll try to maybe follow the order that Ms. Jordan just followed.

The swabs from the boots that were tested, the -- I believe that there was one swab, or actually one swab per boot, I guess, from the sole, and then one swab, as I understand it, that was from the interior of the boot.

And the DNA that was found on the sole of the boot, if -- and the boots were found, as evidence indicates, in the victim's closet. Does it surprise you that the victim's DNA is, therefore, on the sole of the boot?

A. It would be possible if the victim's DNA were present on the flooring inside the closet for there to be transfer from the floor to the soles of the boot. That is one possible transfer, yes, sir.

Q. And it's common to find a number of DNA samples on the sole of shoes, I guess, because of that probability, is that correct?

A. It's not unusual really for swabs taken from anywhere on footwear to come up with multiple DNA contributors,

that's correct.

Q. Okay. If someone is wearing a shoe, I suppose that if you find DNA inside the shoe, it's simply what you would expect to find?

A. That's not unusual. Yes, you would expect to find it.

Q. Okay. I believe this is item 16.2 is a cutting from the front left of pocket from a sweat shirt. And I believe that saliva was indicated, and was that matched to, I believe, Winter?

A. 16.2, I'm sorry?

Q. Yes, ma'am.

A. 16.2 only indicates possible presence of blood. That was carried forward for DNA testing and a profile does match the profile of Winter Wingard.

Q. Okay. I apologize. Blood is indicated.

And item 2.2 was a cutting from the neck area of a shirt, I believe the McCabe T-shirt. And is it correct that that indicated that it was -- it matched Joey Clark and that there was no other -- you didn't find anything other than Joey Clark's DNA on that?

A. That's correct, the DNA profile developed from that particular shirt matched the profile of Joey Clark. There was no indication of a second contributor.

Q. So there was no indication of anybody else's blood, or saliva, or any other organic material?

A. That's correct.
Q. One of the questions Ms. Jordan asked, I believe that you said that your testing cannot provide an answer to the jury as to how DNA gets where it is. It either is there or it's not?
A. Correct.
Q. And that there is no difference in the validity of your testing as to the presence of DNA whether or not it was directly transferred, or transferred through a secondary transfer, or what have you?
A. That's correct, there is no way for me to determine how a particular source of DNA was transferred. It could be from touch. It could be bodily fluids. I can only determine whether or not it's present.
Q. Can you tell the jury what secondary transfer is?
A. Again, as I talked about transfer, say I cut my finger and a drop of blood fell on the table. That would be transfer of my DNA directly to the table. If another individual came along and their sleeve brushed against the blood, that would be what we call secondary transfer, and it would be transfer of my blood from a secondary source to that other individual.
Q. Okay. I'll jump around here a little bit. I apologize.
I believe that there were -- I'm trying to find

which -- there were some fingernail clippings sent to you, but they were not tested, is that correct?
A. That's correct.
Q. Okay. And that there was -- I'm sorry, I'm a little -- there was a smear -- I believe it's called smear, not swab. Smear. This is L10-13550-4.1. It says smear (vaginal, rectal), and it says no analysis performed, is that correct?
A. That's correct.
Q. Okay. Now, as to item 21 -- excuse me, 21.1, this was a swab from a briar, you indicated that Joey Clark and Winter Wingard cannot be excluded, is that correct?
A. For 21.1, the major contributor actually matches the DNA profile of Winter Wingard, and Mr. Clark cannot be excluded as a possible minor contributor to the mixture.
Q. Okay. And is it over -- is it too simplified to say that the major contributor means that there is more DNA of that particular individual than there is of the minor contributor?
A. That would indicate that there is more DNA present in the cutting from the swab that I took from Winter Wingard than any other individual who contributed.
Q. Okay. And as DNA samples go, my understanding is that the item -- the DNA sample in 21.1 is very small. It's a very small amount of DNA from which you have to work with and extract a profile?

A. I would say that's fair, yes, sir.
Q. And also 23.1 and 24.1, I understand they are all very small samples, and in some instances you actually had to use a procedure to actually amplify the results so that you are able to develop that profile?
A. That's correct. Once we perform an extraction we need to have a certain amount of DNA present for that sample to go forward to the next step of copying the entire location. There were several of the samples tested. There were very small amounts of DNA present. That forced me to perform an extra concentration step to help concentrate those samples further so that I could add as much DNA as possible during the copying step.
Q. And direct DNA transfer, you know, if you swipe your -- well, either a drop of blood or you swipe your skin up against, in this instance I suppose it would be either a briar or a tree limb, do you expect to find a more significant or a larger sample in a direct DNA transfer than you would in a secondary-type transfer?
A. I would say normally you would expect more transfer from direct contact than from secondary contact, yes, sir.
Q. And so as the -- as -- strike that. I can come back to that so I don't confuse myself or the jury.
Talking about the third person that was found, or the third individual, the third DNA profile that was found in

the items 21.1, 23.1 and 24.1; Ms. Jordan asked you essentially about the possibility that one of the forensic collection agents contributed to that mixture and you said that it was possible.

Now, if they are following -- and I assume you are aware of the proper procedure and protocols for the collection of DNA?

A. As far as what goes on within the laboratory. I'm not trained in crime scene collection or processing.

Q. Okay. Would you expect, though, in your field of expertise that if proper procedures are followed, and they are followed correctly, that there would not be -- that's the kind of the point, there would not be contamination?

A. Again, without being trained in crime scene processing, I would expect it to be a little bit different from what I do, just because within the laboratory we work in very controlled environment. It's sterile. It's temperature controlled.

If you are out in the woods climbing around through trees, I don't know exactly what the procedure would be. It may not be possible to prevent all types of transfer. I'm not specifically familiar with those protocols.

Q. The oral swab of the victim, and that would be, I believe, 4.5 and 4.6 is what we were referring to earlier, that indicated Joey and Winter, is that correct?

A. Yes, sir.

Q. I believe one of the reports mentioned that there was so little -- I guess it's sperm or sperm fraction, there is so little material, that it was -- it was positive, but it was a weak positive, is that correct?

A. I would have to refer to my case notes to determine whether or not I indicated weak, as far as the positive for P-30. On the report it simply indicates the presence of semen, because of the combination of a positive P-30 test with the presence of male sperm.

Q. So you don't have the information right now in front of you to tell us whether or not there was essentially a lot of DNA or a little bit of DNA?

A. I can certainly refer to my case notes, if you would like me to.

Q. Yes, ma'am, please.

A. My case notes do indicate the weak positive result based on the P-30 test and there is a very small quantity, relatively speaking, of DNA present on both of the swabs from the oral brush.

Q. Thank you.

Again I apologize for jumping around a little bit, but the stutter that Ms. Jordan asked you about, I essentially understand that the process by which you develop this profile was that you have a chemical thing you can do that

acts like this super xerox machine that just duplicates your, you know, your sample just, I don't know, millions of times, maybe. I'm not sure if that's correct or not, but just a whole bunch of times. And as copies copies copies and copies copies copies, I guess that's where you get kind of the -- I guess it becomes sometimes less clear than you would like it to be, is that --

A. That's correct.

Q. That's fair?

A. Uh-huh.

Q. Although when you were determining whether or not something that you are looking at to determine a profile whether it's stutter, and I think sometimes I guess you will call that an artifact?

A. Right.

Q. Or whether it's actually an allele, an actual piece of someone's else's DNA, you have a procedure that you follow. You have kind of rules of the road that you follow for what you are looking for, and I believe you described that it's kind of relative to how -- for instance, how tall the peak is relative to the peak beside it?

A. Yes.

Q. Or the allele beside it.

So in certain instances throughout this report you have indicated that some things that might appear to be peaks,

you have actually eliminated them, based upon your training and experience and you called them artifacts and marked them off and said "in my experience this doesn't indicate another person. It's just a flaw in the copying procedure."

A. That's correct. There were several items in the case where potential types were crossed off and not interpreted because of my interpretation.

Q. And so at some point you have to just simply believe in your process and the science and what you have been taught. So if you have not crossed them off as an artifact, you have to accept the possibility that, in fact, based on your training and science, that that is indicative of a third DNA profile, a third person --

A. It is --

Q. -- is that correct?

A. It is indicative of a possible third contributor, yes, sir.

Q. Now -- I apologize. I'm referring to my notes. I'm certainly not smart enough to remember all of this.

On item 21.1, this is the swab from a briar. Is it correct that most of the actual DNA sample there was from Winter, and that a smaller amount -- maybe 90 percent, or so, was actually from Winter, but the rest was not, is that correct?

A. That's correct. The major contributor to the mixture

does match the profile of Winter Wingard. She would be the significant contributor to that mixture.

Q. Okay. And so what -- to what extent Joey Clark could not be excluded as a contributor, he has a very minor amount of DNA present? Just essentially it's barely there, is that correct -- or, I'm sorry, that's probably an unfair characterization.

There is very, very little there to develop a profile from?

A. That's correct, there is much less DNA present from the minor contributor to this mixture than it is Ms. Wingard. It is a very low level profile.

Q. And this is one of the ones where you actually had to -- there was so little DNA there that you actually had to juice it up, to amplify this, so that your particular kinds of testing could provide a result?

A. Correct, I had to concentrate the volume of the sample so that I could use all of the DNA that was present in the next step of the process.

Q. Okay. And that was the total amount of the sample, which included Winter's as well, right? So the combination -- the sample that you had had Winter and what could not be excluded as Joey and the other individual, the other profile. So the entire sample itself was very, very small?

A. It was relatively small compared to some samples that we type, yes, sir.
Q. Well, at some point you are reaching such a low level of DNA, that -- and I don't know what that point is, but at some point you were getting to where there is just not enough sample for you to test, correct?
A. Correct. When the test that we used to measure how much DNA is present indicates that there is no human DNA present, those samples will not carry forward for DNA testing.
Q. And is it fair to say that one or more of these tests that you performed, they are approaching the point at which you don't have enough sample to actually test?
A. That's correct, some of the amounts were very low.
Q. Okay. And 21.1, being a small sample to start off with, 90 percent of which was Winter's -- just to kind of -- if I'm doing kind of logically the math in my head, so that means that there is terribly small amount of the other two DNA profiles available for testing, or available for discovery, I guess?
A. I think that's fair, yes.
Q. Now, not all of these samples where a third person was indicated was just because of one single, you know, questionable peak, or allele, or anything like that? In fact, there was -- and I'm trying to find which one there

was, but there was -- there were samples that the third profile that was found was represented by multiple alleles, correct?

A. That's correct, there were samples that had alleles that could not be contributed to the individuals known in this case at between four and six different STR locations.

Q. And so as there are more alleles to actually see, but do not belong to Joey or Winter, does that increase the probability that it is not stutter? Does that increase the probability that it is, in fact, a third person?

A. Yeah, I would say with the presence of minor types at multiple locations, such as I had with several of the swabs from the prior retrievals, it is known to be at least a third contributor to that mixture.

Q. All right. And you have described to the jury what secondary DNA transfer was. If the evidence suggests that the victim and Joey had sex prior to the body being drug on the side of the road, would it, in fact, be possible for Joey's DNA to be transferred to the scene by Winter by means of secondary transfer?

A. If there were foreign DNA present on Ms. Wingard from Mr. Clark, it may be possible for it to be transferred to the tree limbs or the briars through secondary transfer.

Q. And the probability of that happening depends, obviously, on various circumstances, one of which would have

to be whether or not, you know -- well, you tell me, whether or not the person is wearing clothing, or had changed clothing, or whether or not they were -- how much of their body came in contact with the outside world, essentially?

A. That would certainly contribute to how likely it is.

If an individual were to dress themselves after the sexual contact, there would be transfer of that foreign DNA to the clothing. Then if the clothing was removed again, there is less of a foreign DNA present on the individual.

Exposure to the elements, being dragged along the ground, all of that could reduce the likelihood of secondary transfer. It would affect how much DNA is still present.

Q. Right.

And, of course, the more -- the more body or more skin available to touch other things, the greater the probability that transfer would occur?

A. I think it's fair to say the more contact there is between an item and the person's body could increase the amount of transfer.

Q. Now -- and I apologize. This confuses me, but I have to ask you. If the State's theory of the case is that Joey Clark killed Winter Wingard and put her on the side of the road; and if we assume, for purposes of this question anyway, that the forensic collection technicians did their job, they are wearing gloves and they didn't put their DNA

on the scene; then -- in other words, if there is not a third person, that there is not someone else on the scene, then would it not -- what is the most likely explanation for the third DNA profile found on the scene?

A. Again, this testing doesn't allow us to determine how DNA has been deposited. All I can tell you is this was transferred for testing. This is the DNA that was present on those smears.

Q. Okay. So it's essentially -- it's not impossible to have a third DNA profile there? It would simply have to have been brought there by one of the two people that were there, or if there were two people there?

A. That is a possibility, yes.

Q. Okay.

MR. HARBIN: One moment, Your Honor?

THE COURT: Yes, sir.

(Off the record)

(Back on the record)

BY MR. HARBIN:

Q. The key that was swabbed, and I am going to try to tell you the number. I believe it's No. 39, No. 40, said that it was a partial DNA profile, is that right?

A. That's correct.

Q. And I believe your wording was it is insufficient for reliable interpretation?

A. That's correct.

Q. That's basically because it's essentially a piece of the puzzle and not enough for you to feel confident in some type of statement, is that right?

A. Correct. This particular partial profile was so weak that I'm not comfortable making a formal comparison between the profile and any of the individuals.

Q. Okay. Do you have that data with you today?

A. Yes, sir, I do.

Q. Okay. Could you take a look at that data for me, please?

I'm going to you ask you a question based upon the limited amount of information that you have relative to that DNA profile, that partial DNA profile.

Can you say from the limited amount of DNA profile that you have that the peaks that do appear are consistent with Winter, but inconsistent with both Joyce Beverly Patrick and Joey Clark?

MS. JORDAN: Your Honor, I object at this point. She has already stated that it's insufficient for reliable interpretation. Is he asking now for unreliable information?

THE COURT: I'm going to overrule the objection. It's cross-examination.

BY MR. HARBIN:

Q. And I understand that this is not something that you would have volunteered that you were certain about, but if there are a limited number of, I guess, alleles, and I don't mean to sound like I really know what I'm talking about, but alleles available then, if a certain allele is available in this partial profile that simply doesn't exist for Joey or doesn't exist for Beverly, I assume you could make what would be less than your optimal level of confident statement as to whether or not it is at least either consistent or inconsistent with -- and, again, we are not holding you to your, you know, normal high standard of what certainly level that you have.

A. If I could have just a moment?

(Off the record)

(Back on the record)

A. There was DNA information developed at three locations, three STR locations that were tested. The DNA types or alleles that were found at those locations could be considered to be consistent with both Winter Wingard and Joyce Patrick. There are types that are not consistent with Mr. Clark.

My standard interpretation for a limited partial profile, such as this, is that they -- it is insufficient for reliable interpretation, but there is some consistency between that.

Q. And Winter is the daughter of Beverly Patrick, so it's -- I guess it's not surprising that sometimes where you have a very limited amount of information, that where one would be consistent, the other might be consistent, because they share common DNA?

A. That's correct. There is quite a bit of common DNA information between those two known individuals.

Q. Is it fair to say that your particular area of expertise and the DNA results that you developed, they are only as useful as the circumstances under which they are found? In other words, in a vacuum all you can simply say is that it is there or it's not, not how it got there?

A. That's correct. This type of testing is basically for investigative purposes. Again, I can only detect DNA that is present on the scene or that is submitted to me. I couldn't determine exactly how it was deposited.

Q. Okay.

MR. HARBIN: Judge, if I could have one moment?

THE COURT: Yes.

(Off the record)

(Back on the record)

BY MR. HARBIN:

Q. One final question.

Was there ever a pocket knife submitted to you for testing? And I have a SLED sheet here and I'm not sure if

this is going to be your number or not, but it says SLED item number 36, and then agency item number 014. So I assume 014 is probably a Cherokee County number, and then your number, I assume, would be 36, and I'm happy to hand this piece of paper that I'm looking at up to you to evaluate it, if you would like.

A. Would you like for me to continue with my case folder?

Item 36, a knife was submitted. There was no processing performed on the knife. I never took custody of the knife or received any samples for testing.

Q. Thank you.

MR. HARBIN: No further questions.

THE COURT: Redirect?

MS. JORDAN: Yes, sir. Thank you.

REDIRECT EXAMINATION BY MS. JORDAN:

Q. As to the -- going back to the DNA.

As the DNA on the sole of these boots and the inside of the boot, are there various ways that a person's DNA could and could not be put inside the boots or on the outside of the boot?

A. There are numerous ways, yes.

Q. Okay. If someone wore a sock that they were wearing in the boot and were walking around the house commonly used by another individual, also used by this individual, is that one way that it could be transferred?

A. It is. If there is any transfer from the floor to the sock, it could then be transferred into the boot.

Q. Okay. And as you spoke about with Mr. Harbin, there is no way to determine how these items received the DNA they received?

A. That's correct.

Q. Okay. Mr. Harbin asked you about SLED 4.1 and the 2010 lab number, which were smears, vaginal and rectal smears?

A. Correct.

Q. And I believe you stated that you -- there was no analysis performed on the those. If those smears from the vaginal and rectal area -- are those the smears that came from the swabs also?

A. Those smears were created during the collection of the sexual assault kit during autopsy. Typically a swab is taken from the area that's being tested to collect DNA materials. It is then rubbed onto a glass microscope slide and allowed to dry. And, if need be, we can stain and check those smears for the presence of semen --

Q. Okay.

A. -- or sperm.

Q. But if you checked the swab in this case for sperm and did not find sperm, would you then go back and check the smears?

A. Typically the way we process a kit, such as this, is

that if all of the swabs that are present are negative for foreign bodily fluid, we will go back and check the smears to see if there are maybe sperm cells present indicating there there is at least some semen there, maybe not enough for us to determine a DNA profile.

In this particular case, because I was able to develop a foreign DNA profile from the oral swab, I did not go back and check any of the smears.

Q. And my recollection from the oral smears, even the rectal smears, there was no semen identified in those two areas?

A. There was no semen identified --

Q. Swabs, I'm sorry.

A. Correct, there was no semen identified on the vaginal or rectal smears -- or, excuse me, swabs.

Q. Which would explain why you did not look at the smears?

A. Well, again, as I was able to develop a foreign male DNA profile from bodily fluid present in the kit, I did not go back and check the smears, as I already had an indication of semen present.

Q. Okay. Mr. Harbin talked to you about 21.1, the SLED swab of the briar. He talked to you about there being a small amount there and how you may have had to use the procedure to amplify the amount. When you do that, does it harm the DNA in any way?

A. It does not. It simply concentrates it from a larger volume of fluid down into a smaller volume of fluid so that I can use the entire sample in testing.

Q. Okay. And in this one, 21.1, you listed that Winter was major and Joey cannot be excluded as minor. Is there any -- does it -- does it impact it that he's the minor and does the probability that he cannot be excluded in there?

A. It does not. It's an overall comparison of Mr. Clark's type that off the scene as to the DNA types present in a mixture, there is consistency dropped those profiles between the types of Mr. Clark and the type of mixture.

Q. Okay. So even though he's the minor contributor, it's still a 1 in 3,700, or 99 percent of the population is excluded?

A. For item 21.1?

Q. Yes, ma'am.

A. That would be approximately 1 in 96.

Q. I apologize. I had looked at the wrong number.

So 99 percent of the population is excluded and he's in that one percent?

A. You would expect approximately 99 percent of randomly tested unrelated individuals to be excluded, based on this number.

Q. Okay. And the fact that it is a minor does not decrease that number at all?

A. It does not. Each STR location that was used in statistics meets the requirements that we have to do such mathematical equations on the type of item.

Q. Okay. So the argument that it's just barely there doesn't diminish the fact that he can't be excluded to the purpose of 99 percent of the population?

A. That's correct. Again, it is a very minor contribution, but Mr. Clark cannot be excluded as a possible contributor to it.

Q. Okay. Now I'm taking time here to talk about the briars and the tree limb. You can't rule out the possibility that this third individual -- you can't say how that got there?

A. Correct.

Q. You can't say if that was there before these two individuals came on the scene that day?

A. Correct.

Q. You can't state if it was put on there if Officer Henson bumped his head?

A. Correct.

Q. Okay. But regardless of the third individual, you can't exclude Joey Clark on those two items?

A. That's correct. Again, in comparing Mr. Clark's profile to the mixtures obtained, I cannot exclude him as a possible contributor.

Q. And when you talk about -- we talked -- you talked about transfer and second transfer, and I'm assuming we could go on with as many numbers as we want to, but in this case if you had someone who potentially had sex earlier that day with the defendant and they put their clothes back on. If they put back on a white T-shirt and they are put back on a red hoodie, does that decrease the likelihood of transfer later?

A. Putting on clothing back on could cause transfer of any foreign DNA from her body to that article of clothing. And then removing the clothing again you can decrease the amount of foreign DNA present. It would make it I would imagine slightly less likely. It all depends on how much was present to begin with.

Q. Okay. And if we -- if we continued on and stated that at some point in time this red hoodie and this white T-shirt came off of her and her body came into contact with red dirt, would that again cause the potential decrease in the likelihood of transfer?

A. It could possibly create a decrease. Any contact, be it with the ground, with articles of clothing, would cause transfer of that DNA off of that person's body and could decrease the likelihood of transfer once in its final position.

Q. Okay. So if her body is naked, would the clothing away.

and red dirt on her body, that could potentially decrease the likelihood of transfer?

A. Potentially, yes.

Q. It doesn't take it away, but it decreases the likelihood?

A. I would say that's fair, yes, ma'am.

Q. Okay. If her body is drug from one point to another point, would that also have a potential to decrease the likelihood of transfer?

A. That could possibly decrease the amount of foreign DNA present, which could decrease the likelihood of transfer.

Q. And if you want to talk transfer from the victim -- the defendant to the victim to an item, you can't even tell us it happened the other way, could you, if it went from the defendant -- I'm sorry, from the victim onto the defendant as if she were being drug or her clothes being taken off to the item? You don't know the sequence that it could happen in?

A. That's correct, transfer could also be happening in the other direction, from the victim to Mr. Clark.

Q. Okay. You can just say a probability of him not being excluded from the minor on those two items?

A. That's correct.

Q. The tree and the briar?

A. That's correct.

Q. Okay. Let's just talk a moment about the oral swabs that he mentioned. He talked to you about there being a weak positive to protein.. Okay, the protein relates to this being semen or sperm? I just don't want to use wrong word.

A. It relates to whether or not we have semen present.

Sperm cells are one portion of semen.

What we look for in our preliminary test is an enzyme or protein known as P-30. It is present in very high concentrations in semen, and we get -- when we have a positive result, it indicates the possible presence of semen. It indicates that we should take that item further for DNA testing.

Q. Okay. And the fact that you have a weak positive for that person, does that in any way negate the 1 in 20 -- the 1 in 20 quadrillion that the DNA matches to Joey Clark?

A. It does not. It doesn't affect the statistic at all. We just try to keep track of when we have a weaker positive just for documentation purposes. We try to be as thorough as we can be.

Q. Okay. And also as to the oral swab and the semen in the oral cavity, are you able in any way to put a time frame to how -- could you say that the time frame that semen would remain in the oral cavity or in the mouth of an individual? Does that increase or decrease if the person is alive versus deceased?

A. We expect that in a deceased individual the time frame would be a little bit longer than in a living individual, just because a living individual constantly is swallowing saliva and would, therefore, be swallowing any semen that may be present. If you are eating, if you are drinking, all of these things could decrease the presence of semen. Once the individual is deceased, you wouldn't expect to see it be degraded or be removed as quickly.

Q. Okay. And you can't give any specifics as to time, but you can tell us it's Joey Clark's semen?

A. I can tell you again with the DNA profile from the sperm fraction matches the profile of Mr. Clark, yes.

Q. Okay. Mr. Harbin talked to you about stutter or potential artifacts that are out there and the possibility of a third person and he said that you cannot say it's a third person. But it's also true that you can't say it's stutter at this level, is that correct?

A. Again, I can't be certain either way whether or not it's a technical artifact or an indication of a third contributor. Because of its size and relation to the other peaks that are present, it's appropriate for me to document it and present it as a possible third contributor.

Q. Okay. And you do run into stutter fairly often in your job?

A. We do, yes.

Q. Okay. He also talked to you about SLED 40, which is State's 83, which is the swab of the key, and he went into specifics with you about 3 out of the 15?

A. Correct.

Q. So there, 3 out of the 15, there is still 12 alleles or potential locations out there that you didn't have when you looked at this?

A. For this particular item, the swab from the key, I used a different chemical set that tested only eight locations. This was because there was such a limited amount of DNA, this particular kit seems to be more sensitive and it allows us to develop more DNA from the initial test of these items.

I was only able to develop DNA sites at three locations. And, again, my standard interpretation for that limited amount of information is to say it's insufficient for reliable interpretation. I'm not comfortable in saying in regard to the inclusion or exclusion any definitive.

MS. JORDAN: Your Honor, may I have a moment?

THE COURT: Yes, ma'am.

(Off the record)

(Back on the record)

BY MS. JORDAN:

Q. Just to go back to the DNA sample as seen with the 1 in 96 and the 1 one in 3,700, because those are smaller samples, does that -- can you rule in whether it was direct

contact or transfer?
A. The amount OF DNA present does not necessarily indicate what type of transfer occurred.
Q. Or does it even indicate if transfer occurred?
A. There would have to be some level of transfer for the DNA to be there at all, but it doesn't indicate normal transfer, secondary transfer. It just indicates that it was present upon collection.
Q. But you can't tell if it's transferred from the individual to the item, or from another individual then to the item?
A. That's correct.
Q. Okay.

MS. JORDAN: Nothing further, Your Honor.

THE COURT: Recross?

RECROSS EXAMINATION BY MR. HARBIN:

Q. The term rape kit has been used several times throughout this trial. Rape kit, to your understanding, is it correct that it's simply the term for the collection of that type of evidence?
A. What we receive as a rape kit can contain several different types of items, but it's typically samples taken from the victim's body that may contain foreign DNA from a potential male assailant.
Q. The fact that it's labeled rape kit when you get it

doesn't tell you whether or not it was a consensual encounter or an attack, as you say -- or there was an assailant involved, correct?

A. That's correct, there is no way for us to determine whether or not any sexual contact was consensual. These are just items collected due to allegations they are making of possible sources of male DNA.

Q. Could you describe what are the -- and you may have done this before, and I apologize, but what are the multiple ways that a person can leave or deposit their DNA onto something else or some others?

A. Well, transfer of DNA from an individual to an object or to another person, it can be as simple again as your hand brushing against their sleeve. There would be some level of skin cell transfer that would contain your DNA.

You can transfer DNA through sweat, through saliva, through blood, through semen, vaginal secretions. Any bodily fluid can cause the transfer of DNA from the individual to an object or to another person.

Q. Is it fair to say the more physical contact to contact a person has with another, the more potential there lies for one person's DNA to transfer to that second person?

A. That really depends on some variables. That could be affected by something as simple as how frequently you bathe or how recently you bathed. And some people just shed skin

cells more readily than others, so there are quite a few different things that go into it, but generally you would expect more contact to result in more DNA.

Q. And things such as whether or not you are sweating or whether or not you are -- well, I guess you would be drooling or something, but with saliva, but whether or not there is actual secretions from your body would affect that as well?

A. Generally what we see is when there is bodily fluid transfer, there is a higher concentration of DNA in the bodily fluid than there may be in say just simple skin cells, but the amount of bodily fluid can also increase how much DNA is present.

Q. Thank you.

Ms. Jordan had gone over the test, and I believe it was 4.5, or -- I'm going to get that wrong, but the test that indicated that there was Joey's DNA from the oral swab, the semen. Taking aside the quality of the test and the certainty of the results, there still was a very small amount of DNA sample there, correct?

A. There was a relatively small amount. Obviously enough to develop a DNA profile, but it is a relatively small amount, yes.

Q. Okay. And in previous testimony, Dr. Ross, the medical examiner, had testified that sperm could last for hours. Do

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you have any expertise that would disagree with Dr. Ross with that simple statement?

A. I do not. Typically the reference we use in terms of oral swabs is sort of an outside window of six to twelve hours on a living individual after the semen were deposited. And, again, that may increase if the individual is deceased.

Q. And item 23.1, that was the item that I -- and I at least intended to reference when I asked you that that was not -- you indicated that there is a third profile available. That was not because of the single allele. There was multiple alleles available to develop or to suggest a third profile that did not match either Winter or Joey, is that correct?

A. The number of individuals is determined by the amount of DNA present at each location. So really the number of DNA types at each location that let's me know there is at least three individuals. There are multiple STR locations where there are types present that could not have been contributed by either Winter Wingard or Joey Clark.

Q. Thank you very much.

THE COURT: All right, thank you very much. You may step down.

Would you like to have the witness excused?

MS. JORDAN: We would, Your Honor.

THE COURT: All right, you are excused. Thank you

for coming.

All right, Madam Solicitor, you may call your next witness.

MS. LESKANIC: The State rests, Your Honor.

THE COURT: All right, ladies and gentlemen of the jury, you have heard the statement now the State has rested their case. That means that you have heard all of the evidence that you would hear from the State at this time.

There are certain matters of law which I need to take up with attorneys who are involved in this case. And when I have completed those matters, I will return you to the courtroom, but I'm going to ask that you go to your jury room.

Please do not discuss this case among yourselves. It's still premature for you to begin any discussions of this matter. Just relax for a few minutes and let me take care of these matters of law and then I will send for you very shortly. Thank you. If you would go to your jury room with the bailiff.

(The following takes place outside the presence of the jury panel)

THE COURT: All right, Mr. Harbin, motions on behalf of the defendant?

MR. HARBIN: Not at this time, judge.

THE COURT: All right.

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All right, Mr. Harbin, is your client prepared to address the matter of the Fifth Amendment protections?

MR. HARBIN: Yes, sir, although if I could beg the court's indulgence, my client has been trying to talk to me for a little bit, and I think it's -- could I have a moment with him?

THE COURT: Yeah. Go ahead. Do you want to -- do you want to take a recess?

MR. HARBIN: Yes, please.

THE COURT: Okay. Let's take five minutes. This is going to take a few minutes. Let's take five minutes and then I'm going to want to know where the defendant stands with regards to testimony. Five minutes.

(Whereupon, proceedings were recessed)

(Whereupon, proceedings were reconvened)

MR. HARBIN: Thank you, judge, for the court's indulgence.

THE COURT: We are back on the record with regard to the matter of the State versus Clark.

Mr. Clark is present with his attorney, Mr. Harbin.

The State is present represented by the Seventh Circuit Solicitor's Office.

We took a brief recess to give the defense counsel an opportunity to confer with his client.

Mr. Harbin, have you had an opportunity to discuss with Mr. Clark the Fifth Amendment Rights and is he prepared to settle that matter now?

MR. HARBIN: Yes, sir.

THE COURT: All right. Mr. Clark, let me ask you to stand, please.

Mr. Clark, yesterday I advised you of your rights under the Fifth Amendment of the Constitution and the similar counterpart provision of the Constitution of the State of South Carolina. At that time I indicated that I would give you an opportunity to confer with your lawyer before you gave me a decision and that I would get your decision as to whether you did or did not wish to testify a later time in this case. That time has come.

My first question to you would be have you had a chance to discuss with Mr. Harbin your rights under the Fifth Amendment to the Constitution?

THE DEFENDANT: Yes, sir.

THE COURT: Have you understood your discussions with him?

THE DEFENDANT: Yes, sir.

THE COURT: Do have any questions that you would like to ask either him or me regarding your privilege against self-incrimination?

THE DEFENDANT: No, sir.

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THE COURT: Have you made the decision as to whether you do or do not wish to testify in this case?

THE DEFENDANT: I have.

THE COURT: And what is that decision?

THE DEFENDANT: I do not want to testify.

THE COURT: Is that decision on your part made freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The court will find then that the defendant in this case has made a free, voluntary, intelligent and knowing decision to exercise the rights granted him under the Constitution and not testify in this matter and the court will respect that decision. This decision was made after having been advised of those rights by the court and having had an opportunity to discuss it with his attorney.

Thank you Mr. Clark. You may be seated.

Having reached this point, Mr. Harbin, does the defense intend to present any other testimony in connection with this matter?

MR. HARBIN: No, sir.

THE COURT: All right. So it would be the State's position -- I mean the defense position that the defense rests as well?

MR. HARBIN: Yes, sir.

THE COURT: All right. That then brings us up to the point of closing arguments and instructions on the law and the charge.

Let me ask the State -- first of all, let me -- are there any specific requests to charge from the State?

Let me tell you a little bit about what my charge is. My general felony charge would include burden of proof, presumption of innocence, and reasonable doubt. The reasonable doubt charge that I use, and I believe y'all had Judge Baxley here last week. I don't know whether he tried anything or not, but I generally use Judge Baxley's reasonable doubt charge, which contains both language hesitate to act, but it also uses the language firmly convinced. So that is the reasonable doubt charge that I use.

In my view of the evidence in this matter, it is, as far as the substantive law is concerned, simply the murder charge. I don't believe there are any lesser included offenses. It would be either murder or -- guilty of murder or not guilty of murder, and I don't believe there are any lesser included charges involved.

And I will use -- basically everybody knows pretty much what the charge is, but basically one that's contained in Judge Anderson's book in Section 2.1 -- yeah, 2-1 is what I generally use.

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The other charges that I will use would be the direct and circumstantial evidence charge as set forth in the Logan case that came out August 14th of last year. I believe that's the appropriate circumstantial evidence charge now.

Expert witness.

And, of course, the defendant not testifying.

Are there any other special requests on behalf of the State?

MS. LESKANIC: No specific requests, Your Honor.

Could you read your circumstantial evidence charge or summarize that?

THE COURT: Yeah, it's State v. Logan, Opinion No. 27296. I don't have the exact site of it, but that's the one that the Supreme Court has recognized at this point.

MS. LESKANIC: And I have a copy of that now, Your Honor, Mr. Harbin provided me. Thank you.

THE COURT: Okay.

MS. LESKANIC: Nothing further from the State.

THE COURT: Anything further from the defense, Mr. Harbin?

MR. HARBIN: Yes, sir, judge, we would ask not -- I'm not -- I'm going to admit I'm not a hundred percent sure about this, but if the State's theory is that Winter Wingard was attacked outside of [redacted] that the fact that

Joey was in the trailer, the fact that he was there, does not make him guilty. So based upon that, based upon their assertion that that's where they think she was exactly attacked at, I would ask for a mere presence charge. My understanding it's not like an accomplice, or an armed robbery type situation, or anything like that, but they seem to be fairly specific as to where the attack occurred. So if the jury finds that he was simply there, but that there is no proof that he actually committed the act, I would ask for the court's consideration on that matter.

I don't know if you want me to --

THE COURT: What says the State?

MS. LESKANIC: Your Honor, the only thing is I think he is saying he wasn't there. The presence is appropriate for someone who says that they were there, but they didn't participate in it. I --

THE COURT: Well, I think what Mr. Harbin is saying, and I may be wrong, but I think what he's saying is that the defendant does not deny being at [redacted] but he denies being at Mikes Creek. Is that right?

MR. HARBIN: Well, he certainly denies being at Mikes Creek, but I think to be more specific so the court can make its ruling correctly is that my client does not deny being at [redacted]

The State has made allegations that Ms. Winter --

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I guess the res gestae of her murder began at [redacted] that she was attacked at [redacted] That would be the mere presence there.

And so I believe Ms. Leskanic was trying to make a distinction between being at [redacted] inside the home as opposed to being at [redacted] outside the home, and I'm happy to -- you know, to allow the court simply to make that distinction, but I do not have --

THE COURT: No, I can't do that, because I think if I do that, then I'm commenting on the facts.

MR. HARBIN: Okay. Oh, I didn't mean to the jury, but for you to tell me whether or not mere presence is appropriate under those circumstances.

THE COURT: I do not think mere presence is an appropriate charge in this case. He may have been present in the home, but -- and that would be one factor, but that's not presence at the place where the State's theory that she was attacked, which is outside, so I would respectfully deny the request to charge on mere presence.

MR. HARBIN: Yes, sir.

The second -- actually it would be the third. I was going to do the Logan thing, but the second would be spoliation of evidence; specifically as it relates to the video system that existed at the time. I believe there is a different video system now at the detention center.

I questioned Detective Burgess specifically about whether or not he bothered to document, to save the document, as it would relate to the video capture of the alleged confessions, the alleged conversations that are -- or the meeting. I guess everybody is sitting at a table or they are not.

The statements that were entered into evidence by the State, they all give different versions of the same encounter; in other words, one person says "I was sitting at a table playing cards with the --

THE COURT: What's the testimony -- what's the evidence about the video?

MR. HARBIN: What I would have -- what I was asking Detective Burgess is "can you give me the video that existed at the time so that you can show the jury?"

"I verified that this dude actually talked to your client, that he was actually there."

And so because they don't have the witnesses proffered, they didn't put the witnesses on the stand, they didn't document any of their reliability, one of the questions that the jury would legitimately have is where is the video.

THE COURT: Was there testimony that all of it was videotaped?

MR. HARBIN: My -- that would only -- that would

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be through my questioning, "did you get --

Now, I would argue that he acknowledged that there was a video, yes, but he didn't say "I have a video. I threw it away." He --

THE COURT: Well, obviously he's not going to say that, but my question to you is was there -- was there video -- is there testimony in the record that there was actually a video made of these interviews and never produced?

MR. HARBIN: No, I apologize. Not the interviews where they gave statements.

THE COURT: All right.

MR. HARBIN: There is a video system that I believe back then ran on maybe a thirty day loop, or something. I can't remember. It's not the same. They have a digital one now and they had a different one three years ago, but my understanding -- I don't know if Major Padgett is here to kind of correct us, but my understanding is that there is a video, there a video of the -- because E-Unit is basically this huge room, as Ms. Leskanic described, so there are videos at various areas that would document whether or not indeed these encounters happened, which was my specific questioning to --

THE COURT: Well, my question to you is, is there evidence in the record that there was an operational video

that did this at the time that it was done and -- in other words, there can't be any spoliation unless there was a video made. So if there was no video made, then there can't be any spoliation.

Now, what's the evidence in the record that a video was even made?

MR. HARBIN: I believe that the evidence in the record will be my colloquy with Detective Burgess.

THE COURT: I don't much care what your statements are, but what were his answers?

MR. HARBIN: His answers were did -- I said did you -- and this would have to be something that the court would infer from his answers, because he didn't say "there was a video. I didn't save it." I grant you that and I'll grant the State's position that that's what the State's position is, but I asked him "is there a video system?"

He says "yes."

I said "did you bother to check the video and save that video?"

He said "no."

He didn't say -- now, I will grant you he didn't say that whether or not, you know, there wasn't a video because it only saves it for thirty seconds, or anything like that. He simply denied even trying to go review the

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video or save it.

THE COURT: All right. Madam Solicitor?

MS. LESKANIC: Your Honor, and we may have to ask Mr. Watts, but I believe he did ask Detective Burgess about whether he verified through video whether these people actually spoke to Mr. Clark while they were in E-Unit, and he didn't know.

He didn't ask him or lay any foundation for what type of video system the jail has, whether it was operational that day, whether it actually records or it just has live feed. I think any mention of that, even in closing argument, is very prejudicial and improper statement of the facts.

I certainly don't think a spoliation charge is appropriate to handle this issue right now.

THE COURT: Well, that's what we are addressing right now.

MS. LESKANIC: Then I do not feel that spoliation is appropriate.

THE COURT: Let me see your request to charge, Mr. Harbin.

MR. HARBIN: Judge, this was copied and pasted from the South Carolina Judicial website.

THE COURT: All right. My recollection of the testimony is that there was no testimony in the record that

there was actually a video system in place that recorded the conversations in that particular area, or in any particular area in the jail, that would have established or refuted the statements that were made by the defendant -- I mean by the jailhouse confidential informants.

To be a spoliation of evidence, the proper foundation and proper questioning has got to be asked if the evidence existed at the time and was lost or destroyed by a party, and I'm simply thinking there is no evidence in the record of that.

I would -- I was a little bit surprised, Mr. Harbin, that the statements came in as to what they said without the individuals coming forward, but be that as it may, that's neither here nor there as far as this question is concerned.

In my view there is no evidence in the record to establish that there was evidence which the State had or made that was either lost or destroyed and I would respectfully deny the motion for a spoliation of evidence.

MR. HARBIN: Thank you, judge.

A collateral issue would be one that Ms. Leskanic brought up, and I certainly don't want to run afoul of the court. I would plan on mentioning the questioning to Mr. Burgess in reference to that subject matter.

THE COURT: I think you can comment on whatever it

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is reasonably inferable from the testimony, and she will have the right to make an objection if she does not think it is reasonable inferable from the evidence, or you can meet it head-on in your argument, if you want to. It would be up to you.

MS. LESKANIC: Thank you, Your Honor.

THE COURT: Okay. Let's talk about arguments. Anything else, Mr. Harbin?

MR. HARBIN: No, sir.

THE COURT: All right. Let's talk about arguments for a moment.

With the defense not having presented any testimony, the defense has the right to last argument. The State would argue first. You just have one argument and are you going to make it?

MS. LESKANIC: I'm going to make it, Your Honor.

THE COURT: How much time do you need?

MS. LESKANIC: Thirty to forty minutes.

THE COURT: Okay. What about you, Mr. Harbin?

MR. HARBIN: That's probably about right.

THE COURT: All right. I don't -- I'm not real strict on time, but when I first got this job eighteen years ago in trying to a little garden variety automobile wreck case that I thought the argument could be made in about ten minutes, and fifteen at the most, fifty-five minutes later

the defense lawyer was still going strong, so I made it a practice to ask lawyers how long they need.

When I was practicing law and trying cases I never liked to argue against the clock anyhow, so I'm not going to really be real strict about it, but let's say let's keep it within forty minutes. If each side would keep it within forty minutes, that ought to be sufficient time for this case.

All right. What I will plan to do then, counsel, would be to bring the jury in, allow the defense to rest on the record and then advise the jury that the only two things remaining to be done are the arguments of counsel and the instructions on the law and that we would go into that at this time.

Anything else you can think of that we need to do on behalf of the State?

MS. LESKANIC: May I just have a moment to grab a couple of exhibits?

THE COURT: Yeah, I'm going to take a few minutes and let you get your thoughts together and get your arguments together. I want to see Mr. Kendall and see about what he's got planned and let's --

What I would like to do, if at all possible, my charge, since we don't have just one offense, it probably will be about thirty minutes, so I would like to get this

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matter to the jury about one o'clock. In the meantime I'm going to have the clerk go ahead and give the jury the lunch menu and let her go ahead and order that and plan to have lunch here around one o'clock.

Madam Clerk, so if you will take care of that now.

Let's be ready to start back at a quarter of twelve with closing arguments.

(Whereupon, proceedings were recessed)

(Whereupon, proceedings were reconvened)

THE COURT: All right. We are back on the record in the matter of State versus Joey Clark.

Mr. Clark is present with his counsel.

The State is present and represented by the Seventh Circuit Solicitor's Office.

Counsel, one thing I didn't go over with you or didn't show you is the verdict form. I have it right here, if you would like to step up and take a look at it.

(Whereupon, the lawyers approached the bench for an off-the-record discussion)

THE COURT: At the bench conference counsel have agreed that Court's Exhibit No. 1 and 2 can go to the jury. Normally Court's Exhibits would not go to the jury, but counsel have agreed that Court's Exhibit No. 1 and Court's Exhibit No. 2 can be included in the matters taken to the jury.

Do you agree with that, Madam Solicitor?

MS. LESKANIC: Yes, Your Honor.

THE COURT: Do you agree, Mr. Harbin?

MR. HARBIN: Yes, sir.

THE COURT: All right. Are we waiting on the victims?

MS. JORDAN: Yes, sir, if I may check outside.

THE COURT: Check on them and see.

(Off the record)

(Back on the record)

THE COURT: All right. I'll bring the jury in.

Mr. Harbin, I'll call on you to present anything that you wish to present on behalf of the State -- I mean on behalf of the defense, and we will go from there.

Bring the jury in, please.

(The following takes place in the presence of the jury panel)

THE COURT: All right. Thank you, ladies and gentlemen. Thank you for your patience while we attended to the matters that we needed to attend to before we could go forward.

You have heard the State announce that they had rested and now the defense would have the right to present any evidence or testimony to you that they wish to present.

Mr. Harbin?

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MR. HARBIN: Defense rests, judge.

THE COURT: All right. The defense has announced that they have rested as well.

That means, ladies and gentlemen, that you have heard all of the testimony in this matter and all the evidence has been presented that will be presented to you, and there are only two things remaining to be done. Those are the arguments of counsel and the instructions on the law by the court.

I will tell you now, as I did at the first of this case, that the arguments of counsel are not evidence in this case. They are simply the lawyers views of what they think the evidence shows. You will decide this case based upon the evidence that you have heard from this witness stand and from any exhibits that have been introduced into evidence and not on the basis of what the lawyers say the evidence -- or what the lawyers say in this matter, but the lawyers do have the right, not only the right, but the duty on behalf of their client, to give you their views of the evidence.

When they have completed their arguments or closing summations to you, I will then instruct you on the law of South Carolina as it pertains to the facts in this case as you may find those facts to be, after which you will be allowed to retire to your jury room to deliberate your verdict.

You will hear first from the solicitor on behalf of the State, and then from the defense counsel on behalf of the defendant by way of argument.

Madam Solicitor.

MS. LESKANIC: Thank you, Your Honor.

May it please the court?

THE COURT: Yes, ma'am.

MS. LESKANIC: Good morning, ladies and gentlemen.

You have sat patiently and paid attention since Tuesday, and on behalf of the State and on behalf of Winter and her family I thank you.

You are here today and you will receive this case today to determine whether you were firmly convinced that Joey Clark killed Winter Wingard on December 2nd of 2010.

You have heard a lot of circumstantial evidence and I'm going to go over with you what circumstantial evidence is. And you have heard a lot of DNA evidence and fiber evidence, but let me start with the simplest thing.

When Joey Clark was in jail, he confessed to fellow inmates that he killed Winter Wingard. He confessed to people in the cell block with him that he killed her. "I stabbed her. She was butchered." Thirteen stab wounds in the neck. She was butchered. Nobody knew that except the police and the person who did it; Joey Clark. There is no other explanation. That's the simple place to start.

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That's not where the case began, but that's easiest place for you to begin.

On December 2nd of 2010, police were called out to Mikes Creek Road. About 3:30 in the afternoon a passerby sees a dead body. They arrive there to see a beaten, strangled, stabbed, bloody woman naked on the side of the road. She had no ID. They have no idea who she is and they have no idea who did this to her, but they began their investigation and they began their search for the truth, and that search led them time and time and time again to that man. Everything they found pointed to that man; her ex-boyfriend.

You heard from Beverly Patrick. Winter was done with him. He had been kicked out of the house in October. Winter wanted nothing to do with him. She had a girlfriend; Anna Mooney. That's who she wanted to be with.

We had to let Anna come in here and read these text messages. And I apologize. That's probably a different world for some of you. It was a different world for me. All of the texting, the language that is used, the graphic descriptions, but, ladies and gentlemen, that's the way you get into somebody's state of mind. What are they thinking at that time.

I would love for have Winter to have survived, what he did to her on December 2nd. I would love to have

been able to call her to come up here and tell all of you what he did to her, but he made sure I couldn't. He made sure that the one witness to what happened could not come in and speak.

So investigators worked and worked and worked to find the truth. They didn't know who it was. They didn't even know who she was. This wasn't a plan to pin something on someone. This was an investigation to do their job and they did it very well and to find the truth. They requested these text messages and, like I say, y'all heard these. He, the defendant, did not want Winter to be with Anna Mooney. He didn't want her to be with anybody else, but he definitely didn't want her to be with Anna Mooney.

We know from the text messages he sent her voice mails supposedly of he and Winter having sex. He is sending voice mails to another girl about he and Winter supposedly engaged in sex. Now, Anna said it may have been a porno. It's not a video, it's a voicemail, but he's doing that; "go away, we are having sex." It didn't work.

Okay. "She has AIDS and I have AIDS. Go away." You know that? That wasn't working either.

"You a brim swimming with sharks. You are looking for trouble."

And at one point he says "stupid, stupid." This is in the late evening and early morning hours of December

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2nd, around the time that Winter was murdered.

And at 2:01 a.m. "oh -- his text is "oh, you just got me in trouble. Winter was mad. Why do you keep interfering in my life. I told you to go away. I told you I don't want to be with you any more. Stop texting my girlfriend."

When Beverly went to bed that night she said Winter had a temperature of 103 or 104. She cared enough about Anna and was so tired of what the defendant was doing, she was willing to call 911 to get an address to the hospital to go get a blood test to prove to Anna that he was a liar. She didn't have AIDS, but he would not stop interfering.

And we know that he knew about 1544, which was actually the telephone number that was given by the 911 operator to the hospital. The last four digits were 1544, and he writes to Anna Mooney "1544, stupid, stupid."

So one of two things. Either he thinks Anna Mooney is in Gaffney and maybe that's her address; or, because he's in the house, he hears that that's the address for the hospital, and by gosh, she's going to go to the hospital, sick with a fever, in order to prove to this girl that she doesn't have AIDS and it wasn't going to happen.

And I tell you, ladies and gentlemen, you can read through the text messages. If he thought that was Anna

Mooney's address, Winter Wingard was not going to see Anna without some of his semen in her mouth. You will read that in the text messages. I don't even want to say the things that it says, but it would say how certain things taste on your mouth. They are crude, they are graphic, but he wasn't going to let Winter go.

You know she called 911 at 2:03 a.m. asking for that address.

At 2:06 he writes to Anna, "love the address at 1544 stupid."

At 2:11 is his last text message and it's to Anna Mooney. "You love pain more than me. I'll send you something in the morning," and that's the last we hear from him.

At 2:14 Winter was attempting to respond to a text sent by Anna.

Anna wrote her at 2:12 and said "marry me Winter."

And Winter had typed the letter "I". The message was sent. It was never received. It was interrupted because the phone was taken from her, the battery was removed because it wasn't going to happen. He had enough.

He told one of the inmates we had been arguing for several days. Been arguing about Anna and it wasn't working for him.

At 2:14 you never hear from Winter Wingard again.

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Ever.

But you know what? This is where I want you to use your common sense. If, like he told Beverly, she went to get a pack of cigarettes, 104 temperature, two o'clock in the morning, he's going to be leaving for work around 4:30 or 5:00, why didn't he just get cigarettes on the way to work? Why are you going is send your sick girlfriend out to get you cigarettes? Because that's not what happened.

And do you think looking at all of the text messages that if she really went to see Anna Mooney and he let her go to do that, that there would not have been a lot of text messages? There is no way he was going to let Winter and Anna be together and not be sending text after text after text. He couldn't leave Anna Mooney alone when he was in the same house with Winter. He certainly wasn't going to leave her alone if he thought the two of them were together. He knew she wasn't with Anna, because he killed her. He had taken aware her form of communication. The phone was found in the backyard of the house. The phone is one place, the battery is in another.

2:14 a.m.? Who is with her at 2:14 a.m.? That man. That's the only person that is with her.

What is all over [redacted] Red dirt. Yeah, there is red dirt all over Cherokee County.

I'm going to show you another one of the backyard,

but you will have these exhibits back there. Their backyard, where the phone is thrown, covered in red dirt. Grass can grow on red dirt and a lot of places are covered with grass, but at this house it wasn't. It was just red dirt. Not the dirt found at Mikes Creek Road, but it is the same type of red dirt that had both her fingerprints on the vehicle. She made it to the car at some point. She had already been down in the dirt. Her exposed body had been in the red dirt, and I can't tell you the exact sequence of events. Winter could, but I can't, but I can still tell you what happened to her. Her body was exposed to that red dirt. Her phone was taken away from her and made where she couldn't communicate with Anna any more.

At some point he made her perform oral sex. He left the semen deposited in her mouth, because it's still there on December 3rd of 2010, at noon, when Dr. Ross performs the autopsy, and it stays in the body longer when you are dead. So it happened close to death.

After she's down in that red dirt and he's down in that red dirt she gets to the car. She's got her fingerprints on the car, both hands. And his palm print possibly around her neck at that point pulling her away.

We know she was strangled. Dr. Ross testified to that. She has petechiae in her eye. That means to cut off the flow of blood. This doesn't have to be noisy, ladies

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and gentlemen, and it didn't have to take long. Choking, it's personal. You are up close and personal, possibly looking at him in the eyes when he did it. It's not a stranger killing.

We've got her prints on the vehicle in that red dirt that Investigator Henson told you about. She made it to the vehicle at some point, but guess who was there to stop her? Joey Clark.

She was beaten in the head. She was beaten in the face. She was beaten in the chest. They were close. It was personal. Blunt force trauma to the head, could be caused by a fist. Rendered her unconscious. Rendered her dead. It's up close and personal.

She's in the vehicle bleeding. We know that. Her blood is on the passenger's side of the vehicle. She wasn't driving. She never got to drive. If she had been in that vehicle to go somewhere, she would have called Anna. She would have text Anna. She couldn't. Her phone was gone and her life was being taken away.

They go to Mikes Creek Road, just a few miles and just a few minutes away from [redacted] You know what? It's an isolated single lane, dirt road, pitch black. It's a great place to put a body, and he drug that body, got her out of the vehicle and he pulled her body. And as Dr. Ross stated, this mark on her back either happened as she was

taking her last breaths or when she was already dead, but most likely at the time of dying.

Blunt force trauma. Blood in the vehicle. Take maybe five to ten minutes to get to Mikes Creek Road going the speed limit. No traffic at two o'clock in the morning.

And then just to make sure, thirteen stab wounds in the neck. It's personal. It's passion. It's anger. It wasn't necessary. She is dead anyway, or very close to it. That is passion and that is personal and that is at the hands of Joey Clark.

Now, as he is pulling this body in the dark it's hard to see a barbed wire fence, but he hit a fence and he climbed over that fence. And when he did, he left clumps of fiber from his Wolverine boots. Beverly said they are not Winter's. They are in a closet. There wasn't none of his other clothes were. He lives in North Carolina. I specifically went over that with Detective Henson. He had moved out. They were done with him, but his boots are here, so they get a search warrant. And the same fibers, the same type of fibers from these Wolverine boots are found in clumps on two strands of barbed wire right above Winter, indicating climbing over the fence. Michael Moskal testified the clumps indicate direct contact. Not the wind blowing and something catching on the fence. Direct contact with his boots.

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Detective Henson did a fantastic job and Cherokee County should be glad to have he and Billy Anthony as their crime scene investigators. When Detective Henson went out to that body, not knowing anything about anything, he knew that when he was moving towards the body he bumped into briers and the tree limb. And he said if I did, the killer may have, and so he took those. And lo and behold 99 percent of the population would be excluded as possible contributors to DNA left on the briar and tree limb. You know who is not excluded out of 99 percent of the population? That man right there, the one that we know was the last one with her, the one that didn't want her leaving, the one whose dirty hand print, palm print is on that vehicle. His DNA is at the scene. The fibers from his boots are on the wire, and he confessed.

The vehicle has to be parked within walking distance of [redacted] He has to get back. His vehicle is there. So it's parked about over six hundred feet away from the residence, and the keys to the vehicle are found pretty much in the direct line from where the vehicle was parked. You walk through a field in the backyard, the keys are put there. Common sense, who is going to put the keys in the backyard of [redacted]? But you know what? You just killed somebody and things are going probably a little haywire in your mind, I would think. Oh, gosh, I got out of the car.

I got these keys. It's pitch black. I got to get back to the house, throw them out, and that's where they're found, because he had to get back, because he had to tell Beverly she went for cigarettes and tell her Anna Mooney about it. Anna Mooney lives in Georgia.

He's the one that locates this vehicle, over six hundred feet away. Sunset on December 2nd was at 5:15. It's one of the shortest days of the year. The owner of the vehicle, Ms. Patrick, "that's not my vehicle."

"Yeah, yeah, that's yours."

Do you know how he knew it was hers? Because he left it there.

"But maybe if I contribute to the investigation, I won't be a suspect. Maybe I need to get my truck to be able to leave as soon as Beverly gets her car back." She couldn't tell it was hers over six hundred feet, through trees, and he knew that was her vehicle? Only because that's where he left it.

I don't know if you have kids. You ever do an Easter egg hunt and you kind of try to lead them where you need them to go, because you know where you had hidden something? Let's look over here. That's all it is. It's the same thing. He knew where it was. Let's look over here because I remember where it is. Nobody else can see it.

He left work at 1:30 that day. He didn't see it

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then. He had time when he was with Beverly. He didn't see it for all that time he came home and he was alone. He left work early on December 2nd because he was sick. Killing somebody will make you sick. Beverly didn't have a vehicle. She didn't have a way home. You know what? With all the texting and talking he didn't say "hey, I'm getting ready to leave. Do you want to go with me?" Uh-uh, he needed to leave alone and he had time alone to do whatever he needed to do.

Mr. Briggs testified that he saw the GMC vehicle parked near his house in the location where he discovered it at three a.m.. Winter's last text was trying to be sent at 2:14. At three o'clock the vehicle was back. The vehicle has her blood in it and he's returned and there is plenty of time. The killing would take minutes and the drive time would take minutes. A lot happened to Winter, but it doesn't mean it took a long time for it to happen. Unfortunately it doesn't take long to strangle someone and to beat them about the head and face, to drive them a couple of miles down the road and dump their body. He had plenty of time. But for someone to have plenty of time and to have that vehicle parked at three a.m., he had to be with her from the start. There wasn't time for anybody else. There was time for Joey Clark.

He told Beverly -- and they went to the sheriff's

department four -- they had even positively identified that it was Winter. They hadn't told Beverly it was her daughter who was left on the side of the road. Joey told her "I can't believe somebody would throw her out like a piece of trash," like all the trash he dumped her out with. He knew she had been dumped out with trash and with trash, because he put her there. He said that before police even said "you know for sure that's your daughter."

"I can't believe somebody would dump her out like the trash," like garbage, but that's where he dumped her. He knew. He knew how twenty-six year old Winter Wingard took her last breath of her life. He took that from her.

Ms. Patrick had to come up here and testify for you, ladies and gentlemen, and it's been a long, almost four years with her to have to come up and deal with this. I appreciate the fact that she could come and testify.

You are going to hear from Mr. Harbin. He's going to get to talk to you when I finish, but I don't get to stand back up again. There are things I'm sure that I would like to say towards his comments he's going to make. I have talked to you about the inmates statements. He may make some comment about. Well, the police didn't produce a video, whatever there testimony, there was a video. Or he may say there was an unidentified print inside the vehicle. It wasn't the same type of print. It wasn't the red dirt

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print.

You have heard a lot in a short amount of time. I ask you to think through it and to use your common sense. You know what she said at 2:14. No one else had a motive.

Her purse that was found in the vehicle, had credit cards and over $92 in cash. It wasn't a robbery. It was personal.

He is going to talk about the low DNA, 1 in 96, and 1 in 3,700. Different ways DNA can get there; direct transfer; secondary transfer. That's right. It wouldn't match 99 percent of the population, but it fits him. Use your common sense.

This is -- a lot of this case is circumstantial evidence. How do you know? We don't know. I can't tell you whether he beat her in the head first or he strangled her first, but I can tell you he did it.

There is a judge that uses an example of circumstantial evidence that I want to try to give you an idea of what that is, because you don't have the key witness who can come here and tell you. You go to bed one night, the stars are shining, everything looks good. You go to sleep, and you sleep well throughout the entire night. You don't wake up. You wake up, you feel rested in the morning, and you look outside your window and you see puddles in the driveway. You see puddles in the road. You see water

dripping off the leaves. You didn't hear it rain, and you didn't see it rain, and you don't know whether it started really hard or it started soft, but you know it rained. You are firmly convinced of that. That's circumstantial evidence.

No one can -- you didn't see it happen and I can't bring up somebody to tell you this is exactly what he did to her in this order, but you put all the pieces of the puzzle together and he's guilty. He did it.

Murder is the unlawful killing of another with malice aforethought. That means you kill somebody. It's not in self-defense, and you have malice, which is a wicked heart and an intent to do evil. It's not premeditation. A lot of people think murder requires premeditation. It doesn't. You have to intend it at the moment that you deliver the blow. That's it.

At the moment that he strangled her, at the moment he beat her in the head, the moment he stabbed her, that's malice. It's a wicked and evil heart. That's the heart of Joey Clark.

On December 2nd, 2010, Winter Wingard was in the hands of Joey Clark. Today, ladies and gentlemen, she's in yours. Find the truth and find him guilty. Thank you.

THE COURT: Mr. Harbin.

MR. HARBIN: Thank you, judge.

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THE COURT: Yes, sir.

MR. HARBIN: Ms. Leskanic.

My grandfather used to have a saying that said when you are holding the hammer, everything looks like a nail. What he meant by that was once you had your mind made up, everything ceases. You are going to think that it's just proven. Once you have an idea, you exclude the things that prevent the possibility of that idea. You just look for things that you want to see. That's what happened in this case.

Detective Burgess got on the stand and he's admitted as much, that as soon as he saw this note, or whatever, this 1544 thing, I'm not exactly certain of the significance of why he decides that he's focusing on Joey at that point, but Joey is a suspect. That's the saying. He said -- I said "when was it?"

"That was the night that they reported Winter missing."

So that's how much information he had. He was the boyfriend, or the ex-boyfriend, or the live-in roommate, or whatever he was, but Detective Burgess had made up with his mind with that tiny little amount of information.

And Police 101, you follow the evidence right here. You don't build the case around a hypothesis and that is the problem with this case. It's everything that the

State has presented to you is viewed through the lens of well, Joey is guilty, so this must mean this, right?

But let's give credit to the State that I get that there is probable cause to believe that Joey committed the crime. I mean, they presented to you evidence. I mean, I'm not trying to insult your intelligence, but there is evidence that suggests that he could have done it, but this isn't a probable cause hearing. Probable cause is what you need to get arrested, so I can understand that he got arrested, because, you know, he is an ex-boyfriend, or a boyfriend, or a roommate, which I don't really think that's been decided here. And arguably he could have been jealous. I mean, I get that. I'm not going to deny that that is the circumstances to consider, but we are here to decide a much greater burden of proof here.

Let's address what I think, anyway, as to the two best pieces of evidence that the State has, the two things that I'm convinced really is why the State sunk their teeth into this and to the idea that Joey is guilty. And let's look at them, because maybe that explains why they just kind of refuse to look anywhere else. And let's give credit where credit is due for whatever evidence.

So the DNA evidence, I think that the State simply misunderstands what this DNA means. If any of you all, or anyone, goes home and is intimate with their significant

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other, when you are done, you are going to have that person's DNA on you. That's just fact. Their SLED person admitted as much.

When you are naked, you have all of your body exposed, where it had been exposed when you were having sex, and so, therefore, you increase the probability of a raw part of your body - skin, whatever - touching something else and, therefore, transplanting not only your DNA, but the person who you were just intimate with, their DNA.

Now, I will take a side and say I have no idea who the third person's DNA is. No idea. Although, I could guess that perhaps it's Beverly, because she lives there. She's in constant contact with her and her things. They touched the same things. They sit on the same couch. They lay on the same bed even sometimes, so perhaps Beverly's.

If she had seen Anna recently, perhaps it's that. That doesn't mean that Anna was there at the crime scene. The State I believe has presented good evidence that Anna wasn't there at the scene. It could have been Anna, because maybe that's the last person she was intimate with before she was with Joey.

You might jump around here a little bit. You might wonder, well, you know, Beverly seems to say that they weren't together any more, they weren't intimate any more, that Anna certainly would assert she was the girlfriend and

that Joey was not the boyfriend. I don't know. We don't know. I would encourage you to look through the texts, however, and right about the 1:30 mark on December 2nd, right after the night of December 1st, you will see about a twenty minute gap in time where Anna and Winter had been furiously texting, as all three of them had been furiously texting all day or all night, and there is twenty minutes that are just gone. And you will see that Anna sends a couple of texts; "where are you," or sends a question mark. She's mad that Winter has not returned her text. And when Winter does finally return her text, she says "oh, I had fallen asleep." All right. So she said she had fallen asleep for about twenty minutes.

During that same time Joey sends a text to Anna indicating that he had just had sex with Winter. Now, I find that a difficult coincidence to believe once that's probably true.

Now, you get to decide from your own experience whether or not you believe Anna, whether you believe Beverly, whether you believe the texts, right. The texts will tell a story. So you will get to decide whether or not it seems plausible that that would have happened.

I would argue that the tone of the texts over the day -- you will get to read all of them. We didn't read all of them aloud, but the texts that came back -- that will

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come back with you into the jury room, the State just assumes that they are all very like violent and mean spirited, and certainly there was animosity. I don't think that Joey particularly liked Anna. I don't think Anna particularly liked Joey. She said as much, but this was a text war. This was -- you know, this is a texting thing. I mean, there is just -- it's juvenile, right? I mean, you are -- they are exchanging barbs about, well -- you know, I don't need to repeat them, but, you know, how does things taste and the other things, right, so it's juvenile.

It's not necessarily angry, because it occurs to me that the State just presumes all of this anger, this, you know, violence, rage. I mean, this is a -- this is an incredible event here. And the State kind of invents this incredible amount of emotions where I don't know that there is any evidence that it exists. And so the DNA that the State will claim proves that Joey was on the scene of the body here, on Mikes Creek Road, is just as easily explained, and, in my opinion, more likely explained by the fact that he had just recently had intercourse with Winter.

Now, let me go further into that that what is the likelihood that someone commits this act, this crime, and that the only three places, because there were three places on the scene where Joey's DNA was found --.

And, by the way, they bagged and tagged and

submitted all kinds of stuff to SLED, and these are the only three. I know y'all are probably bored to tears, as I was, reading all of those numbers that Detective Henson had bagged and tagged all that stuff and submitted it to SLED. They literally left no stone unturned.

The only three times that Joey's DNA appears on the scene is in a mixture with Winter's and some third person's. Now, again, I just simply have no idea who the third person is. We can all guess.

Isn't it more likely, significantly more likely, that because of the manner in which that DNA was found and packaged with the other two profiles of DNA that Winter simply had Joey's DNA and maybe Beverly, maybe Anna, whoever, and that that's how it got there? What are the chances that Winter's DNA just, you know, rubs off on the limb and then Joey's rubs off only on that limb, only right there where Winter touched it? And then somehow magically another third person puts their DNA right at the exact same place too? That doesn't make any sense to me.

And I was appreciative that, although Ms. Leisy works for SLED, that she's a law enforcement agent, and obviously a prosecution witness, but she was honest with you; yes, secondary transfers exists. Yes, it is possible. Yes, it is a greater possibility when there are bodily fluids being excreted, like sweat when you would be having

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sex. Yes, it's a greater likelihood that the DNA transfer could occur, the secondary transfer could occur if you have more body parts exposed. Of course, Winter was naked.

Now, it's certainly a piece of evidence to be weighed by you, but I don't think that evidence certainly by itself survives any weighing as getting beyond a reasonable doubt. If you can't explain how the third party got there, then I don't think you can rely on Joey's DNA being there to tell you anything, right?

And I don't know if you followed my questioning with Ms. Leisy, but if the State's theory was that there were only two people there, Joey and Winter, then one of them had to carry someone else's DNA, right? It's just a logical impossibility that that's -- someone had to.

Now, I think it was suggested that maybe the DNA was just there, which that would be incredible, that somebody had gone along and touched the same limb and then an hour later this happened. That I think is just too incredible of a possibility.

So even under the State's theory, if they are right, if they are right that Joey takes Winter here, and, therefore, his and Winter's DNA is on the scene, one of them had to transfer this other third person's DNA to these objects.

The point of telling you that is that under their

theory secondary transfer is not only possible, it's pretty much required to explain the existence of the third person. So it would be difficult for them to, therefore, argue that secondary transfer would not be a plausible explanation for why Joey's DNA is not there. It took me awhile to wrap my brain around that, so hopefully together y'all can make sense out of my argument.

The other piece of DNA -- excuse me one second.

(Off the record)

(Back on the record)

MR. HARBIN: The other piece of evidence that I think is -- I would evaluate as potentially the strongest piece of evidence by the State would be the statements by the jailhouse witnesses. Okay. So let's start by asking where are they? If the State's honestly believed that these were reliable people, wouldn't they have put them on the stand? Why didn't they put them on the stand?

How is it that the lead investigator on a murder case can simply forget how this first informant, Mr. Phillips, "Skeet" as they called him, how he came to inform law enforcement that he had heard this? That is -- you know, I hesitate to say -- I grew up in Florence and my mom always told me you would never call somebody a liar. So I'll say maybe he couldn't, I don't know. Maybe it's just a mistake, but it's difficult for me to understand how that's

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possible, to put it that way. If you are a professional, your job is to build cases. Your job is pay attention to the details. And I ask you where does this informant come from that came out of nowhere? Joey was in jail for not having a license, and you don't think that it would stick out in an investigator's mind how it came to pass that this informant revealed himself?

I want you to look at the statement and read it carefully. It also doesn't read like an informant's statement. It reads like a newspaper report or a police officer. "Twenty-six year old white female from Florida." There is not a jailhouse informant in the world that talks like that. He also gets the background. Wasn't arrested for DUS, and you don't get arrested for DUS when you take a cab.

Now, whether there were other officers involved in the interview, maybe Detective Burgess doesn't remember, because he didn't remember a lot of things. Maybe everybody wasn't on the same page initially about how much information was being given out to informants, I don't know, but the idea that you have this informant come out -- and you have essentially at that point is December -- Winter is killed on the night of December 2nd; discovered December 2nd, afternoon. Joey is arrested the next day. Y'all think that was coincidence, right? Arrested the next day, put in jail

on a no driver's license ticket, in jail. Not written ticket, put in jail, and then magically within twenty-four hours he's confessed to murder.

Then when you get that confession, when you get this earth shattering piece of news, you don't go back and actually ask the three fellows that's mentioned in the statement. That is incredibly unlikely, or suspicious, or incompetent. I don't know which one, but it doesn't make any sense. Why would you not run, literally run, to go talk to these other three people? The statement says they're sitting at a table and Joey says this. At the very least go ask them. If they say go jump off a bridge, fine, document it, but Detective Burgess admitted he didn't even try. And, in fact, from the stand it appeared that it didn't even occur to him.

"How do you know Mr. Phillips? How do you him."

"I went to high school with him."

Maybe he's too comfortable with Mr. Phillips and he let's stuff slip, I don't know.

At that point in the trial I believe that the State was having you believe that there were no public information available about this, and yet we find out through the coroner that there was a press release that contained almost every detail that the statements had, except the stabbing. So the State has got to hang their hat

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on the fact that they know that there was a stabbing there. I'm not convinced, based upon the performance on the stand, that Detective Burgess can guarantee that he didn't let that slip. I would not make an accusation that he did it on purpose, but I cannot, based upon what he told you, how he acted and what he remembered and how well he seemed to be organized, that he did not let that slip somehow.

The other three -- there is five statements. There is three statements that essentially don't say he confessed to anything. They say "what are you in here for," and he says "I'm in here for killing my wife," or, "killing my girlfriend." They have different versions of it, so I don't know how they all heard the same thing.

And then one of them even mentions "well, Skeet Phillips came in here screaming he stabbed her up." Well, that kind of taints the rest of the statements, doesn't it? I mean, if you have one person screaming this, well, now your informant is yeah, yeah, he did that. That's where they got their information from him, from "Skeet" Phillips. His statement was twenty-four hours before these other ones, right.

The one I find most interesting, fascinating actually, is Michael Stillwell's statement. You can read it when you get back there. Michael Stillwell says that Joey said he killed Winter, in so many words, but then he offers

a very specific set of facts. He said that Joey had been arguing with Winter for days. And y'all -- the statement will tell. Don't believe me, but they are arguing in the kitchen, or he picks up the knife in the kitchen and he stabs her in the kitchen. Now, we all know now that didn't happen, for a number of reasons.

Number one, do you really think that Detective Henson actually missed the blood in the kitchen? You know -- or missed like, you know, a whole bunch of cleaning solvents and fluids and stuff to cover up where there would be blood?

Number two, we had experts say that she was probably stabbed, almost certainly stabbed, at Mikes Creek.

So why is that relevant you ask? "Mr. Harbin, why do I care?" Maybe that one guy was lying, I don't know. But I -- the way that that really, really affected my view of Detective Burgess is that I asked him, I said "so Mr. Stillwell was wrong?" And I think he said "yeah." I think he agreed with me.

And then I went one step further and I said "would you go so far to say that he was lying?" That was very interesting, wasn't it? He said "no." He said no, because of the totality of the circumstances.

And I can't remember if I asked him a followup question or he just continued to talk, but then he went

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unprompted. I didn't ask him about this, unprompted. He began talking about this note, this note with 1544 on it, and how he had focused on Joey as soon as he had saw the note. And I said "when did you see the note," kind of rehashing with it here. "I saw it on December 2nd."

And he went even further. He said "well, that just sort of got me thinking, get me thinking that this -- I mean this happened in the kitchen. It started in the kitchen." The only person that you heard from, the only person who thinks this has anything to do with the kitchen is Detective Burgess. Don't you find that odd?

So a jailhouse informant gives a statement with an incorrect version of events from a confession and it just so happens to jive with the theory that Detective Burgess had made out of whole cloth. That's where Michael Stillwell got that detail. Again, whether by accident, I'm not willing to make that accusation, or a purposeful act, that is really neither here nor there, but that's where he got that bit of information.

In sum total, the informants at the jail, their testimony is entirely without merit. And if it was, they would have put them on the stand. You don't know whether they got the oath, whether they didn't. We don't know that. They didn't put them on the stand. You don't know how they sounded, whether or not they were intelligent enough to put

two words together. You don't know. You do know that the statements sounds suspicious somewhere along the way, especially with the police type.

Be skeptical. I asked you to be skeptical at the beginning of this trial. There is a reason. Those I believe are the two biggest points that the State had to make. And I believe once you actually look at them from a distance, oh, yeah, it's impressive, DNA on the scene, he confessed. Once you actually look at it, they are way less impressive, much less impressive.

Now, going back to this idea that Joey was arrested for not having a license. Now, I'm hoping that none of y'all take that for granted, that tidbit. That's not an unimportant thing. The idea here is that the police developed a suspect and they built their case around that suspect. They did not follow individuals leads, as Ms. Leskanic would have you believe, and so to engineer this possibility of a case, what they do is they pick him up on what everybody else would be let out of the jail for. Just write a ticket, come to court, we will figure it out later. He's stuck in jail. He's incarcerated. And then magically there is all this informant testimony. It just doesn't happen that way, folks. It doesn't make any sense.

And let's think about that one step further too. Joey is in jail for not having a license and then he

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confesses to murder. Now, the State would have you believe well, you know, he hadn't even been charged with murder. Well, I think he's smart enough to know he's not in jail on a no driver's license ticket. He's already talked to Detective Burgess. You know Detective Burgess has already made up his mind that he's guilty. You would have to be an idiot not to figure that out. Why are you stuck and eating with these folks when you just have a no driver's license ticket? So when asked, you know, this is a possibility where maybe part of this statement is true. When asked "what's you in here for?

"I'm in here for killing my wife."

Maybe they leave out the part where the police think I'm killing my wife. That makes much more sense than the State would have you believe he just confessed.

Now, that leads me into Beverly's testimony. I told you at the beginning of this trial what happened to Winter is an awful thing and it's an unforgivable evil act, and the loss that her family and friends suffered, I don't want to ever know how that feels. And I know that it must be horrible, and so that I give Beverly Patrick a wide amount of leeway with what she remembers and how she remembers, taking into account that the only people that she's been talking to for the last three years about this case are law enforcement that have their own particular set

of beliefs about this. So when she characterizes Winter and Joey's relationship a certain way, I take it understanding where she's coming from and how much hurt she must be feeling. I did, however, notice some kind of inconsistencies in her story. You know, on one hand she would have you believe that Joey is this awful person that just refuses to leave and that he's causing all these problems, but she's drinking with him and eating pizza and just casually riding up to North Carolina with him drinking moonshine.

The day that they find -- the next day, I guess, that they find the truck, he is doing yard work with her. That spoke to me a little bit. Why would you be -- somebody who you are trying to get kicked out of your house, why are you allowing him to do something like that? Why don't you say "hit the road, jack. You know, I don't need you here." She didn't need him there for to go to work. She could have arranged a ride the next day. I say that to mean that I don't know that Beverly's recollection of that relationship is exactly how it was.

Now, I'm not arguing whether or not Winter had broken up with him, or they were friends with benefits, or just roommates that occasionally were intimate, I don't know, but it doesn't make sense that the way she described Joey, that she would kind of casually be doing these things

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with him.

The story about Joey's standing over the bed, that's just strange, and I asked her about it. Why -- that's a big deal. That's creepy. If it happened that way with -- and the manner in which she claims it happened with the relationship being as broken as she claimed it to be, wouldn't that be a really big deal? I mean, you are in the bedroom. That's -- she's kind of acting like it's, you know, Joey get out of here. And, again, I don't want to beat Ms. Patrick up, because she's gone through enough, but I think you have to understand that prism through which she remembers all of this stuff and who she's been grilled and interviewed by over the last three years. And then she just comes to believe that Joey Clark was guilty perhaps because she needs something, at least closure, then I -- I'm not going to be angry at her, but I don't know that her testimony is quite as strong as it would otherwise be.

No witnesses to the crime. No weapon.

I asked if there was a pocket knife taken from my client. No testing. They didn't mention it at all. I think we can probably take for granted that wasn't the murder weapon, or they would have told you about it. They didn't match the stab wounds and that kind of thing.

No time of death. There is no time of death. That's kind of important, right, because they claim that

this has to happen before three o'clock. They have a forty-five minute window between 2:14, or something like that, and three o'clock. If they can put a time of death a little bit after that, it blows their whole theory out of the water.

Their theory, by the way, was just made up out of thin air. If we go back to Detective Burgess and this altercation was supposed to start in the kitchen. There is no evidence of that. And then come outside of [redacted] with no evidence of that. And she gets the red mud from [redacted] which apparently in Detective Burgess' mind is the only place in Cherokee County with red mud. And I don't say that to be flip. I say that to get you in his head. He has -- he seems -- the idea -- the concept that there is red clay everywhere in Upstate South Carolina seemed to escape him. There is not red mud at Mikes Creek. Okay. I get that, but he is assuming for the sake of his argument that Joey took her to Mikes Creek. So Joey had to assault her where there was red mud there.

Did they tell you whether there was red mud where the GMS was parked? If Winter drove the GMC to where it was found, and somebody assaulted her there, and then removed her there, did they tell you whether there was red mud there? I mean, it was only less than a half a mile away, I guess. Probably similar terrain, right? I mean, this all

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appeared to be kind of farm clear-cut area that was later moved into.

And why is there black dirt at Mikes Creek? And you can use your common sense for this. I'm no expert, but there is black dirt where there is water. That's what happens. There is more fertile soil where there is water. But as you move away from the creek, you get back to where everything else is red mud. Did they bother to tell you how far down the road you have to go to see red mud, if there was? Is it that hard to believe that there would be red mud within a few yards of where she was? Could there have been a struggle at Mikes Creek where she collected red mud, because -- or red clay. I'm calling it red mud. Red dirt, red dust, whatever. They didn't cover any of that, because it was never a possibility. It just never entered their mind, so their case was being built around their theory that they already had.

There are multiple investigators in this case that we didn't hear from, ones that might have been important, ones that did the witness interviews, that we want us to believe the informant testimony, if somebody was there, put them on the stand. They are law enforcement agents. That's what they get paid to do, but they are not here. I wonder why. I don't know why, but they are not here.

Why was SLED called in? Why was SLED called in?

There is no involvement of an outside agency. There is no conflict of interests. There is nothing out -- you know, there is one citizen and another citizen living in Cherokee County and SLED was called in. Not only was not explained, that agent didn't testify. I don't know that that really has any bearing on guilt or not, but it's interesting.

I mentioned Beverly Patrick's testimony a little bit ago and she had said very specifically that she had had three shots of moonshine. And I asked her about that. I was a little -- I'm not a big moonshine fellow, but it occurs to me that nobody drinks three shots of moonshine just by itself. You might sip moonshine. You might be drinking something else and take a shot of moonshine. It's very odd that you take three shots of moonshine. And she admitted, well, maybe I had a beer, and that's fine.

And she said under oath that she was not drunk, that she did not go and pass out, and she was -- I mean, I don't know if she was asserting she was sober, but she was not -- she was relatively okay. That is important, right, because under Detective Burgess' theory there was this altercation outside. And where he was -- where the -- everything you saw was it's right outside Beverly's window, so she's not passed out drunk, there had to be noise. I mean, had to be. And not to be indelicate, but Winter was a large woman, and so she had the ability to fight back to an

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extent. I mean, I don't -- I don't expect her to, you know, prevail in any particular type of physical altercation, but enough where she's got to yell or two out something, right? Were any of the neighbors talked to at all? Did we have any evidence whatsoever of anybody hearing anything? If -- but to do nothing than to confirm that there was some type of noise and altercation that particular moment or at that location. You see, they are just assuming that that happened and they have zero proof that anything happened. I think there was a hair band found where you park your car every day. And, you know, I'm married with two kids and stuff falls out of my car almost every time I open the door, and that's my fault, because the car is messy, but things fall out of cars doesn't mean that there was an attack. And there was no evidence on the particular item that there was an attack, just that it was there.

The keys that were found in the backyard, the State has a very particular set of circumstances in which they imagined Joey committed this crime. And then so under their theory he walks from this GMC back to the trailer and he chunks the keys on the way. I believe Ms. Leskanic suggested he's in the heat of the moment and he simply just doesn't think about the fact that he's kind of carrying back with him evidence, which makes sense, right? So you throw them in the field behind your house.

Ms. Leskanic also asserts that when he gets off of work early, that he's going to do something, going to cover something up, right? Why not pick the keys up? Nobody home. Go pick the keys up. Go pick the phone up. If that's the way it happened -- I mean, if Joey is kind of concocting all this stuff, go pick the keys up. The cell phone records, you can check them. They seem to indicate he was at home after he had got off work before he went to go get Beverly. Why not go pick the keys up. They didn't offer that because it doesn't fit with their theory of the case. It's just a theory. That's all it is, it's just a theory.

And let's talk about the text messages too. So the State would have you believe that after drinking moonshine, which they didn't harp on it, so I don't know if they think that he was drunk, or super drunk, or not drunk at all, but he was drinking moonshine, and then something incredible happened, kills Winter, deposits her body at Mikes Creek, drives the car back, has the foresight I guess to park the car somewhere away from the house to suggest something. I don't know what that is to suggest. Then doesn't have very much foresight when he throws keys in the field and doesn't go back and get the keys, by the way, the next day. But by five o'clock, or so, in the morning he has decided apparently in his genius to start calling and

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texting Winter pretending to be concerned about her. That takes a pretty decent amount of planning. It takes a pretty smart fellow to do that, right? Because he hasn't been accused of anything yet, hasn't been caught, doesn't know anybody is even expecting that. He is covering his tracks, I guess. That's got to be the State's theory. What's the explanation for the texts?

And so you follow those texts, not only does he find, you know, where are you Winter, you know, please come back, call Anna. Text Anna. Anna, I know she's with you. Tell her to get back. Please come home. Not only does he do that, he actually goes so far as to get into another argument with Anna about whose -- you know, about whose girlfriend she is or about whatever. I mean, he gets back to the levels of deception that would take to orchestrate that. If it were true, if he was simply innocent, it's astounding. That's a smart dude, a calculating dude, right? It's not the same dude that confesses to informants in twenty-four hours. It simply doesn't make sense. The State cannot have it both ways. He's either an idiot or he's a genius.

The question that I asked Detective Burgess about the Channel 7 News crew, there is no evidence that there was Channel 7 News crew, and I acknowledge that, because my questions aren't evidence, and the judge will tell you that.

My questions are not evidence, but answers are. Answers are. This isn't a big town. It's not a huge police department, and if there was a news crew there, Detective Burgess would have known. And if there wasn't, he would have known that too. And so think about what his answer was when I asked him "why was the new crews called?" His answer was somewhere along the lines of "I don't know." It wasn't "I don't know what you are talking about. There was no news crew." It's important.

And what was the followup question by the State? It wasn't that it didn't happen. It was "did you call the news?"

"No, I didn't call the news."

So the implication I believe that you are allowed to extrap from that was there was a new crews there. That was December 4th. That was two days before he was arrested for murder. That sounds like a case that's being built. The sheriff can't wait for people to know that he's got his guy and the news shows up.

The only thing I can say about Anna Mooney's testimony, just read her texts. I don't think that she's incredibly valuable to this, because, you know, she wasn't there. She's didn't see anything. She can say "well, Joe was mad at me. I was mad at Joey." But there are some facts that are very interesting, if you kind of go through

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them one by one. There is even a text where she out of the blue text Joey, "you know, I'm not straight guy. I'm bi." That's just really weird, right? Why would you do that? And I say that to point out that there was an interesting dynamic between these three. I think that Winter, and maybe Joey, maybe Joey -- maybe Anna as well, some combination, they just kind of enjoyed the drama that came along with this fighting over Winter. That was kind of part and parcel of that. I mean, that's just adding fuel to the fire. It's not that State's theory where it's this burning or rage. You know, I need to kill somebody over this. This was just a -- you know, maybe Joey is the kind of a roommate who occasionally had sex with Winter. I don't know, but the State has concocted this rage and this need, you know, what would cause a person to do something this like out of whole cloth. They take what is not evidence to be something violent and makes it violent just kind of out of the blue.

And what was the trigger point? I mean, they had gone through breakups before, so Joey hadn't, you know, come to say himself to be a violent person. He was asked to move out and hadn't moved out, right? Didn't fight it. Didn't get in a big mess over it, so they just assumed that this was the breaking point, I suppose.

Joey handed over his cell phone to Detective Burgess, right. I mean, he said that. He said, you know,

he asked and he voluntarily give his cell phone. Yeah, well, that's just a piece of evidence. You are guilty, you don't really want to hand over your cell phone. You want to hold it at least long enough to get a warrant and go erasing stuff.

The boots, the Wolverine boots. So I don't understand a couple of things. Number one, how does a boot, inside of a boot, get on the top strand of a barbed wire? You know, if you are pulling a body, as they think -- maybe you come into contact with the bottom tier. How does it get on the top tier? And so you might ask how does any boot get up there? Well, it doesn't have to be a boot. Wolverine, I'm sure all of y'all know, or at least one of y'all, and y'all can ask each other when you get -- you can use each other's common sense when get into the jury room. Wolverine is an enormous company. It makes thousands, if not hundreds of thousands, of boots. And I would venture to say that half of the male population over the age of fifteen in rural Cherokee County has a pair of Wolverines, or something very similar.

Also keep in mind that Wolverine probably doesn't manufacture the cloth that is inside the boot. They probably order it from a third-party vender that sells that cloth to another company and another company. Perhaps they make coats. Perhaps they make hats, gloves, whatever. It

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doesn't seem to make any sense that the boot fibers, the inside of the boot fiber, is on this barbed wire.

Also he said specifically I can't tell you it's from his boot, and they didn't even to offer to like show you the boot, well, this is, you know, the place where we tore it from. I think he even said he cut it out, so there is no way for you to -- I mean, there is nothing that actually shows you that.

Let's imagine that if the boot did reach this top barbed wire, wouldn't that mean that the person was falling over the fence? I mean, your boot gets caught, I guess you are trying to climb the fence. They have a theory that somebody is climbing the fence. Maybe where they got their boot. Wouldn't you fall down? You have been drinking moonshine. You can't be that athletic, so wouldn't you fall? Wouldn't you have your DNA everywhere, probably on Winter?

Speaking by the way, did anyone mention that they swabbed Winter's body? You know, I mean that's a huge surface area, to try to discover some evidence that they just didn't do.

Fingernail clippings before I forget. If there was this big struggle outside of the trailer, and Winter is a large woman, there is a likelihood that she would have defended herself at least at some point, right? And what is

likely to catch underneath your fingernails but somebody's DNA, somebody's skin, somebody's blood. So two problems with that. Number one, they didn't test it because it could have said there is a whole bunch of DNA here from somebody that ain't Joey Clark. They didn't test it. Thought they had a good case without it, why showing somebody else.

Number two, there's no mention, not a single one of any defensive wounds on Joey Clark. Not a scratch. The coroner said Winter weighed 260 pounds and was 5'7", or 5'9", I can't recall, and not a single set of defensive wounds. Not a mark. All of these horrible bruising around her shoulders and her face is just -- I mean, she's pummeled to death literally and there is no mark on Joey. There is no blood found anywhere.

Whoever stabbed Winter had blood all over their shoes, by the way. How do you not get blood on your shoes? Look at those boots and you tell me if there is blood that spattered -- I mean, you saw spatters everywhere. How are you washing that off? The shoes are dirty. Their theory doesn't hold water.

THE COURT: Five minutes.

MR. HARBIN: Yes, sir.

We went through the cell phone -- I'm sorry, the black T-shirt -- the black McCabe T-shirt going to tell you that there was leaves on it. It was tested. Nothing.

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Whatever clothing somebody wore, it had something on it. I mean, they had to drag Winter. There was nothing on that T-shirt. That T-shirt wasn't there.

The toxicology. The 911 tape, she's slurring her words. She is under the influence of something. We don't know. That doesn't mean she deserves to die, but if you get a toxicology report, what is it going to tell you? It's going to give you a level of whatever it was that was in her system, whether it was alcohol, whether it was painkiller, whatever it was. It's going to give you a level.

MS. LESKANIC: Objection, Your Honor. He's discussing -- may we approach?

THE COURT: Yes, come on up.

(Whereupon, the lawyers approached the bench for an off-the-record discussion).

THE COURT: Proceed. Limit the argument to those matters that are in evidence, or reasonably inferable from the evidence.

MR. HARBIN: Prints on the inside passenger glass of the GMC. The State wasn't going to tell you about that. I had to jump up and tell you. There is third-party print right where all the blood is. No mention of it. They don't care about it because it doesn't fit with their theory.

The comment that Beverly said that Joey made to her, I'm a little suspect of it to begin with. However, the

phraseology she used, she said that Joey said, "they threw her out like a piece of trash." That sounds remarkably like a good-cop bad-cop scenario to you, doesn't it? It's something that a cop would say when he's trying to get you to admit something and he's talking about what happened and Joey repeats that. It's not something that you come up with yourself when you are consoling Beverly.

I'll end with this.

Oh, one quick thing. Mikes Creek. Mr. Taylor said he lived over there. There is people that party there. There is people that congregate there. There is clearly evidence of that there, right? I mean, you saw pictures of random stuff around there. Why would you -- if you are going to go to the woods, go to the woods. Don't go to the woods where people congregate. It doesn't -- now, clearly somebody brought her there, so I understand that, but I don't understand how if their theory fits with, you know, take her a place where -- if you know where Mikes Creek is, I guess you know where people congregate and party. Why would you take a crime scene to Mikes Creek? It doesn't makes any sense. It's not well thought out. Like the text would be, he is a either a genius or he's an idiot. They haven't figured that did out yet.

The amount of semen in her mouth that I was talking to Ms. Leisy about. Simply pointing out that it's a

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very small amount, such as an amount that might be residual from having sex sometime ago; not having sex and then immediately killing her. It would be larger amount.

I don't dispute the certainty with which Ms. Leisy can tell you that it was Joey. I think the State kind of misunderstood a course of my argument. It's simply consistent with his version of the story, that would be through the text messages, right? They had the text before. There is a very marginal tiny little bit left in her mouth and that's where it came from.

Burden of proof. The State has the burden of proof here. They have admitted as much, as well they should, and I'm sure they welcome that burden.

There are several levels that we have in our system of justice. One is reasonable suspicion. Okay, reasonable suspicion is the lowest one, at least that I know of.

And then probable cause, maybe slightly above that somewhere. Probable cause is what you need to get a warrant. It's certainly less than fifty percent, because we have one for fifty percent, or at least over fifty percent, and that's called preponderance of the evidence, okay?

So probable cause is something less than fifty percent.

Preponderance of the evidence means that you are

at least more than fifty percent swayed in one direction or the other. I don't know if we are there yet in this trial. I understand that some of their things make sense to convince you that Joey did something, but a lot of it is unexplained and it really cuts down on whether or not I'm willing to go to the preponderance of the evidence.

Then you have one more level, which is clear and convincing. It's what -- well, it's what it means. It's clear and convincing. Ask yourself is there anything in this case that's clear? And after that is it convincing? Is it clear and convincing. Not just clear, not just convincing, but both, clear and convincing. I don't think they met that burden by a long shot.

And then above that burden of proof you have proof beyond all reasonable doubt. It doesn't exists here.

Joey Clark lived with Winter. Something horrible happened to Winter, and he was essentially the only idea, the only best guess that the police had:

He's innocent. Please find him not guilty. Thank you.

(Whereupon, at 1:10 p.m., the Court charged the jury panel)

THE COURT: Thank you, ladies and gentlemen.

Now I would ask that you give me your attention.

You have listened very patiently and attentively

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to the presentation of the evidence in this case and also the able arguments made by the solicitor on behalf of the State and by defense counsel on behalf of the defendant and I thank you for that.

It now becomes the duty of the trial judge under the Constitution of this state to charge and instruct you in the law applicable to this case, and it is your duty as jurors to accept and apply the law as the court will now state it to you.

As jurors it is your exclusive duty to decide all of the issues of fact in this case. And for that purpose to determine the effect, the value, the weight, and the truth of the evidence.

Both the State of South Carolina and the defendant have a right to expect that you will conscientiously consider and evaluate the evidence and apply the law of the case thereto to the end both the State of South Carolina and the defendant will receive and obtain a fair and impartial trial.

Now, when I use the word defendant, I refer, of course, to Mr. Joey Clark.

The State of South Carolina by the Bill of Indictment charges the defendant, Joey Clark, with the offense known in the law as murder.

And the indictment provides, in pertinent part,

that Mr. Clark did, in Cherokee County, on or about December the 2nd of 2010, feloniously, willfully and with malice aforethought kill one Winter Delane Wingard by causing blunt force injury to her head and/or sharp and blunt force injury to her neck and as the victim died as a proximate as a result thereof.

To this charge and to this indictment the defendant has entered a plea of not guilty. This plea of not guilty by the defendant places the burden of proof on the State to prove by evidence the guilt of the defendant beyond a reasonable doubt before you can convict the defendant and find him guilty.

The defendant, Mr. Clark, is presumed in the law innocent of the charge contained in the indictment.

It is a cardinal and fundamental rule of law that a defendant, irrespective of the charge against him, will always be presumed innocent of the crime for which he is indicted, unless and until the guilt of the defendant has been proven by evidence which satisfies the jury of his guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal theory. It is not just a legal phrase. The presumption of innocence is a substantial right to which every accused is entitled.

Our Supreme Court has declared that the

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presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant and it remains with him and assigns to him that class, the innocent, until that presumptive robe of righteousness has been stripped from his person by evidence satisfying you, the jury, of the guilt of the defendant beyond a reasonable doubt.

The presumption of innocence accompanies the defendant from the time of his arraignment and appearance in this court and continues with the defendant after you retire to the jury room to deliberate your verdict.

The presumption of innocence continues in existence to the benefit of the defendant until you, the jury, reach the conclusion that the State has proved the guilt of the defendant beyond a reasonable doubt.

The State is not required to prove the guilt of the defendant beyond all doubt or beyond every doubt, but beyond a reasonable doubt.

What is reasonable doubt? It is not an imaginary or fanciful doubt or a weak doubt. It is a substantial doubt. It is a doubt which the words imply, a doubt for which you can give or assign a reason based on the testimony and evidence in this case.

A reasonable doubt is not any sort of a doubt. You and I know from every day life experiences that you may have a sort of a doubt about any matter that arises, no

matter how trivial it may be or how serious it may be.

A reasonable doubt is the doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act.

Proof beyond a reasonable doubt is proof which leaves you firmly convinced of the defendant's guilt.

If you have a doubt for which you can give or assign a reason as to the guilt of the defendant, then he is entitled to a verdict of not guilty.

Reasonable doubt may arise from evidence which is in the case, or lack of evidence which is in the case.

You, the jury, must make the determination of whether or not reasonable doubt exists as to the guilt of the defendant.

The very fact, however, that the jury engages in a full and free discussion of the issue of guilt or non-guilt in this case with the normal conversational ebb and flow on these issues does not automatically mean that reasonable doubt exists in this case, or in any other case.

I charge you that the defendant is entitled to every reasonable doubt arising in the whole case.

If, upon any issue of fact essential to conviction and a verdict of guilty you have a reasonable doubt as to how that issue should be resolved, it would be your duty to resolve that doubt in favor of the defendant.

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A defendant, ladies and gentlemen, is not required to prove his innocence, but the State is required by law to prove every essential element of the offense charged against the defendant by evidence which satisfies you, the jury, of the guilt of the defendant before you can convict him and find him guilty.

If then, upon the whole case, you have a reasonable doubt as to the guilt or innocence of the defendant, he is entitled to that reasonable doubt and would be entitled to an acquittal and a verdict of not guilty.

But, on the other hand, if, upon the whole case, you find the State has proven by evidence which satisfies you, the jury, of the guilt of the defendant beyond a reasonable doubt, then in such circumstances it would equally be your duty to convict the defendant and find him guilty.

Now, I instruct you that the indictment in this case, which I have in my hand, is not evidence and cannot be considered by the jury as evidence in the case. The indictment is simply the formal written instrument which contains the charge against the defendant and it serves as the formal document by which this matter is brought to trial.

During this trial each of us, you and I, have certain duties to perform.

As the trial judge, it is my responsibility to preside over the trial of this case, and I also have the duty to rule upon or pass upon the admissibility of evidence offered during the progress of the trial.

You are to consider only the competent evidence before you, and you are to disregard and disabuse from your mind any testimony ordered stricken from the record of this case, if there be any, and you are to consider only the testimony which has been presented from this witness stand together with any exhibits admitted into the record of this case and any stipulations that counsel made into the record.

I have the additional duty to charge you the law. As the presiding judge I am the sole judge of the law in this case, and it is your duty to accept and apply the law as I now state it to you. If you have a preconceived idea as to what the law is or what the law ought to be and it does not agree with what I tell you the law is, you are obligated under your oath to abandon this preconception on your part, because you were sworn to accept the law precisely as I now state it to you.

In every case tried in this court before a jury the jury becomes the sole and exclusive judges of the facts of the case. You, the jury, are the judge of the facts in this case. The court is the judge of the law.

The Constitution of this state has declared trial

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a judge shall not intimate, state, comment upon, or make any statement to a trial jury about the facts in the case. Since you are the sole judge of the facts, you are not to infer from anything that I have said during the progress of this trial in ruling upon the admissibility of evidence, or otherwise, or anything that I say during the course of this charge to you that I have any opinion about the facts of this case. I do not. The law does not permit me to have an opinion about the facts of the case. This is a matter solely for you, the jury, to determine.

As jurors then it is your duty to determine, as I have stated to you, the effect, the value, the weight and the truth of the evidence presented during the course of this trial. Necessarily then you must assess the credibility of the witnesses who have testified in this case. Credibility is simply a legalistic term meaning believability. It becomes your duty then to analyze and evaluate the evidence and to determine that evidence which convinces you of its truth.

I charge you that in determining the question of credibility or believability of the witnesses, you may believe one witness as against several witnesses, or several witnesses as against one witness.

You may believe a part of the testimony of a witness and reject the remaining part of the testimony of

that same witness.

You may believe the testimony of a witness in its entirety, or you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited any interests, any bias, or any prejudice in the case.

And you may consider the demeanor of the witness; that is, the appearance of the witness on the witness stand.

And you may consider the opportunity for knowledge concerning those things about which a witness testified.

These considerations you do not exercise arbitrarily, but if in your good judgment there is sound reason in the record for so doing, because your objective, ladies and gentlemen, is to determine the truth, whether it comes from one or more witnesses. And in doing so, in exercising your mental processes and in determining what you consider to be the truth, the law simply requires that you exercise your good judgment, your common sense, your sense of logic and reason and your experiences in life. You then apply these attributes of ability to the evidence and determine what you consider to be the truthful evidence. And to these true stated facts, as determined by you, the jury, you take and apply the law as the court now states it to you and thus arrive at a verdict in this case.

Now, as I said, the defendant in this case is

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charged with the offense of murder.

What is murder? Murder is defined as the willful felonious killing of a human being by a human being with malice aforethought, that malice being either expressed or implied malice.

Section 16-13-10 of the Code of Laws provides murder is "the killing of any person with malice aforethought, either express or implied."

The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

The presence of malice is a required element of murder. Malice is defined as being hatred or ill will: Malice in its legal sense does not necessarily import ill will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.

Malice is the wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong.

Malice is a legal term implying wickedness and excluding a just cause or excuse.

The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that

exclude any legal right to do so.

Malice may be either expressed or implied. The word expressed or implied add nothing to the meaning of the word malice. They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exist, that is either by positive evidence or by inference.

Expressed malice is where there is a deliberate intention to unlawfully take the life of another.

Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life, or a reasonably prudent man would have known, according to common experience, there was a plain and strong likelihood that death would follow the contemplated act.

Now, the law says that if one intentionally kills another one with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise the inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case, and you may give it such weight as you determine it should receive.

A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument or object has been used as a

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deadly weapon depends upon the facts and circumstances of each case.

Now, although malice must be a forethought, there is no requirement that it must exists for any appreciable length of time before the commission of the act. It may be conceived at the very moment that the act occurs. There must be a combination of evil intent and the act producing the result.

Now, ladies and gentlemen, there are generally two types of evidence which were presented during a trial; direct evidence and circumstantial evidence.

Direct evidence directly proves the existence of a fact and does not require deduction.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence.

The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. However, to the extent that the State relies on circumstantial evidence, all of the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant

guilty beyond a reasonable doubt and this burden rests with the State, regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Now, there has been expert testimony presented in this case. Although lay witnesses are not permitted to testify about facts within their knowledge -- or are limited to testifying about facts within their knowledge and are not allowed to give opinion, certain witnesses, who by their training, education or experience are considered experts in a particular field may give their opinions on that field, based upon the facts and their conclusions. These opinions constitute evidence to be considered by you in connection with all the other testimony and evidence in this case.

You may consider the expert's opinion, just as you do all the evidence in this case. It is for you, the jury, to give it such weight as you in your experience and discretion may determine. You must weigh such evidence and accept or reject it in the same manner that you do all other evidence in this case.

Now, ladies and gentlemen, I will tell you now and will emphasize to you that the defendant in this case has not testified. This is his Constitutional Right. It is not a circumstance you can take into consideration or even allow to enter your discussions in the jury room.

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Under the Constitution of South Carolina and the United States Constitution it is the defendant's Constitutional Right not to testify. The burden of proof is on the State of South Carolina to establish the guilt by competent evidence beyond a reasonable doubt.

The fact that the defendant did not take the stand and testify in his own behalf does not create any inference against him. The jury must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussions or the deliberations of the jury in any manner whatsoever.

Now, ladies and gentlemen, I have about finished my instructions to you, but I would tell you that you are not partisans or advocates for the State of South Carolina or for this defendant. It has been often said that you do not serve on the jury to punish your enemies or reward your friends. Obviously such a perverted system of justice would be intolerable. You have been selected by both the State and this defendant as fair and impartial jurors. It is your duty then by your joint deliberations to determine the truth in this case, giving the defendant the benefit of every reasonable doubt on each and every issue and to then apply the facts which you find to be the truth in this case and apply the law to those facts, and thus arrive at a verdict which does speak the truth.

The word verdict, ladies and gentlemen, has a Latin derivative. It comes from the Latin word veradicto, which means to speak the truth. And when you have accomplished these responsibilities you will have satisfied your oath as jurors and you will have discharged your duty to this court.

Now I want to inform you on the forms of verdict in this case.

If the state has failed to prove the guilt of the defendant beyond a reasonable doubt, your verdict would be two words: Not guilty.

If the State has proven the guilt of the defendant beyond a reasonable doubt, your verdict would be one word: Guilty.

The verdict that you render in this case must be the verdict of each and every juror. It must be your unanimous verdict. All twelve jurors must agree on the verdict which you authorize your foreman to write.

Now, Mr. Foreman, I have prepared a verdict form for your use in the jury room and I'm going to go over it with you in just a minute, but I would tell you that the order in which I have put the possible verdicts on this verdict form has no significance whatsoever and you should not infer from the order in which I have put the possible verdicts on here that I have any opinion as to what your

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verdicts should be. I do not. The law does not allow me to have an opinion, but obviously I have to put something down first and something second. But across the top up here we simply have the State of South Carolina, County of Cherokee. And the court, the Seventh Judicial Circuit; the name of the case, the State of South Carolina versus Joey Lynn Clark; and verdict and the case number. And it says that "we, the jury, unanimously find the defendant Joey Lynn Clark concerning the offense of murder," either not guilty or guilty. You would put a checkmark or X mark whichever was the unanimous verdict of the twelve jurors in one of those two, sign here that you certify this decision was the unanimous decision of the jury and sign your name. Notify us and we will return you to the courtroom.

Now, I'm going to send you to your jury room. I'm going to ask that you not begin your deliberations just yet. There are certain matters of law which I now need to take up with the attorneys. If it is not necessary for me to bring you back in for additional instructions, the bailiffs will bring you the verdict form. They will also bring you the exhibits in this case, which you will have the right to look at or study for as long as you would like to. And also I have --

Has lunch already gotten here?

THE CLERK: Yes.

THE COURT: Okay. Lunch is in the jury room. You can do it either way you want to, Mr. Foreman. If you want to just stop and eat lunch before you begin your discussions, or you can begin your discussions and have a working lunch, but that would be up to you.

But if you would, just don't begin your deliberations just yet, because I have got to take some matters up with the lawyers. But when the bailiff comes and tells you it's time for you to begin your deliberations, you may do so. And notify the bailiff when you have reached a decision. A bailiff will be stationed outside of your jury room door for jury security during the course of your deliberations, and you just notify him whenever you are ready to return to the courtroom.

Now, with the exception of the two alternates, I'm going to ask the twelve jurors to go to your jury room and please do not begin your deliberations just yet. Thank you. You may go to your jury room.

(Whereupon, at 1:32 p.m., the jury panel went to the jury room, awaiting instructions to begin deliberations)

THE COURT: Additions or exceptions on behalf of the State?

MS. LESKANIC: None, Your Honor.

THE COURT: On behalf of the defense?

MR. HARBIN: No, sir.

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THE COURT: All right. Here is the verdict form. And if y'all will gather up the exhibits.

Just before I do let me talk to the alternates for just a minute. The purpose of drawing alternates is in the event somebody gets sick and is unable to serve. You have heard all the testimony in this case, but you are not going to participate in the decision, so I'm going to be able to excuse you from any further service in this case. I do want to thank you for your service, but it is necessary that we have alternates. And even though you have not heard or will not participate in the decision, I do appreciate the attention that you have given to this case.

I will tell you that once you have been excused as a juror in this case, there is nothing illegal about your talking with anyone about your service in this case. There is nothing illegal about anybody talking to you about your service. It is a practice of which I strongly disapprove and I strongly discourage, but it's not illegal. You have the right to talk with anyone, but you also have the right not to talk with anyone, and it's your call. If anybody wants to talk to you about it and you indicate that you don't want to talk to about it and they continue to harass you, you let me know, or let the court personnel know, and we will deal with them. I would ask that you not talk with anybody about it until after this jury reaches a verdict,

and you won't know when that is, so I would ask that you not talk with anybody about this matter until at least sometime tomorrow. But after that it would be strictly up to you as to whether you wish to talk with anybody or not.

This is the last case that we will need a jury for this week, so not only will you not have to be called back in or report back tomorrow, you are excused, not only from this case, but also for the rest of the week.

I want to thank you for your willingness to serve. I know that it's never convenient to serve on a jury, and I know you didn't have a lot of choice about being here, as you were subpoenaed to appear, but it is important that we have good citizens willing to come forward and serve when they are requested to do so.

Next week sometime you will get a small check from the clerk's office for your service this week, but it will in no way compensate you for the time that you have been up here, but it's a small token of our appreciation on behalf of Cherokee County for your services this week.

Also by serving on the jury this week you have met your citizenship responsibilities for jury service in circuit court, either Common Pleas or General Sessions, for the next three years. So if you were to get a summons from the clerk in the next year we couldn't even take you. You would actually be disqualified. The second and third years

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you have an exemption. You could serve if you wanted to, but you wouldn't have to serve. So you cannot be required to serve as a juror in the Circuit Court more than once every three years. Now, I can't help you with Federal Court or Magistrate's Court, but as far as Circuit Court is concerned, you can't be required to serve more than once every three years.

So with that you are excused from any further service. Again, thank you for your service and you are free to go.

(Whereupon, the jury alternates were discharged from any further jury service)

THE COURT: All right, counsel, I think the exhibits have pretty well been straightened out and everybody knows that we have got those straight and we'll hand those over. We are allowing those two Court's Exhibits to go back as well.

(Whereupon, at 1:50 p.m., the jury panel was instructed to begin their deliberations)

(Whereupon, at 1:51 p.m., proceedings were recessed, pending the verdict of the jury panel)

(Whereupon, at 3:13 p.m. proceedings were reconvened)

THE COURT: All right, we are back on the record with regard to the matter of the State versus Joey Clark.

Mr. Clark is present in the courtroom with his counsel Mr. Harbin.

The State is present and represented by the Seventh Circuit Solicitor's Office.

Counsel, I have been advised that the jury has reached a verdict in the case.

Is there anything before we bring the jury in, Ms. Leskanic?

MS. LESKANIC: Nothing from the State, Your Honor.

THE COURT: Mr. Harbin?

MR. HARBIN: No, sir.

THE COURT: All right. Let me caution everyone and I would tell you that -- of course, I do not know what the verdict is and no one knows what the verdict is, and I know this is an important matter to all of the people that are concerned here today. However, I am going to have to require that order and decorum be maintained in the courtroom room when the verdict is published. And if there is anyone who thinks that they cannot sit quietly without any shows of emotion when the verdict is published, then I would ask that you leave now.

(No response).

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

(Whereupon, at 3:17 p.m., the jury panel returned to open court to report its verdict)

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THE COURT: Mr. Foreman, I have been advised that you have reached a verdict, is that correct?

JURY FOREPERSON: Yes, sir.

THE COURT: Hand it up, please.

All right, from the standpoint of form, the verdict appears to be correct.

Mr. Harbin and Mr. Clark, if you could, if you would stand.

Madam Clerk, you may publish the verdict.

THE CLERK: State of South Carolina versus Joey Lynn Clark, Indictment 2013-GS-11-1167, we, the jury, unanimously find the defendant, Joey Lynn Clark, concerning the offense of murder guilty.

Signed by foreperson Brad Wilkins.

Ladies and gentlemen of the jury, if this is the verdict of you all, please indicate by raising your right hand.

Thank you.

THE COURT: You may be seated.

Mr. Harbin, anything before the jury is dismissed?

MR. HARBIN: No, sir.

THE COURT: All right.

All right.

THE CLERK: Can I get the foreperson to sign this?

THE COURT: Yeah, go ahead.

Mr. Foreman, the clerk is going to ask you to sign the back of the indictment that that is your verdict. So if you could go ahead and do that and then I'll give y'all some instructions.

(Off the record)

(Back on the record)

THE COURT: All right. Mr. Foreman and ladies and gentlemen of the jury, this will conclude your services in connection with this, and I will tell you that I want to thank you for your service this week. I make it a practice, however, to never comment on the verdict of the jury. In my view the role of the jury and the fact finding process is so important that the trial judge should not comment on the verdict of the jury, even after a jury has returned a verdict, and I make it a practice and policy never to comment on the verdict of the judge.

I will tell you that there was evidence in the record by which you could have reached a decision that you did.

This will conclude your services in connection with this matter and I'm going to discharge you in just a few minutes and I will tell you that once you have been discharged as a juror in this case, there is nothing illegal about your talking with anyone about your service. There is nothing illegal about anybody talking to you about your

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service. It is a practice of which I strongly disapprove and I strongly discourage, but it is not illegal. You have a right to talk with anyone, or you also have the right to not talk with anyone. And if you are approached and somebody wants to ask you about your service on this case and you don't want to talk about it and they continue to harass you or bother you, you let the court personnel know and we will deal with them, but it's your call. It's up to you as to whether you wish to discuss it with anybody or you don't wish to discuss it with anybody.

I will also tell you that the next phase of this case is the sentencing phase and we are going into that in just a few minutes. As soon as I discharge you we will go into the sentencing phase, and I know that very often jurors are interested in knowing what the ultimate outcome of the case is. And if you would like to stay after I discharge you for the sentencing phase, then what I would ask that you do is go downstairs, go across and come up and have a seat in the back of the courtroom and you could sit in on the sentencing phase, if I would like to, and I would assure you that you will be dismissed and allowed to get to your cars and go before anyone else is dismissed in this case. So if you would like to stay, you are welcome to stay, but you don't have to. You can go ahead and leave when I do discharge you, if you would like to.

I will also tell you that this is the last case this week that we are going to need a jury for, so you will not have to call back and you will be finished with your jury service for this week.

I want to thank you on behalf of the State and Cherokee County for your services this week. I know that it is never convenient to serve on a jury, but it is important that we have good citizens who are willing to come forward and serve when they are subpoenaed to do so, even though you didn't have much choice about being here, and I do appreciate your willingness to come forward and serve when you were requested to do so.

On the way out if you would like to stop by the clerk's office, the clerk has a small check for your services this week. It will in no way compensate you for the time that you have spent up here this week, but it's a small token of appreciation on behalf of Cherokee County for your services. The clerk's office is on the first floor, and there will also be a certificate for you to show that you served on the jury this week that you can take to your employer to show that you served on the jury this week.

I hope that you have found your service on the jury this week interesting and educational and that you have a better appreciation of our Criminal Justice System as a result of having served on the jury this week. I know all

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of you have seen trials on television, but I think that you have probably found things are a great deal different in real court than they are on television, but I do appreciate your service and I am going to excuse you now.

You can stop by the clerk's office and get the check and documents and come back into the back of the courtroom, if you would like to, for the sentencing phase, or you can leave. It would be up to you, but thank you for your service and you are free to go. Thank you very much.

(Whereupon, at 3:23 p.m., the jury panel was discharged from further jury service)

THE COURT: Motions on behalf of the defendant, Mr. Harbin?

MR. HARBIN: No, sir.

THE COURT: All right. Do you have a sentencing sheet?

MS. LESKANIC: Yes, sir.

(Off the record)

(Back on the record)

MS. LESKANIC: That's without the defendant's signature, Your Honor.

THE COURT: The defendant does not need to sign a sentencing sheet --

MS. LESKANIC: Yes, sir.

THE COURT: -- when there is a jury conviction.

MS. LESKANIC: Yes, sir.

THE COURT: Y'all come around, please, Mr. Harbin.

All right, Madam Solicitor, anything --

I know, of course, from this having been a jury trial that there are no matters that you felt like were 609 impeachment matters that could be brought during the trial, but what kind of criminal record does the defendant have?

MS. LESKANIC: Beginning in 1992, Your Honor, he has a conviction for robbery and assault and battery of a high and aggravated nature.

1998, failure to stop for blue light.

2001, burglary in the third degree.

2010, assault and battery third degree and open container.

And then related with this case, Your Honor, in 2010, a failure to maintain proof of insurance and the driving offenses.

THE COURT: All right. Mr. Harbin, is that the defendant's criminal record, as far as you know?

MR. HARBIN: Yes, sir.

THE COURT: All right.

MR. HARBIN: Judge, for the record, Mr. Clark just informed me he believed he was acquitted of the driving offenses, but I don't necessarily think that may be material to Your Honor's decision.

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THE COURT: All right.

All right, Madam Solicitor, the court will be glad to hear from the victim's mother, or anyone on behalf of the victim, if they would like to address the court.

I heard her testimony, of course, but under our law the Victim's Rights Bill does provide that the family of the victim can address the court, if they would like to, and I would be glad to hear from anybody that would like to speak on behalf of the victim.

MS. JORDAN: Your Honor, as you know, the mother, Ms. Patrick, is here, along with Winter's sister and Winter's aunt. They are present in the courtroom. They do not wish to speak to the court at this point in time. I think they are just nervous and very happy with the verdict, but they would ask the court to impose the maximum sentence.

THE COURT: All right. Anything further that you would want to present on behalf of the State?

MS. LESKANIC: No, Your Honor. I appreciate you sitting through the trial and you have heard and seen everything.

THE COURT: All right.

All right, Mr. Harbin?

MR. HARBIN: Judge, may it please the court, a trial guilty situation is an awkward call for a defense attorney.

My client, I believe he -- although he disagrees with the jury's verdict, I believe he's respectful of this court and their decision and understands what Your Honor has to do here today.

The facts in this case would indicate that Winter was killed over emotions, uncontrolled emotions, and it's not something where, you know, it wasn't for money or for, you know, for some kind of long term planned personal gain. And so I would ask the court to take into consideration that this was not the calculated move of someone that had, you know, planned something in advance for any other reason, other than I guess pure emotions, uncontrolled emotions clearly. So, judge, for whatever that offers to the court, I would ask you to take that into consideration and perhaps not give him the maximum sentence, if that is what the court saw fit to do.

THE COURT: How old is Mr. Clark now?

Mr. Clark, how old are you now?

THE DEFENDANT: Forty-three, Your Honor.

THE COURT: Forty-three.

Mr. Harbin, I would be glad to hear from Mr. Clark if there is anything he would like to say, but I would tell you that, you know, obviously anything that he says here in court is on the record and could affect any appeals in this matter. And if he does not wish to say anything, then I

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would not hold that against him, because I understand that is what the situation is.

MR. HARBIN: Yes, sir, I believe he's going to decline to speak, judge.

THE COURT: Okay. Is that correct, Mr. Clark, you don't want to say anything at this time?

THE DEFENDANT: No, sir.

THE COURT: He's been in jail since this happened, Mr. Harbin?

MR. HARBIN: Yes, sir.

THE COURT: And that would be December -- arrested when?

MR. HARBIN: December 6th, 2010.

THE COURT: The 2nd?

MS. LESKANIC: December 6th, 2010 he was served with this warrant, Your Honor.

THE COURT: When I was elected to this position about eighteen years, some of my colleagues on the bench told me that -- that had been on the bench some time told me the most difficult thing that we would have to do would be criminal sentencing. Nothing has changed in the last eighteen years that has changed that opinion by me and many others. It is the most difficult thing that we have to do.

We judges have no crystal ball. We can't see the future. All we can do is to impose the sentence that we

think is appropriate, based upon all of the circumstances, including the facts of the case, the individuals involved, including the victims and the defendants, and all of the other factors involved. Very often my sentence does not satisfy everyone. Sometimes it doesn't satisfy anyone. Nonetheless, we are charged with the responsibility of imposing what we think is the appropriate sentence, and that's what I'm going to do in this case. It will be less than a life sentence, but I will tell you, Mr. Clark, that there might be some hope sometime down the line, a long way down the line, you're getting out of jail, but the sentence -- that the crime of murder is classified as a violent offense. I'm sure Mr. Harbin can tell you what that means and how that affects your sentence. And also it is considered a most-serious offense under our law, which means that it is a no-parole offense and you have to serve eighty-five percent of whatever I sentence you to. So the sentence that I'm going to impose is going to mean that you are going to be in prison for a long time.

I don't think this was really a calculated crime on your part, but is kind of a crime of passion, but, nonetheless, that does not make it any less serious, and, of course, it's still the crime of murder.

Therefore, the sentence of the court is that the defendant is committed to the State Department of

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Corrections for a term of forty-five years.

He will be given credit for the time that he's served since December the 6th, 2010.

MS. LESKANIC: Thank you, Your Honor.

THE COURT: All right. Good luck to you, sir.

(END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 18th, 19th, and 20th days of March, 2014.

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

SEPTEMBER 26, 2014

Michael R. Watts
Circuit Court Reporter

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WITNESSES

Cherokee County Sheriff's Office

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 11-7-13

VERDICT

Guilty

Foreperson of Petit Jury
Date: 3/7/14

DOCKET NO. 13-GS-11-1167

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

vs.

Joey Clark

Indictment for

MURDER

SC Code: 16-03-0010, 0020
CDR CODE: 116
CLASS: FEL-EXM

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 NOV 7 AM 10 16
BRANDY W. MCBEE

ATRUE COPY
CLERK OF COURT
CHEROKEE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF CHEROKEE)

At a Court of General Sessions, convened on _____, the Grand Jurors of Cherokee County present upon their oath:

Murder

That Joey Clark, did in Cherokee County on or about December 2, 2010, feloniously, willfully, and with malice aforethought, kill one Winter Delane Wingard by causing blunt force injury to her head and/or sharp and blunt force injuries to her neck, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

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

Kimberly A. LeClaire
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Cherokee)
STATE VS.)
Joey Clark)
AKA:)
Race: W Sex: M Age: 43)
[redacted])
Address:)
City, State, Zip:)
DL#: SID#:)
*CDL: Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1101167
A/W#: 2013GS1101167
Date of Offense: 12/2/2010
S.C. Code § : 16-03-0010
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder [30 years to LIFE]

in violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/in/nor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As indicted, ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Deskanie Mahan 11883 SC Bar# 69723 Defendant [signature] Attorney for Defendant 70074 SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT to or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Since Aug 6, 2010.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corps ☐
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____

A TRUE COPY
ATTEST: CLERK OF COURT
CHEROKEE COUNTY, SC

*Fine:		$
§ 14-1-206 (Assessments 107.5%)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (If paid in installments)		$ 3.90
TOTAL		$ 133.90

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Brandy Kennedy
Court Reporter: Mike Watts
Presiding Judge: Howard P. King
Judge Code: 2107
Sentence Date: March 20, 2014

SCCA/217 (03/2011)

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ORIGINAL

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	
	)	
JOEY LYNN CLARK, **SCDC NO. 00187595**	)	**016CP-110509**
	)	
v.	)	APPLICATION FOR:
	)	
STATE OF SOUTH CAROLINA	)	POST-CONVICTION RELIEF PURSUANT
	)	TO UNIFORM POST-CONVICTION
	)	PROCEDURE ACT

1. Place of Detention: **Broad River Correctional Institute**

2. Name and location of the court, which imposed sentence:

Cherokee County General Sessions, 125 East Floyd Baker Blvd. Gaffney, SC 29340

3. Name of co-defendants: **NONE**

4. The indictment number or numbers upon which and the offenses for which sentence imposed:

Indictment No. **2013-GS-11-1167**

5. The date upon which sentence was imposed and the terms of the sentence:

March 20, 2014 45 years

6. The jury made a finding of guilty upon Mr. Clark's plea of not guilty.

7. A direct appeal was made.

8. (a) The name of each Court to which you appealed:

SC Court of Appeals, Case No. **2014-000797.**

(b) The result in each such Court to which you appealed:

The SC Court of Appeals dismissed the appeal on **August 19, 2015**

(c) The date of each such result:

The SC Court of Appeals made the decision on 08/19/2015 in an unpublished Opinion No. 2015-UP-433.

State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

1. **Ineffective Assistance of Trial Counsel, and Prosecutorial Misconduct**
   (a) Applicant was denied the right to effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, §3, and §14 of the South Carolina Constitution.
   (b) Applicant was denied the right to effective assistance of counsel when trial counsel allowed inadmissible statements to come in as a result of Crawford 541 U. S. 36, violations.
   (c) Applicant was denied the right to effective assistance of counsel when trial counsel allowed inadmissible SCRE Rule 802 Hearsay statements to be admitted during the trial.
   (d) The State committed **prosecutorial misconduct** in its closing argument, as well as in allowing Detective Richard Burgess to read inmate statements into the Record in the State's re-direct, and offered improper state of mind speculation during closing with no proper foundation.
   (e) The State failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim, and defense counsel Mr. Harbin failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested. **See Trial Transcript Pages 640 through 641.**
   (f) The State failed to perform DNA testing of cigar butts found in the yard at the victim's house, even though neither Mr. Clark, nor the victim and residents of the house smoked cigars. Defense Counsel, Mr. Hartman, failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested for DNA. **See Trial Transcript Page 278 Lines 01 – 03.**

This PCR Application presents questions of law or issues of fact requiring a hearing.

Mr. Clark files his PCR Application Pursuant to the holdings of *United States v. Cronic, 466 U.S. 648 (1984), Crawford v. Washington 541 U.S. 36 (2004), Crane v. Kentucky, 476 U.S. 683, (1986) State v. Gourdine, 322 S.C. 396, 472 S.E. 2d 241, (1996). State v. Belcher, 385 S.C.597 (2009), and Strickland v. Washington 466 U.S. 668, (1984).*

Per se prejudice, under the *Cronic* Standard, is appropriate because defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making the "adversary process itself presumptively unreliable."

11. State Concisely and in the Same Order the Facts Which Support Each of the Grounds Set Out in Question Number 10.

   ➢ **Ineffective Assistance of Trial Counsel and Prosecutorial Misconduct.**

As Mr. Clarke's PCR Attorney, I have reviewed the entire transcript and boxes of relevant discovery and pretrial materials in preparation for this PCR Application. I have also conducted very thorough interviews with Mr. Clark at Broad River Correctional Institution. This PCR Application is longer than other PCR Applications that I have done in the past. The reason for this is that previously, I was able to select fewer pertinent parts of the transcript as evidence of trial counsel's ineffective assistance of counsel. The circumstances of Mr. Clark's March, 2014 murder trial made it difficult to select isolated pertinent parts of the trial transcript regarding Mr. Harbin's cross-examination of Detective Burgess, as well as, Harbin's closing argument.

This was because the cross-examination sabotaged any chance that Mr. Clark had in getting a fair trial. Thus, it was necessary to include the majority of this ill-advised and disastrous cross-examination of Detective Burgess by Mr. Harbin. **The cross-examination errors were compounded by Mr. Harbin's trial strategy during his closing argument.** Mr. Harbin repeated most of the unsubstantiated allegations which were contained in the inadmissible inmate statements. Much of his closing argument had to be included because his closing argument reinforced the jury's impression that Mr. Clark had confessed to the murder of Winter Wingard.

- **Mr. Clark never confessed to the murder of Ms. Wingard.**

Mr. Harbin, in his closing, told the jury that there was evidence to believe that Mr. Clark committed the crime. No reasonable attorney would have employed this trial strategy. The inmate statements were read into the record as evidence by Detective Burgess during the Assistant Solicitor's redirect examination of Detective Burgess. **Moreover, Mr. Harbin failed to object to these inmate statements being admitted into evidence.**

- **Mr. Harbin never offered any objections during the State's Case in Chief.**

It was also apparent upon my review of the transcript, that the State offered testimony and evidence that required objections by Defense Counsel Harbin.

Mr. Harbin's failure to object left his direct appeal attorney no alternative other than to file an *Ander's* Brief because no issues were preserved for appellate review.

- **This failure not only prejudiced his direct appeal, it was prejudicial ineffective assistance of counsel at trial.**

For example, in the Trial Transcript, on Page 275, Lines 1 – 8, Assistant Solicitor Ms. Leskanic asked Investigator Jimmy Henson the following question:

> Q: Why did y'all go back again to the residence?
>
> A: Investigator Jimmy Henson: Let me see. Detectives kept getting information, and I believe they had gotten some information from inmates from the jail where Joey Clark was locked up and they got enough information that we needed to go back out and look into the kitchen area.

- Defense Counsel Harbin never objected to any of the references to the inmate's statements.
- **Moreover, Mr. Harbin failed to object to the State's improper closing argument.**

In the Trial Transcript, during Assistant Solicitor Leskanic's closing argument on Page 599 Lines 19 – 22, the Assistant Solicitor told the jury the following:

"When Joey Clark was in jail, he confessed to fellow inmates that he killed Winter Wingard. He confessed to the people in the cellblock with him that he killed her. "I stabbed her. "She was butchered."

Mr. Clark never confessed to killing Winter Wingard.

Ms. Leskanic, in her closing argument, on Page 603, Lines 22 – 24, again referenced the inadmissible inmate statements.

- **Mr. Harbin sat in silence and failed to object.**

- **The Assistant Solicitor committed prosecutorial misconduct when she impermissibly bolstered and impermissibly vouched for the credibility of the crime scene investigators and again told the jury that Mr. Clark confessed.**

Ms. Leskanic, during her closing argument, on Page 601, Lines 5 –9, in the trial transcript stated the following to the jurors:

"So investigators worked and worked and worked to find the truth. They didn't know who it was. They didn't even know who she was.

This was an investigation to do their job and they did it very well and to find the truth."

Ms. Leskanic, during her closing argument, on Page 608, Lines 1 –15, in the trial transcript, stated the following to the jurors:

> **Detective Henson did a fantastic job and Cherokee County should be glad to have he and Billy Anthony as their crime scene investigators.**
>
> When Detective Henson went out to that body, not knowing anything about anything, he knew that when he was moving towards the body he bumped into briars and the tree limb. And he said if I did, the killer may have, and so he took those. And low and behold 99% of the population would be excluded as possible contributors to DNA left on the briar and tree limb. You know who is not excluded out of 99% of the population? That man right there, the one that we know was the last one with her, the one that didn't want her leaving, the one whose dirty handprint, palm print is on that vehicle. His DNA is at the scene. The fibers from his boots are on the wire, and he **confessed.**

Generally,"[t]he assessment of witness credibility is within the exclusive province of the jury." **See:** *State v. McKerley,* 397 S.C. 461,(Ct. App. 2012).

Thus, a solicitor may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. **See:** *Vaughn v. State,* 362 S.C.163, (2004.)

A solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." **See:** *Matthews v. State,* 350 S.C.604(2002).

- Thus, the solicitor's statements were improper and objectionable.

Mr. Harbin sat in silence and failed to object to this impermissible bolstering and vouching of the crime scene investigators' efforts.

- **The State committed prosecutorial misconduct when it impermissibly allowed Detective Burgess to read the inmate statements into evidence.**

The State cannot presume that Defense Counsel Harbin's opening of the door with his cross-examination of Detective Burgess allowed the State to ignore the *6th Amendment Confrontation Clause*, the holdings of *Crawford*, as well as, the *South Carolina Hearsay Rules of Evidence*. The State had the inmates on the witness list and had an obligation to put them on the stand under oath, have them testify and be subject to cross-examination.

- **The State also committed prosecutorial misconduct in its closing argument when it impermissibly referenced the statements of the inmates, as well as, impermissibly bolstering the credibility of the State's investigators and offering improper state of mind speculations regarding Mr. Clark's reasons about why he would cooperate with the police investigators. Ms. Leskanic offered no foundational support for these improper state of mind speculations.**

The following are excerpts taken from Ms. Leskanic's closing argument in the Trial Transcript on Pages 599 – 613:

Page 603, Lines 22 – 24: "He [Mr. Clark}, told one of the inmates we had been arguing for several days. Been arguing about Anna and it wasn't working for him."

Pages 608 – 609, Ms. Leskanic offers the following improper state of mind speculation:

> Common sense, who is going to put the keys in the backyard of [redacted]? But you know what? You just killed somebody and things are going probably a little haywire in your mind, I would think. Oh, gosh, I got out of the car. I got these keys. It's pitch black. I got to get back to the house, throw them out, and that's were there found,

because he had to get back, because he had to tell Beverly she went for cigarettes and tell her Anna Mooney about it.

But maybe if I contribute to the investigation, I won't be a suspect.

I don't know if you have kids. You ever do an Easter egg hunt and you kind of try to lead them you need them to go, because you know where you had hidden something? Let's look over there that's all it is. It's the same thing he knew were {to}look over there because I remember where it is.

- **The State committed prosecutorial misconduct when it failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim.**
- Defense Counsel Mr. Harbin offered ineffective assistance of counsel when he failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested. **See:** Trial Transcript Pages 640 through 641.
- The State committed prosecutorial misconduct when it failed to perform DNA testing of cigar butts found in the yard at the victim's house even though neither Mr. Clark, nor the victim and residents of the house smoked cigars. This failure is even more egregious considering that Investigator/Detective Jimmy Henson in his crime scene investigative report stated that he found at the Mike's Creek Road crime scene a piece of a gold colored cigar wrapper and the pull tab that opens the cigar wrapper and it was purple in color.
- Defense Counsel, Mr. Harbin offered ineffective assistance of counsel when he failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested. **See:** Trial Transcript Page 278 Lines 01 – 03.

Prior to trial, Mr. Harbin had retained a DNA expert, Dr. Daniel B. Demers, as well as Mr. Chris Robinson, a forensic consultant, to investigate and prepare for trial. However, Mr. Robinson was not retained until March 7, 2014. Mr. Harbin had requested and received funds from the State to

retain these experts. The Record has numerous examples proving that Mr. Harbin intended for Dr. Daniel Demers to testify in Mr. Clark's murder trial. Moreover, in Mr. Harbin's March 7, 2014 letter to the Hon. Judge Roger Couch detailing the reasons it was necessary to use State funds to retain the defense experts, Mr. Harbin stated the following:

> Upon continued review, it appears that there are gaping holes in the forensic evidence of this case, and unexplained – unperformed testing of potentially exculpatory evidence. The review of this investigation, specifically with regard to the manner of gathering of evidence and forensic data collection is relevant and necessary to the complete presentation of Mr. Clark's case to the jury. Of particular importance, will be the ability to present to the jury the standards and practices, as well as the science available at the time that can be used in evidence gathering and forensics. **A subject which cannot simply be opined upon by defense counsel.**

- **Inexplicably, Dr. Daniel Demers, and Mr. Chris Robinson, never testified during Mr. Clark's March, 2014 murder trial.**

For example, in Judge King's questioning of the juror panel in the Trial Transcript on Pages 32 – 35, he told the jury that the following individuals may appear as witnesses in this case, and the witness list is quite extensive, so I'm going to go over this witness list with you. On Page 34, Lines 6 – 10, he calls the names of the inmates who made statements against Mr. Clark. He calls the names of Michael Stillwell, Ridge Crosby, Michael Covington, John Austin, and Bryant Phillips. On Page 35 Line 12, he calls the name of Dr. Daniel Demers. The Record proves that none of the inmates testified and were not subject to cross-examination. However, the Record proves that the inmate statements were admitted as evidence.

The Record proves that Dr. Daniel Demers did not testify. Mr. Harbin did inform Mr. Clark that he had retained Dr. Demers.

However, Mr. Harbin never showed Mr. Clark the preliminary DNA report prepared by Dr. Demers and did not discuss what the report meant or how it would be used at trial.

Furthermore, Mr. Harbin called none of these experts to testify at the March 17, 2014 motion hearing and the March 18-20, 2014 trial. Moreover, it is apparent from the Friday, December 13, 2013 email Mr. Harbin sent to Assistant Solicitor Kim Leskanic, that Dr. Demers would testify in Mr. Clark's trial as an expert witness.

It is also apparent as evidenced by Mr. Harbin's defendants potential witness list that included the names of Joey Clark, Dr. Daniel Demers, and forensics consultant, Chris Robinson.

Mr. Harbin only used cross-examination to explain, refute, and rebut the State's DNA expert. Unlike the cross-examination by the defense attorney in *Frasier v. State*, 410 S.E.2d 572, 306 S.C. 158 (S.C., 1991), Mr. Harbin's cross-examination of the State's DNA expert, Ms. Leisy, **did not bring out any of the problems with the DNA evidence against Mr. Clark that Dr. Demer's preliminary report highlighted.** Moreover, in *Frasier*, no DNA expert was retained by defense counsel, whereas Mr. Harbin had retained a defense DNA expert to testify at Mr. Clark's murder trial. However, Dr. Demer did not testify.

- **The failure to have Dr. Daniel Demers testify was unreasonable and ineffective assistance of counsel for which Defense Counsel Harbin cannot offer either a reasonable and objective trial strategy, nor any valid reason for employing this strategy. This failure meets both prongs of the *Strickland* Standard and survives harmless error analysis.**

The validity of counsel's strategy is reviewed under "an objective standard of reasonableness." **See:** *Ingle*, 348 S.C. at 470, 560 S.E.2d at 402.

The evidence and testimony against Mr. Clark were circumstantial. There were no eyewitnesses to the killing of Ms. Winter Wingard..

See: Trial Transcript Page 599 Line 15 of the State's Closing Argument: Assistant Solicitor: "You have heard a lot of circumstantial evidence" See Trial Transcript Page 612 Lines 13 – 16 of the State's Closing Argument: Assistant Solicitor: "There is a lot of this case {that} is circumstantial evidence. How do you know? We don't know. I can't tell you whether he beat her in the head first or he strangled her first, but I can tell you that he did it." The State could not provide a time of death for Ms. Winter Wingard. See Page 446, Lines 12 – 14 and Page 447, Lines 1 –4 of the Trial Transcript. **The State could not identify the murder weapon. See:** Page 262, Lines 1 – 7 and Page 437, Lines 9 – 13 of the Trial Transcript.

Mr. Harbin's pretrial notes document that he knew this case was circumstantial, and that there were no eyewitnesses. He knew that the State's Pathologist could not determine the exact time of death, and could not identify the deadly weapon used to kill the Decedent, Ms. Winter Wingard. Mr. Harbin knew that the probable cause for the arrest of Mr. Clark for murder was based on the inmate's statements, and the red dirt found on the body and DNA. Mr. Harbin's pretrial notes indicate that he took initial steps to become familiar with the case.

- → However, the case files do not indicate that Mr. Harbin developed these initial steps into an actual trial strategy other than having the last argument and using only cross-examination of the State's witnesses.
- → He also failed to adequately communicate to Mr. Clark the theory of his defense other than telling him not to worry because the State had no case and that he would prove this by having the last closing argument.
- → Mr. Harbin's performance during the pretrial motion hearing on March 17, 2014 and during the actual jury trial held on March 18 through March 20, 2014 was both unreasonable and prejudicial. His trial strategic choices were limited, due to his overreliance in having the

last argument and the use of cross-examination to rebut the testimony of the State's expert witnesses. This all or nothing approach was unreasonable.

Mr. Harbin had prior knowledge that the jail inmates made statements incriminating Clark.

- **Mr. Harbin offered ineffective assistance of counsel when he did nothing to suppress these statements made by the inmates.**

Mr. Harbin unreasonably viewed these inmates as confidential informants even though he was told on Page 73 of the Trial Transcript that none of the inmates were confidential informants.

- → Mr. Harbin's trial performance opened the door for these inadmissible statements to be admitted as evidence in violation of the *Crawford* holding and the *Sixth Amendment Confrontation Clause* Rules, as well as, the *South Carolina Rules of Evidence Hearsay Rules.*

The significance of these statements being read into evidence **without** the inmates taking the stand and being subject to cross-examination was so alarming to Trial Judge King that on Page 593 of the trial transcript during his discussion of jury charges he made the following comment:

- → **Judge King: I was a bit surprised, Mr. Harbin, that the statements came in as to what they said without the individuals coming forward.**

The admission of the inmate's statements was treated as a confession made by Joey Clark by both the State and by Defense Counsel Mr. Harbin. The effect of the statements prejudiced Mr. Clark in the eyes of the jury and denied him a fair trial.

→ Mr. Harbin's performance was made even more deficient when **he failed to ask for a directed verdict even though according to Assistant Solicitor Leskanic, this case was a circumstantial evidence case.**

In the trial transcript during the Assistant Solicitor's closing argument on Page 599 she told the jury the following:

You have heard a lot of circumstantial evidence and I'm going to go over with you what circumstantial evidence is.

The Assistant Solicitor continued in her closing on Page 612 in the trial transcript and told the jury the following:

"a lot of this case is circumstantial evidence. How do you know? We don't know. I can't tell you whether he beat her in the head first or he strangled her first, but I can tell you he did it".

→ Moreover, Mr. Harbin's violation of *Crawford* and the *Confrontation Clause*, and the *SCRE Hearsay Rules,* and his total failure to request a *Rule 19* directed verdict motion are further evidence of his ineffective assistance of counsel and all survive harmless error analysis.

→ The State's commission of prosecutorial misconduct that denied Mr. Clark a fair trial also survives harmless error analysis.

→ Mr. Harbin's failure to request that Judge King instruct the jury on the lesser included charge of voluntary manslaughter based upon the State's plea offer of voluntary manslaughter and his failure to object to the implied malice jury instruction through the use of a deadly weapon, even though the State never identified what the deadly weapon was, also survive harmless error analysis.

→ Mr. Harbin's failed to withdraw from representing Mr. Clark due to his anger and fear of Mr. Clark. Mr. Harbin received from the Solicitors Office a verified threat from Mr.

Clark. The threat came from a recorded jail conversation between Clark and his wife. Clark said the following: "if Harbin kept bringing him bad news," he was going to do bodily harm to Mr. Harbin. The failure to withdraw survives any harmless error analysis.

Mr. Harbin's cross-examination of the State's witnesses and in particular State's Witness, Detective Richard Burgess, was ineffective assistance of counsel.

His cross-examination opened the door for the improper admission into evidence of the inadmissible inmate statements which were read into evidence by Detective Burgess during the Assistant Solicitor's re-direct of Detective Burgess. **See Attached Exhibit Number 01 (Inmate Statements).**

Furthermore, Mr. Harbin's cross-examination of Detective Burgess opened the door to the voluntary statement that Mr. Clark gave to the police during the investigation of the Decedent's death. In the trial transcript on Pages 364 through 374, during the Assistant Solicitor's direct examination of Detective Burgess, no questions or answers were asked or given about either the inmate's statements or Mr. Clark's voluntary statement given to police.

In the Trial Transcript, on Page 375 – 398, during Mr. Harbin's cross-examination of Detective Richard Burgess, Mr. Harbin's cross-examination strategy meets both prongs of the *Strickland* Standard.

Mr. Harbin's cross-examination of Detective Burgess implicates Mr. Harbin's erroneous belief that it would be beneficial to Mr. Clark to discuss the unsubstantiated allegations made by the inmates.

→ Mr. Harbin's apparent reason for believing it would be beneficial was that he would point out discrepancies among the statements.

→ **No reasonable attorney would have allowed the judge and the jury to hear and consider the inmate's statements without hearing and seeing the inmates on the stand, under oath, and subject to direct and cross examination.**

In the March, 17, 2014 Pretrial Transcript, on Page 18, Lines 22 – 23, Assistant Solicitor Leskanic informed Judge King and Mr. Harbin of the following:

→ The State may call the jail inmates who made statements against Mr. Clark to testify.

In the Trial Transcript, on Pages 73-74, the State informed the Court and Mr. Harbin of the following:

> **Ms. Leskanic:** Mr. Harbin filed a motion yesterday requesting any confidential informant file that may exist with regard to Bryant Phillips, Michael Stillwell, Michael Covington, John Austin, and Ridge Crosby. The investigator with our office, Greg Phillips, checked with both the Gaffney City Police Department and the Cherokee County Sheriff's Department. **None of these individuals have ever worked as confidential informants for either of those agencies.**

Mr. Harbin knew that the inmates making these statements were not confidential informants. Thus, they were not subject to any special rules or procedures that applied to confidential informants. **Yet, Mr. Harbin treated these inmates as if they were confidential informants somehow immune from testifying and being cross-examined under oath.**

→ Mr. Harbin's strategy simply served to inform the jury about these statements, as well as enhancing the credibility of the statements authenticity.

→ Mr. Harbin simply ignored the Hearsay Rules even though many of the statements contained double hearsay. Mr. Harbin chose to ignore the *Sixth Amendment Confrontation Clause,* as well as the holdings of *Crawford.*

For example, in the Trial Transcript, during cross-examination of Detective Burgess, the following exchanges took place:

> Question: You got a statement from a dude named John Raymond Austin, is that correct? A. Yes.
>
> Question: Does his statement differ for Mr. Phillips statement in his recitation of the alleged confession? A. It is similar. They said they asked him what he was in for and he said murdering his wife.
>
> Mr. Harbin: Question: Did Mr. Austin reference who was sitting around when Mr. Clark allegedly confessed all the stuff? A. It was himself, Skeet, Mike, Jack, and Ridge.
>
> Question: Which is not the same folks that Mr. Phillips had described, is that correct? A. Yes.
>
> Question: So essentially they are telling two different versions of the same story? A. Yes.
>
> Question: Does Mr. Austin reference Mr. Phillips and anything Mr. Phillips had said out loud to the folks in E – Unit?
>
> Detective Burgess: Answer: He says when he walked away, a little while later Skeet went over and got to talking with him and Skeet came back and told us that he said she was stabbed up, and he also said none of us in there even knew how she had died.
>
> Mr. Harbin: Question: Mr. Crosby is also another fellow that gave a statement. A. Yes.
>
> Question: Is it fair to say that the statement doesn't say he admitted it? He just simply explained why he was in jail, under arrest. A. Yes.
>
> Question: Now, Michael Covington is another fellow that came forward...
>
> Question: Let's skip over Mr. Covington's statement. You had a statement giver come forward, Michael Stillwell, correct? A. Yes.
>
> Question: And there was specific information in his statement that prompted the issuance of a search warrant, is that correct, or the seeking of a search warrant rather? A. Yes.
>
> Question: Could you tell the jury what that specific information was and what search warrant that you got is a result of it?
>
> Answer: It would be the third search warrant on the residence. Stillwell referred to Joey the guy said he had been working on his wife or girlfriend for several days

and finally had enough. So they were in the kitchen and he picked up a knife and started stabbing her. And then the guy said he put her body in the car and dumped it.

Question: What were the results of that search warrant?

Answer: There was according to Mr. Henson's testimony, too, there was no blood located in the kitchen area.

Question: Is it fair to say Mr. Stillwell was incorrect? A. Yes.

Question: Would you go so far as to say he was lying? A. No

Mr. Harbin: Question: And at that point what was the information that you used for probable cause that led you to believe at that point that Joey was arrestable for this offense?

Detective Burgess: Answer: Along with the other evidence from crime scene, as far as red dirt kept leading us back to Songbird, because there is no red dirt on Mike's Creek Road. Along with that, and we also had received some statements that were from individuals there were also housed with Mr. Clark basically admitting guilt.

Mr. Harbin: Question: So let's talk about that. So you had received information from people in the jail that Joey had admitted that he had killed Winter Detective Burgess: Answer: Yes.

Mr. Harbin: Question: And subsequent to that interview did you ask Ms. Patrick and Joey to come down to the station to give a statement? Detective Burgess: Answer: Yes.

Question: And they both voluntarily came down to the station to give statements? A: Yes.

Question: Did you take either their statements at that time? A. No

Question: Who did? A. Detective Clark.

Question: So you did not participate in any of the interview of Joey Clark and Beverly Patrick

Assistant Solicitor Ms. Leskanic: Your Honor, I'm going to object and ask if we can approach, Your Honor? The Court: Yes. The Court: Based on the ruling of the bench, proceed on to another subject, Mr. Harbin.

Mr. Harbin: Question: The probable cause for the warrant what led you to develop your case so that you focused on Joey Clark and ultimately arrested him, is it true that tipping point essentially was this information that you received from folks at the jail? A. Yes.

Question: When did you receive information from your jail informants as to these alleged confessions? A. The first one was December 5 at 1:07.

Question: And did you take that statement? A. I did.

Question: Do you know the fellow that gave the statement? A. Yes.

Question: What is his name? A. Bryant Phillips.

Question: So you just kind of appeared somehow in front of Mr. Phillips at the jail. Is it often that somebody is put in jail for traffic ticket and just magically in two more days, he confesses to murder and you don't remember how this person came to your attention?

Answer: All I can tell you, Mr. Harbin, is I was told to go, I needed to speak to him, and I did.

Question: What information did you to develop from this interview of Mr. Phillips?

Assistant Solicitor Ms. Leskanic: Objection, hearsay.

The Court: Do you have a reason that that would not be hearsay, Mr. Harbin?

Mr. Harbin: Well, Judge, I don't know that it's necessarily for the truth of the matter asserted.

The Court: What is the purpose of it then?

Mr. Harbin: Well, because he has claimed that he and I'm trying to develop this, that he is using the information that he gained to

Assistant Solicitor Ms. Leskanic: That is fine. I will withdraw, Your Honor.

The Court: All right. Go ahead.

Mr. Harbin: Question. What was the content of this interview that led you to develop your case against Joey Clark, as opposed to anybody else?

Detective Burgess: A. Do you want me to read Mr. Bryant's statement?

Mr. Harbin: Question: No. What is the pertinent information that you were able to gather through your investigation as it pertains to Mr. Phillips and his interview?

A.They said that when I asked him, he said that he and some other guys had asked him what he was in for and said they had got him for killing his girlfriend. He said they found her butchered to death. And with that being said, at that point he was not even charged with murder.

Question: You found Mr. Phillips to be a credible witness? A. With his statement and others, Yes.

Question: The statement that Mr. Phillips gave, can you confirm whether he referenced that there were other people that supposedly witnessed this alleged confession? A.Yes.

Question: How many other people did he say witnessed this alleged confession?

A. Himself and three others.

Question: Would that be Arnold Banks, Drey Clark, and Ralph Smith? A. Yes.

Question: Did you or did you not talk to them? A. No I can't say that I got a statement from them.

After Mr. Harbin ended his cross-examination of Detective Burgess and **prior to Assistant Solicitor Leskanic's re-direct of Detective Burgess**, on Page 401 through Page 407 of the Trial Transcript, out of the presence of the jury, the following conversations, in pertinent part, took place between Judge King, Assistant Solicitor Leskanic, and Mr. Harbin:

Judge King: All right. There are two things that I think that I would like to just maybe look at, or we may have to do them a little bit more extensively after lunch, but my recollection is that there was a discussion at the bench, a bench conference, with regard to questions that were asked or on cross-examination by Defense Counsel regarding cooperation of his client and the fact that he gave statements.

And the State was concerned that it has now come out in front of the jury that the statements were made, even though there was nothing in regard to the content of the statements and that the State feels that they may need to explain those statements.

Ms. Leskanic: Your Honor, we instructed Detective Burgess not to mention the statement.

We had not held a *Jackson v. Denno* Hearing prior to trial.

We did not intend on introducing his statement. His statement mentions prior bad acts. ...

We have discussed at the outset of the trial that we were not seeking to put a statement in, that we were not requesting a *Jackson v. Denno* Hearing, so the defense was aware of that.

However, now that they have opened the door, the jury is going to want to hear that statement.

Judge King asked Mr. Harbin the following question: Well what was your purpose in asking the question? Upon hearing Mr. Harbin's answer, **Judge King stated the following:** Well, the problem I had with that is that you could've done that, and you tried to do that, through the cross-examination of Mr. Burgess about the jailhouse informants...

On Page 405, lines 17 through 25, and on Page 406 Line 1, the following conversation took place between Judge King and Mr. Harbin:

Judge King: Is it *Jackson v. Denno*? What is the issue of voluntariness with regard to the statement? Do you contest that, Mr. Harbin? **Mr. Harbin: No, Sir.**

Judge King: You do not. So you would not require a *Jackson V. Denno*? **Mr. Harbin: No.**

On Page 407, Lines 8 to 17, **in the presence of the jury,** this conversation took place.

The Court: And is my understanding now, Madam Solicitor, that at this time the State does not wish to go into that statement, but wants to reserve or even inquire further with regard to that reserve the right to possibly visit the issue later on, is that correct?

Ms. Leskanic: That is correct, Your Honor.

The Court: Okay. Any problem with that, Mr. Harbin?

Mr. Harbin: No, Sir.

- Defense Counsel offered ineffective assistance of counsel when he failed to require the State to conduct a *Jackson v. Denno* Hearing in regards to the voluntary statement made by Mr. Clark.

In the trial transcript, on Pages 409 through 423, during **the re-direct examination of Detective Burgess by Assistant Solicitor Leskanic** the following conversations regarding the inmate's statements took place, in pertinent part:

Assistant Solicitor: Question. All right. Going to the inmates at the jail that gave statements that Mr. Harbin asked you about.... The first one is from Bryant Phillips. Do you have that with you, or I have a copy, if you need it. Detective Burgess: Answer: yes, ma'am, I have it....

Assistant Solicitor: Question. Would you please read his statement to the jury that he gave you?

Detective Burgess: Answer. He stated that "yesterday a redheaded guy with glasses was brought into my dorm. Me, Arnold Banks, Drey Clark and Ralph Smith was playing cards when the new guy came in he came over to the table. We asked him what he was in for and he said they got him for killing his girlfriend. He said they found her butchered to death. He said she was a 26-year-old white female from Florida. He also said her name was Winter something. He said they found her near Mike's Creek Church...."

Mr. Phillips' Statement, as well as, all the other inmate statements were not notarized and had numerous authenticity issues. Mr. Harbin never objected on any grounds to having Detective Burgess read the statement to the jury and did not object to having it admitted in as evidence. The statement was inadmissible evidence and was prejudicial. Mr. Harbin offered ineffective assistance of counsel that meets both prongs of *Strickland*.

Assistant Solicitor: Question. Would you please read Mr. Austin's Statement that he provided you?

Detective Burgess: Answer. "It says the other day a white guy came in in the dorm wearing glasses and had red hair. Me, Skeet, Mike Jack, and Ridge were sitting at a table. When we saw him come in we asked to come over. We asked him if he had any cigarettes and he said no. Then we asked him what he was in here for and he said murdering my wife. Then he walked away. A little while later, Skeet went over and got talking to him.

Then Skeet came over and told us that he had said she was stabbed up. None of us in there even knew how she had died."

→ **Mr. Austin's Statement contained double hearsay.** Mr. Austin's Statement was not notarized and had numerous authenticity issues.

Mr. Harbin never objected on any grounds to having Detective Burgess read the statement to the jury and did not object to having it admitted in as evidence. The statement was inadmissible evidence and was prejudicial. Mr. Harbin offered ineffective assistance of counsel that meets both prongs of the *Strickland* Standard and survives harmless error analysis.

Assistant Solicitor: Q. Would you please read Mr. Ridge Crosby's Statement that he provided you?

Detective Burgess: A. It says "in the last few days will I've been incarcerated at the county jail a white guy with glasses came in. I asked him what he was in for and he told me he was in here for murder for killing his girl. Later I found out his name was Clark. I haven't talked to him since."

Assistant Solicitor: Q. Do you have the statement of Michael Stillwell? **A.** Yes.

Assistant Solicitor: Q. Will you please read his statement?

Detective Burgess: A. It says. "Yesterday after supper I was sweeping up in E unit. While I was sweeping there was a white guy with glasses and reddish colored hair talking. Someone asked him why he was in jail. The guy said it was for traffic offenses, but he had been question about his girlfriend getting killed. The guy said he had been arguing with his wife or girlfriend for several days and he finally had enough. The guy said they were in the kitchen and he picked up a knife and started stabbing her. Then the guy said he put her body in the car and dumped it. I started moving away from him and I heard him say that he had told the police that his wife had left around 2:00 a.m. and she had been found around 5:00."

Assistant Solicitor: Q. Do you have the statement of Michael Covington? A. Yes.

Assistant Solicitor: Q. And what does his statement say?

Detective Burgess: A. It says: "today is December 6, 2010. About three days or so ago, I was in the cellblock E when the jail guards brought a white guy in. I think it was at nighttime. The white guy was wearing glasses. I started talking to him the next day. I said what's up? He shook his head no. Later on we were sitting down at the table playing cards, we were playing spades. While sitting at the table asking him you were in here for, **he said they are trying to say I killed my wife.**

He looked like he was getting ready to tell me something, then he nodded his head no. We played six games of spades, and then walk towards the door after playing cards the door was the one that leads open to the outside area.

While we were standing near the door, just outside, I asked him how did she die, and he said he stabbed her, and said something about dropping her off at Mike's Creek.

I told him I went to church there. He then cut off the conversation like he didn't want to talk about it no more.

We then talked about playing cards again, and we did go back in and play cards. He asked me why I was in jail and I told him. The only name I ever called him was Buddy, like in friend.

I asked Agent Darrell Betsill to type my statement for me."

Assistant Solicitor: Q. What were you basing your investigation and your arrest warrant old at the time that you arrested the defendant for murder?

Detective Burgess: A. Basically it was on the statements and the other evidence, as far as like I said earlier, the dirt.

Ms. Leskanic: At this time the State would offer State's Exhibit 145, which is a statement by Bryant Phillips; State's Exhibit 146, a statement by John Raymond Austin; State's Exhibit 147, a statement by Ridge Crosby; State's Exhibit 148, a

statement by Michael Stillwell; and State's Exhibit 149, a statement by Michael B. Covington into evidence.

Mr. Harbin: No objection, Judge.

The Court: ***All right. It would be admitted into evidence without objection.***

Mr. Harbin never objected on any grounds to having Detective Burgess read the statement to the jury and did not object to having it admitted in as evidence. The statement was inadmissible evidence and was prejudicial.

Defense Counsel Harbin's closing argument is another example of how his cross-examination of Detective Burgess provided ineffective and prejudicial assistance of counsel to Mr. Clark. Trial Counsel Harbin seemed to act more "for the benefit of the State," rather than as an advocate for Mr. Clark. Mr. Harbin offered ineffective assistance of counsel that meets both prongs of Strickland and survives harmless error analysis. **See:** *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). In *Reeves*, the Court held that "error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense."

→ Mr. Harbin's numerous references to the statements of the inmates in his closing argument only served to remind the jury and enhance the credibility of both the statements and the State's use of the allegations contained in the inmate statements that made it appear to the jury that Mr. Clark confessed to killing Ms. Winter Wingard.

The following are excerpts taken from Mr. Harbin's closing argument in the Trial is Transcript on Pages 614 – 645.

Page 615: But let's give credit to the State that I get that there is probable cause to believe that Joey committed the crime. I mean, they presented to evidence. I mean, I am not trying to insult your intelligence, but there is evidence that suggests that he could've done it, but this is not a probable cause hearing.

Page 621: The other piece of evidence that I think as – I would evaluate is potentially the strongest piece of evidence by the State would be the statements by the jailhouse witnesses. Okay. So let's start by asking where are they? If the State also believed that these were reliable people, would not they have put them on the stand? Why did not they put them on the stand?

Pages 622-623: I want you to look at the statement, [Referring to inmate Bryant Phillips statement], and read it carefully. It also doesn't read like an informant's statement. It reads like a newspaper report or a police officer. "26-year-old white female from Florida." There is not a jailhouse informant in the world that talks like that. Not written ticket, put in jail, and then magically within 24 hours he's confessed to murder. Then when you get that confession,.... The statement says they're sitting at a table and Joey says this.

Page 624: There is three statements that essentially don't say he confessed anything. They say "What are you in here for," and he says "I am in here for killing my wife," or, "killing my girlfriend." They have different versions of it, so I don't know how they all heard the same thing. And then one of them even mentions "well, Skeet Phillips came in here screaming he stabbed her up." Well, that kind of taints the rest of the statements....

Pages 624-625: The one I find most interesting, fascinating actually, is Michael Stillwell's statement. You can read it when you get back there. Michael Stillwell says that Joey said he killed Winter, in so many words, but then he offers a very specific set of facts. He said that Joey had been arguing with Winter for days.

Pages 624 – 625: And the statement will tell. Don't believe me, but they are arguing in the kitchen, or he picks up the knife in the kitchen and he stabs her in the kitchen. Now, we all know now that did not happen, for a number of reasons.

Page 626: So a jailhouse informant gives a statement with an incorrect version of events from a confession and it just so happens to jive with the theory that Detective Burgess had made out of whole cloth. That is where Michael Stillwell got the detail.

Pages 626 – 627: In sum total, the informants at the jail, their testimony is entirely without merit. And if it was, they would have put them on the stand. You don't know whether they got the oath, whether they did not. We don't know that. They didn't put them on the stand. You don't know how they sounded, whether or not they were intelligent enough to put two words together. You don't know. You do know that the statements sound suspicious somewhere along the way, especially with the police type.

Page 628: So when asked, you know, this is a possibility where may be part of the statement is true. When asked "what you in here for? "I am in here for killing my

> wife." Maybe they leave out the part where the police think I'm killing my wife. That makes much more sense than the State would have you believe he just confessed.

No reasonably competent attorney would have adopted Mr. Harbin's trial strategy in this case, or at the very least, a reasonable and objective attorney would have decided to abandon the strategy once it was patently clear that it would not be fruitful, and very likely harmful.

Mr. Harbin's decisions and actions were not reasonable and any strategic reasons asserted would not excuse the deficient conduct. Mr. Clark was denied his right to have a zealous advocate. **See:** *Jones v. Barnes*, 463 U.S. 745, 758 (1983). ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); **See:** *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation"). The *Sixth Amendment* requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense. The effect was to provide Mr. Clark not with a Defense Counsel, but with a second prosecutor.

- **Mr. Harbin offered ineffective assistance of counsel by failing to request a jury charge of voluntary manslaughter as a lesser included charge of murder.** Note that Mr. Clark's trial occurred from March 17 – 20, 2014. This was prior to the case of *Abney v. State*, 408 S. C.41, 757 S.E.2d 544, (S. C. App., 2014). Thus, the holding of *Abney* does not apply.

The trial court is required to charge a jury on a lesser included offense "if there is any evidence from which it can be inferred the lesser, rather than the greater, offense was committed." **See:** *State v. Gourdine*, 322 S.C. 396, 472 S.E. 2d 241, (1996). The law to be charged is determined by the evidence presented at trial. **See:** *State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986). In determining whether the evidence requires a charge on a lesser included offense, courts view the

facts in the light most favorable to the defendant. See: *State v. Cole,* 525 S.E.2d 511, 338 S.C. 97 (S.C., 2000).

The evidence that existed from which it could be inferred that the lesser included offense of voluntary murder was the following:

01. **The State made an offer to reduce the charge from murder to voluntary manslaughter.** The offer was set to expire in November, 2013.

02. In the Trial Transcript, during Mr. Clark's sentencing, on Page 675, **Judge King** stated the following:

> **"I don't think this was really a calculated crime on your part, but is kind of a crime of passion, but nonetheless, that does not make it any less serious, and of course, it still is the crime of murder."**

In the Trial Transcript, on Page 87, during Assistant Solicitor Leskanic's opening statement, she stated the following to the jury:

> "This is a murder ladies and gentlemen. This is not a case where we have self-defense or what's the charge going to be. The charge that you are going to be given is murder, guilty or not guilty. That's it."

- **Mr. Harbin offered ineffective assistance of counsel when he failed to object to the Assistant Solicitor's blatantly false statement of substantive law.**

The Assistant Solicitor had no legal authority to exclude the lesser included offense charge of voluntary manslaughter when she, as the representative of the State, had made an offer of voluntary manslaughter which is a lesser included offense of murder. Justice demands that the jury be properly informed so that the jury can render a just verdict. Justice also demands that the presiding

judge be properly informed as to whether or not the State and Defense Counsel have considered any plea agreements that impact the substantive law that the jury must consider as it evaluates the facts and the evidence. Judge King was not properly informed by either the State or Defense Counsel Harbin during the time they discussed the substantive law jury charge regarding whether or not the lesser included offense of voluntary manslaughter would have been appropriate in Mr. Clark's jury trial. This is evidenced in the Trial Transcript on Page 585, Lines 16 – 21 in which **Judge King** stated the following:

> In my view of the evidence in this matter, it is, as far as the substantive law is concerned, simply the murder charge. I don't believe there are any lesser included offenses. It would be either murder or guilty of murder or not guilty of murder, and I don't believe there any lesser included charges involved.

- Mr. Harbin offered ineffective assistance of counsel when he failed to inform Judge King about the plea offer of voluntary manslaughter.
- Mr. Harbin offered ineffective assistance of counsel when he failed to request that Judge King add voluntary murder as a lesser included charge to the substantive law, as well as adding voluntary manslaughter, guilty or not guilty, to the verdict form.
- Mr. Harbin offered ineffective assistance of counsel regarding his advice to Joey Clark about whether to accept or reject the State's voluntary murder plea offer. **See:** *Judge v. State,* 321 S.C. 554, 471 S.E.2d 146 (S.C., 1996) and *Davie v. State,* 675 S.E.2d 416, 381 S.C. 601 (S.C., 2009).

Mr. Harbin, on October 16, 2013, **chose to mail Mr. Clark a letter** advising him of this plea offer. This letter was **addressed to the Cherokee County Detention Center** where Mr. Clark was incarcerated. Jails often lose mail. It would've been more reasonable for Mr. Harbin to schedule an attorney visit and **personally discuss this plea offer with Mr. Clark.** Money was not an issue

as Mr. Harbin could bill the State for attorney visits due to his appointed status. **Mr. Clark states, for the Record, that he never received this letter while he was being held in the Cherokee County Detention Center.** Mr. Clark states, for the Record, that **he and Mr. Harbin never discussed this plea agreement prior to its expiration date in November, 2013.**

On November 8, 2013, Assistant Solicitor Leskanic sent an email to Mr. Harbin wanting to know if his client, Mr. Clark had made a final decision on the plea offer. On November 11, 2013, Mr. Harbin emailed an answer to Assistant Solicitor Leskanic. The tomorrow referred to in Mr. Harbin's email answer was November 12, 2013. Mr. Harbin's email answer to Ms. Leskanic stated the following:

> **I screwed up and forgot about the decision deadline.** I had planned on going to Gaffney to see him tomorrow but that plan was made while I was in the middle of not remembering he had a deadline. I cannot get to Gaffney today, but will keep my appointment for tomorrow. I anticipate that his mind has not changed, but if it does, I'll beg you and the judge to allow him to plead because of my ill planning. I plan getting a written offer acceptance or rejection as well as his signature on a waiver of his motion to have me relieved as counsel as well as a waiver of any potential conflicts of Judge Kelly. One way or the other I'll be in touch tomorrow after I visit with Joey. If all goes as planned I will drop off a hard copy at your office before I leave town.

Mr. Harbin visited Mr. Clark on November 12, 2013 and obtained Mr. Clark's signature waiving his desire to dismiss Mr. Harbin as his appointed counsel.

During this visit on November 12, 2013, Mr. Clark states, for the Record, that he and Mr. Harbin never discussed this plea offer and he never signed any paperwork accepting or rejecting the plea offer that was set to expire in November, 2013.

Mr. Clark states, for the Record, that the only time he discussed a specific plea offer with Mr. Harbin was in January or February 2014.

→ Please note that this discussion took place after the November 2013 expiration of the States plea offer that was referred to in the October 16, 2013 letter Mr. Harbin mailed to Mr. Clark. In this 2014 discussion with Mr. Clark, Mr. Harbin told him that he had a meeting with a judge **{who was not Judge King}.**

This judge told Mr. Harbin that he would not accept anything less than 23 years. Mr. Harbin advised Mr. Clark to reject the plea, but Mr. Clark never signed any paperwork formally accepting or rejecting this or any plea offer.

Moreover, in this 2014 meeting, Mr. Harbin advised Mr. Clark to reject the plea offer because the State had no case, and that all the evidence was circumstantial. He advised Mr. Clark to reject the plea offer because he would get the last closing argument and that he had nothing to worry about.

Mr. Clark states, for the Record, that the only time he told Harbin that he would not consider a plea was during his initial meeting with Mr. Harbin. Mr. Clark states, for the Record, that this verbal opposition to plea bargain was not set in concrete.

Mr. Clark states, for the Record, that if he had been properly informed by Mr. Harbin of the November, 2013 plea offer, he would have considered the merits of plea bargaining even though he did not kill Ms. Winter Wingard.

Mr. Harbin believed the probable cause used to arrest Mr. Clark was inadequate. For example, Mr. Harbin wrote in his pretrial notes the following: Warrant has no probable cause listed other than it

was based upon the investigation. This case has no physical evidence connecting Mr. Clark to the incident. Everything appears to be based upon statement from inmates and Clark's past history.

The search warrant affidavit of Detective Richard Burgess states that statements were taken where the person of Joey Lynn Clark gave several admissions of guilt to several persons in his unit inside the Cherokee County Detention Center.

- **Mr. Harbin offered ineffective assistance of counsel when he failed to request a hearing outside the presence of the jury to determine whether sufficient probable cause existed for the arrest of Mr. Clark for the murder of Winter Wingard.**

The defendant's failure to request a hearing outside the presence of the jury to determine whether probable cause existed for the arrest constitutes a concession that the evidence is competent. **See:** *State v. Rankin*, 3 S.C. 438, 448 (1872) (defendant's failure to object to evidence is a concession of its competency); **See:** *State v. Blassingame*, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury at this threshold point to establish the circumstances under which it was seized.")

- **Mr. Harbin offered ineffective assistance of counsel when he failed to object to Judge King's implied malice by the use of a deadly weapon jury charge. See: Trial Transcript Pages 655 – 656.**

In *State v. Belcher*, 385 S.C. 597, 685S.E.2d 802, the Court held "that where evidence is presented that would reduce, mitigate, excuse or justify homicide caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon."

The failure of Mr. Harbin to inform Judge King of the State's voluntary manslaughter plea offer prevented the use of voluntary manslaughter being used to acknowledge that evidence was presented to reduce or mitigate the homicide of Winter Wingard.

As stated previously in this Application, the State never identified the murder weapon and thus never introduced as evidence what the deadly weapon was that was used to stab Ms. Wingard. Likewise, the State's Pathologist, could not identify the deadly weapon that was used to inflict the blunt force trauma. The State could only speculate that a fist could have been used to calls the blunt force trauma. A hand or a fist is not normally considered a deadly weapon. Mr. Clark had a knife in his possession. SLED tested the knife and found no blood on it. The State was unable to identify the weapon that was used to stab Ms. Winter Wingard. The State's Pathologist could not identify what kind of weapon caused the stab wounds. Issuing an implied malice charge when the State is unable to produce the deadly weapon into evidence is highly unusual and seems to be ill advised. An effective defense attorney would have objected.

- Defense Counsel offered ineffective assistance of counsel in his strategic choice of not putting on a defense in order to have the last closing argument.
- Defense Counsel offered ineffective assistance of counsel when he failed to request that a mistrial be declared.
- Defense Counsel offered ineffective assistance of counsel when he failed to object to the excessive use of graphic pictures that went beyond and were not necessary for the proof of the State's case.
- Defense counsel offered ineffective assistance of counsel when he failed to request a change of venue. Mr. Harbin knew that TV news crews were called in to report on the murder trial and that this case was so publicized that Mr. Clark would not be able to

have a fair trial in Cherokee County. Mr. Harbin also knew that Mr. Clark had filed a *Section 1983* lawsuit against the County of Cherokee and against the Cherokee County Sheriff's Department.

- Defense Counsel offered ineffective assistance of counsel when he failed to request State funding for a soil expert to compare and analyze the red dirt that was found on Ms. Wingard's body, as well as, being found at the three crime scenes. The red dirt was predominantly discussed as evidence of Mr. Clark's guilt. Thus, it was critical for a defense expert witness soil scientist to testify and rebut the State's reliance on the red dirt's composition as to location exclusion. The trial transcript has numerous references to the importance of the red dirt versus black dirt in Mr. Clark's murder trial.
- Defense Counsel offered ineffective assistance of counsel when he failed to make a motion to sequester the State's witnesses pursuant to *South Carolina Rules of Evidence Rule 615.*

- **Defense Counsel offered ineffective assistance of counsel when he failed to request a jury view of the crime scene.** Mr. Clark's Trial Transcript has sufficient examples proving that he was prejudiced and that the outcome of the trial would be different had Mr. Harbin requested a jury view of the crime scene. The evidence the State presented consisted of diagrams and photographs, as well as testimonial references to this evidence. This evidence was confusing as to the jury's understanding of the perspectives of the crime scene. Had the jury actually viewed scene, their understanding of the layout of the road and the red dirt versus the black dirt would have been enhanced. Mr. Harbin, as Mr. Clark's appointed attorney, requested funds to hire a DNA expert and a forensics consultant. Rather than spending the State's limited funds requesting boxes of the

arresting officers' personnel records, it would have been better to request funds for a jury view to see whether or not the red dirt or the black dirt were present.

➢ **Mr. Harbin offered ineffective assistance of counsel by continuing to represent Mr. Clark as a client when he believed Mr. Clark was a threat to his safety. Mr. Harbin had a conflict of interest.** "Defense attorneys have an obligation, upon discovering a conflict of interest, to advise the court at once of the problem." **See:** *Holloway v. Arkansas*, 435 U.S.475, (1978).

An actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties. **See:** *Duncan v. State*, 281 S. C. 435.

Mr. Clark was charged with the murder of Ms. Winter Wingard. The public defender's office had a conflict in that they were representing Mr. Ridge Crosby, one of the inmates who had made statements against Mr. Clark.

Mr. Harbin was appointed to represent Mr. Joey Clark on December 09, 2010.

Mr. Harbin recognized that he had to withdraw as Mr. Clark's appointed counsel and he did take an initial step with Judge Kelly to withdraw. However, Judge Kelly refused to allow Mr. Harbin to withdraw. Mr. Clark's murder trial was continued when Judge Couch ruled that Judge Kelly had a conflict that prevented Judge Kelly from presiding at Mr. Clark's murder trial.

Thus, Mr. Harbin had ample opportunities to again request that he be allowed to withdraw as Mr. Clark's appointed attorney because he had irreparable conflicts with Mr. Clark. However, Mr. Harbin failed to utilize these opportunities and continued to represent Mr. Clark. Mr. Harbin had an obligation to continue to make formal requests to withdraw before the various judges that made rulings related to Mr. Clark's case after Judge Kelly was disqualified. Even if Judge Couch, Judge Baxley, and Judge King had denied Mr. Harbin's requests to withdraw, the issue would have been

preserved for direct appeal. Thus, Mr. Harbin offered ineffective assistance of counsel for which he cannot advance any reasonable strategy for continuing to represent Mr. Clark absent any judge other than Judge Kelly's refusal to grant his request to withdraw as Mr. Clark's appointed counsel.

The attorney client relationship between Mr. Clark and Mr. Harbin developed into an adversarial situation which culminated in Mr. Clark filing a motion to dismiss appointed counsel Harbin on August 6, 2012. However, Mr. Clark withdrew this motion on November 12, 2013. Mr. Clark states, for the Record, that he withdrew the motion to withdraw out of having a sense of desperation and not because he regained trust in Mr. Harbin. His withdrawal of the motion was also influenced by his family's inability to retain private counsel.

Mr. Harbin still retained the duty to decide whether or not he could still continue to represent Mr. Clark zealously and advocate for Mr. Clark. The Record proves that he was not able to effectively and zealously represent and advocate for Mr. Clark.

The attorney client relationship further deteriorated when Mr. Clark filed an official complaint with the Office of Disciplinary Counsel which was received and filed on June 19, 2013.

In Mr. Harbin's response on September 26, 2013, he told the investigator that he had contacted Resident Judge Keith Kelly, in Cherokee County, as well as Solicitor Barry Barnett about scheduling a hearing to determine whether Mr. Clark should be appointed a new counsel. The Office of Disciplinary Counsel dismissed the complaint against Mr. Harbin on September 26, 2013. As previously stated Judge Kelly denied Mr. Harbin's request to withdraw. **However, Mr. Harbin never renewed his request to withdraw before the other judges that came along after Judge Kelly was disqualified from presiding at Mr. Clark's trial.**

The attorney client relationship deteriorated to the point of no return when Mr. Clark talked to his wife on the jail telephone and was overheard saying **that if Mr. Chase brought him more bad news he was going to do bodily harm to Chase Harbin.**

→ This jail conversation was replayed to Mr. Harbin around October 30, 2013.

During the pretrial motion hearing on March 17, 2014, on Page 15 Lines 3 – 8, the following exchange took place: The Court: Okay, what else have you got Ms. Leskanic, on this matter? {Before Ms. Leskanic could answer Judge King, Mr. Harbin jumps in}. **Mr. Harbin: The security measure, the Taser belt we just consented to Judge.**

- Mr. Harbin was extremely concerned about his security in that he so readily consented to this security requirement.
- **This threat curtailed Mr. Harbin's zealous advocacy, as well as altering Mr. Harbin's trial strategy.**

Mr. Clark states, for the record, that during the trial he sat next to Ms. Christine Lewis, Mr. Harbin's paralegal, and that Mr. Harbin sat at the very end of the table. **Mr. Clark states for the record that Mr. Harbin told him this arrangement would be beneficial because it would let the jury see that Ms. Lewis was not afraid to sit beside the accused killer.**

- In order for either Mr. Harbin or Mr. Clark to communicate with each other at the trial, all information had to be relayed back and forth by Paralegal Lewis.
- **Mr. Harbin offered ineffective assistance of counsel when he failed to properly investigate, develop, and present all available, relevant, and admissible mitigating evidence. See:** *Wiggins v. Smith,* 539 U.S. 510 (2003).

Counsel made a strategic decision not to present any significant mitigating evidence, and failed to provide the Judge with a plea for mercy or a specific sentencing recommendation at the end of the trial. Mr. Harbin, on March, 27, 2014 filed a motion to reconsider the sentence in the Cherokee County Clerk's Office. **In this motion, Mr. Harbin admits that he neglected to offer to the Court information relevant to the determination of Mr. Clark's sentence, including work history, and marital and family status.** The State submitted a response on April 4, 2014. Judge King considered this motion but denied it. Judge King denied the motion in an Order filed on April 11, 2014.

- → It is interesting to note that in the State's April 4, 2014 response to the motion to reconsider the sentence, the State observed that Mr. Harbin offered no evidence during the trial to substantiate a claim for manslaughter/heat of passion.
- ➢ **Mr. Harbin offered ineffective assistance of counsel when he failed to present evidence during the trial that would have substantiated a claim for manslaughter/heat of passion.**

In the Trial Transcript on Page 97, Lines 15 – 20, Assistant Solicitor Ms. Leskanic stated the following:

I have asked Mr. Harbin. He did not have any objections, but what I would like is when I'm questioning Ms. Patrick and I need to put in one of those exhibits, to have one of the crime scene investigators just open that box. They are not going to state anything. I'm not going to ask them any questions.

On Page 98, Lines 14 – 17 the following is recorded: The Court: You may call your first witness. Ms. Leskanic: May it please the court, the State calls Beverly Patrick.

Mr. Clark states, for the Record, that at his March, 2014 murder trial, the State called the police officers, and the coroner, as its first, second, and third witnesses and not Ms. Beverly Patrick and Ms. Anna Mooney as the Trial Transcript denotes.

I have verified with Mr. Clark that he was not confused when the crime scene investigator was present during Ms. Patrick's testimony. Mr. Clark contests the veracity of the official record as denoted in the trial transcript. Mr. Clark also states, for the Record, that he told his appointed direct appeal appellate attorney that the trial transcript did not record the actual order of testimony of the State's witnesses.

Mr. Clark states for the Record that during his March, 2014 murder trial, the juror who was selected as the jury foreman was present at Mr. Clark's polygraph examination. Mr. Clark states for the Record that he told Mr. Harbin this during the selection of the jury during his March, 2014 murder trial.

Mr. Clark states for the Record that he told Mr. Harbin to reject this person and not have him sitting on the jury. Mr. Harbin told Mr. Clark that he needed proof and without that he would not reject this potential juror.

- **Mr. Harbin offered ineffective assistance of counsel when he failed to strike this juror and when he failed to investigate whether or not this juror was present at the polygraph testing.**

9. Prior to this application have you filed with respect to this conviction:

   (a) any petition in a State Court under South Carolina Law? No.
   (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
   (c) Any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
   (d) Any other petitions, motions or applications in this or any other Court? No.

10. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: Omitted Not Applicable

11. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No:

(a) If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: **The reason Mr. Clark did not previously present any of his PCR allegations to the Courts of South Carolina is that these allegations were not preserved for direct appeal.**

12. Were you represented by an attorney at any time during the course of:

(a) Your arraignment and plea? Yes.
(b) Your trial, if any? Yes.
(c) Your sentencing? Yes.
(d) Your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) Preparation, presentation, or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes.

13. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. **Mr. Chase Harbin, 419 Vardry Street Greenville, South Carolina 29601**

ii. **Mr. Robert M. Pachak, Appellate Defender, SC Commission on Indigent Defense, PO BOX 11589, Columbia, SC 29211-1589**

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing
ii. Direct Appeal
iii.

14. State clearly the relief you seek in filing this application:

A new trial or any other relief allowed under statutes and case law for the vacating, setting aside or correcting the conviction and sentence.

As Mr. Clark's PCR Attorney, I have discussed the dangers and benefits of a PCR Application, and he understands and wants to file this PCR Application.

15. Are you now under sentence from any other court that you have not challenged?

Mr. Clark is not under sentence from any other court.

ORIGINAL 016CP-1105 09

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Chesterfield)

I, Joel Stroud, Attorney for Mr. Clark, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

JOEL STROUD Joel Stroud 07-19-16

Printed Name Signature Date

SWORN to and subscribed before me this 19 day of July, 2016.

J. Michael Caskey J. Michael Caskey

Notary Public

My Commission Expires: My Commission Expires January 17, 2023

(SEAL)

FILED IN THE OFFICE OF THE CLERK OF COURT
2016 JUL 20 P 1:43
BRANDY W. HOBBS
CHEROKEE COUNTY, SC

744

0160-110509

Exhibit Number 01: Inmate Statements

1. Bryant Phillips
2. Michael Stillwell
3. Michael B. Covington
4. Ridge F. Crosby
5. John Raymond Austin

FILED IN THE OFFICE
CLERK OF COURT
2016 JUL 20 P 1:43
BEARDY W. MCBEE
CHEROKEE COUNTY, SC

CHEROKEE COUNTY SHERIFF'S OFFICE
312 E. Frederick Street
Gaffney, S.C. 29340
(864) 489-4722

CASE NUMBER

CHECK ONE:
☐ VICTIM
☐ WITNESS
☐ OTHER

INTERVIEW FORM

Name: Bryant Phillips Address: [redacted] Granite Dr.

Telephone Number: _____ Social Security Number: [redacted]

Date of Birth: [redacted] 75 Today's Date: 120510 Time: 1:07pm

Yesterday a red headed guy with glasses was brought in my Dorm. Me, Arnon Banks, Drey Clark, and Ralph Smith was playing cards. When the new guy came in he came over to the table. We asked him what he was in for and he said they got him for killing his girlfriend. He said they found her butchered to death. He said she was a twenty six year old white female from Florida. He also said her name was Winter something. He said they found her near Mike's Creek Church. He said he had went to his girlfriends Mom's House to get the keys and when he was leaving in a cab he got put in jail for driving under suspension.

Time Interview Began: 1:07 p.m. Time (Statement/Interview) was completed: 1:20 p.m.

I have read this statement consisting of 1 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBED TO BEFORE ME

THIS _____ DAY OF _____, 20___

_____
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

Signed: Bryant Phillips
Witness: [signature]
Witness: [signature]

746

CHEROKEE COUNTY SHERIFF'S OFFICE
312 E. Frederick Street
Gaffney, S.C. 29340
(864) 489-4722

CASE NUMBER

CHECK ONE:
☐ VICTIM
☑ WITNESS
☐ OTHER

INTERVIEW FORM

Name: Michael Stillwell Address: [redacted] Flat Lee Rd Shelby, NC 28150

Telephone Number: _____ Social Security Number: [redacted]

Date of Birth: [redacted]1974 Today's Date: 12-6-10 Time: 11:20 AM

(MS) Yesterday after supper I was sweeping up in E-Unit. While I was sweeping there was a white guy with glasses and reddish colored hair talking. Someone asked him why he was in Jail and the guy said it was for traffic offenses but he had been questioned about his girlfriend getting killed. The guy said he had been arguing with his wife/girlfriend for several days and he finally had enough. The guy said they were in the kitchen and he picked up a knife and started stabbing her. Then the guy said he put her body in the car and dumped it. I started moving away from him and I heard him say that he told the police that his wife had left around 2:00 AM and she had been found around 5:00. (MS)

Time Interview Began: 11:20 a.m. Time (Statement/Interview) was completed: 11:50 a.m.

I have read this statement consisting of 1 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBED TO BEFORE ME

THIS _____ DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

Signed: Michael Stillwell
Witness: [illegible]
Witness: Tracy Lee

Statement of Michael B. Covington

My name is Michael B. Covington, my date of birth is [redacted]/1991, my Social Security number is [redacted] and I live at [redacted] Jasmine Drive, Gaffney, S.C. I am currently in the Cherokee County Detention Center and have been since September of 2010. I am in the jail because of being charged with Burglary. I am in Cell Block E and have been since the time I got put in jail.

Today is December 6, 2010. About 3 days or so ago, I was in Cell Block E when the Jail Guards brought a white guy in. I think it was at night time. The white guy was wearing glasses. I started talking to him the next day, I said what's up and he shook his head no. Later on, we were sitting down at the table playing cards, we were playing spades. While sitting at the table, I asked him what you in here for, He said they trying to say I killed my wife. He looked like he was getting ready to tell me something, then he nodded his head no. We played six games of spades, and then walked towards the door after playing cards. The door was the one that leads open to the outside area. While we were standing near the door, just outside, I asked him how did she die, and he said he stabbed her, and said something about dropping her off at Mikes Creek. I told him I went to church there. He then cut off the conversation like he didn't want to talk about it no more. We then talked about playing cards again, and we did go back in and play cards. He asked me why I was in jail and I told him. The only name I ever called him was Buddy, like in friend. I asked agent Darrell Betsill to type my statement for me.

Darrell Betsill - SLED
Witness 12-6-2010

/s/ Michael Covington
Michael B. Covington

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CASE #_____

VOLUNTARY STATEMENT

LEAD #_____

LAST NAME	FIRST NAME	MIDDLE NAME	AGE	D.O.B.
Covington	Michael	B	19	3-6-91

NICKNAME/AKA	M ☒ F ☐	SSN	STREET ADDRESS
N/A		[redacted]	139 Jasmine Dr.

CITY	STATE	ZIP	MAILING ADDRESS IF DIFFERENT
Gaffney	SC	29340	N/A

HOME TELEPHONE	WORK TELEPHONE	CELL TELEPHONE	OCCUPATION
N/A	N/A	N/A	N/A

EMPLOYER	EMPLOYER ADDRESS
N/A	N/A

DRIVER'S LICENSE NUMBER/STATE	DATE AND TIME OF INTERVIEW
N/A	12-6-10 12:20pm

LOCATION OF INTERVIEW: Cherokee Detention Center

INTERVIEWING AGENT	DEPARTMENT	INTERVIEWING AGENT	DEPARTMENT
Betts, J.D.	SLED		

I, Michael Covington understand I do not have to say anything, and I volunteer the following information of my own free will, for whatever purposes it may serve. I can cannot read and write and completed the 11 grade in school. (MC)

I Request The ATTached STATEMENT Serve AS My STATEMENT To The police (MC)

I have read each page of this statement consisting of 3 page(s), each page of which bears my signature, and corrections, if any, bears my initials, and I certify that the facts contained herein are true and correct.

Date: 12-6-10 Time: 1:10pm Michael Covington
Signature of person giving voluntary statement

WITNESS: J.D. Betts SLED WITNESS:_____

I certify that I have been given a copy of this statement consisting of_____ pages.

Form # CF-002 (Rev. 7-24-06)
CALEA 1.2.3, 44.2.3

THIS IS THE SOB I GAVE AGENT BETS-'11
THE STATEMENT ABOUT. I CANT READ
OR WRITE VERY WELL (JDB)

Michael Covington

750

CHEROKEE COUNTY SHERIFF'S OFFICE
312 E. Frederick Street
Gaffney, S.C. 29340
(864) 489-4722

CASE NUMBER

CHECK ONE:
☐ VICTIM
☒ WITNESS
☐ OTHER

INTERVIEW FORM

Name: Ridge F. Crosby Address: [redacted] White Oak Rd. [redacted]

Telephone Number: [redacted]-2122 Social Security Number: [redacted]

Date of Birth: [redacted]-92 Today's Date: 120610 Time: 1628

IN THE LAST FEW DAYS WHILE I'VE BEEN INCARCERATED AT THE COUNTY JAIL A WHITE GUY WITH GLASSES CAME IN AND I ASKED HIM WHAT HE WAS IN FOR. HE TOLD ME HE WAS IN HERE FOR MURDER FOR KILLING HIS GIRL. LATER, I FOUND OUT THAT HIS NAME WAS CLARK. I HAVEN'T TALK TO HIM SINCE.

Time Interview Began: 1628 ☐ a.m. ☒ p.m. Time (Statement/Interview) was completed: 1632 ☐ a.m. ☒ p.m.

I have read this statement consisting of 1 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBED TO BEFORE ME

THIS _____ DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

Signed: Ridge Crosby
Witness: [signature]
Witness: [signature]

[redacted]

CHEROKEE COUNTY SHERIFF'S OFFICE
312 E. Frederick Street
Gaffney, S.C. 29340
(864) 489-4722

CASE NUMBER

CHECK ONE:
☐ VICTIM
☒ WITNESS
☐ OTHER

INTERVIEW FORM

Name: John Raymond Austin Address: [redacted] W. Bernie St

Telephone Number: _____ Social Security Number: [redacted]

Date of Birth: [redacted]80 Today's Date: 12.06.10 Time: 12:40 pm

THE OTHER DAY A WHITE GUY CAME IN THE DORM WEARING GLASSES AND HAD RED HAIR. ME, SKEET, MIKE JACK, AND RIDGE WERE SITTING AT A TABLE. WHEN WE SAW HIM COME IN WE ASKED TO COME OVER. WE ASKED HIM IF HE HAD ANY CIGARETTES AND HE SAID "No." THEN WE ASKED HIM WHAT HE WAS IN HERE FOR AND HE SAID "MURDERING MY WIFE." THEN HE WALKED AWAY. A LITTLE WHILE LATER SKEET WENT OVER AND GOT TO TALKING TO HIM. THEN SKEET CAME OVER AND TOLD US THAT HE HAD SAID SHE WAS STABBED UP. NONE OF US IN THERE EVEN KNEW HOW SHE HAD DIED.

Time Interview Began: 12:40 p.m. Time (Statement/Interview) was completed: 12:55 p.m.

I have read this statement consisting of 1 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBED TO BEFORE ME

THIS _____ DAY OF _____, 20____

_____
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

Signed: John Austin
Witness: [signature]
Witness: _____

APPEAL TO THE SOUTH CAROLINA COURT OF APPEALS
CHEROKEE COUNTY

Notice of Appeal and Indictment(s)
Sally Elliott, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

RECEIVED
APR 29 2014
ATTORNEY GENERALS OFFICE

THE STATE v. JOEY LYNN CLARK

Name(s) of Codefendant(s): None

Indictment Number(s): 2013-GS-11-1167

Crime(s) Charged: Murder

Trial Judge: Honorable Howard P. King

Court Reporter: Mike Watts

Date(s) of Trial: March 17, 2014-March 20, 2014

Crime(s) Convicted: Murder

Was this a guilty plea? No

Date and Length of Sentence: March 20, 2014- 45 years in the SC Department of Corrections. Credit for time served since December 6, 2010.

Date Notice of Appeal served: April 15, 2014

Appellant is: (1) In Jail: Yes
(2) Free on Bond: No

Appellant's attorney is: (1) Public Defender:
(2) Court Appointed: H. Chase Harbin
(3) Retained Counsel:

Appellant's attorney's address is: 419 Vardry Street, Greenville, SC 29601

Attorney for the State: Assistant Solicitor Kimberly L. Leskanic and Assistant Solicitor Jennifer Jordan

Comments:

WITNESSES

Cherokee County Sheriff's Office

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 11-7-13

VERDICT

Guilty

Foreperson of Petit Jury
Date: 3/7/14

DOCKET NO. 13-GS-11-1167

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

vs.

Joey Clark

Indictment for

MURDER

SC Code: 16-03-0010, 0020
CDR CODE: 118
CLASS: FEL-EXM

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 NOV 7 AM 10 16
BRANDY W. MCBEE

ATTEST COPY
CLERK OF COURT
CHEROKEE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF Cherokee)
STATE VS.)
Joey Clark)
AKA:)
Race: W Sex: M Age: 43)
[redacted])
Address:)
City, State, Zip:)
DL#: SID#:)
*CDL: Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1101167
A/W#: 2013GS1101167
Date of Offense: 12/2/2010
S.C. Code § : 16-03-0010
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder [30 years to LIFE].

in violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/in/or 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____ 11683 _____ _____ _____ 70074
DESIGNATED 69423 SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable; the balance is suspended with probation, for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT on ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Since Dec 6, 2010.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% Fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corps ☐
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (If paid in installments)		$ 3.90
TOTAL		$ 133.90

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Brandy Kennedy
Court Reporter: Mike Watts
Presiding Judge: Edward D. Miller
Judge Code: 2107
Sentence Date: March 20, 2014

A TRUE COPY
CLERK OF COURT
CHEROKEE COUNTY, S.C.

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF CHEROKEE)

At a Court of General Sessions, convened on _____, the Grand Jurors of Cherokee County present upon their oath:

Murder

That Joey Clark, did in Cherokee County on or about December 2, 2010, feloniously, willfully, and with malice aforethought, kill one Winter Delane Wingard by causing blunt force injury to her head and/or sharp and blunt force injuries to her neck, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

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

Kimberly J. DeLaine
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	SEVENTH JUDICIAL CIRCUIT
Joey Lynn Clark, #187595,	2016-CP-11-0509
Applicant,	**RETURN AND PARTIAL MOTION TO DISMISS**
v.	
State of South Carolina,	
Respondent.	

FILED IN THE OFFICE
CLERK OF COURT
2017 MAY 18 A 11:08
CHEROKEE COUNTY, SC

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on July 20, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. Applicant was indicted by the November 2013 term of the Grand Jury for Cherokee County for one of murder, (2013-GS-11-1167) after originally being indicted in 2011. Applicant was represented by Chase Harbin, Esquire, at trial. On March, 20, 2014, Applicant was convicted of murder and sentenced by the Honorable Howard P. King to imprisonment of forty-five (45) years.

Applicant filed a timely notice of appeal. An appeal was perfected by Robert M. Pachak, Esq., who submitted an Anders brief. The South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's motion to be relieved on August 19, 2015. State v. Clark, Op. No. 2015-UP-433 (S.C. Ct. App. 2015). The Remittitur was returned on September 9, 2015.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel's cross examination of Detective Burgess "sabotaged any chance that [Applicant] had in getting a fair trial."
   b. Counsel's "closing argument reinforced the jury's impression that [Applicant] had confessed to the murder of [the victim]."
   c. Counsel failed to move to suppress or object to inmate statements being admitted into evidence.
   d. Allowed inadmissible hearsay statements to be admitted during the trial.
   e. "[Counsel's] failure to object left [Applicant's] direct appeal attorney no alternative other than to file an Anders brief because no issues were preserved for appellate review."
   f. Counsel failed to request a directed verdict.
   g. Counsel failed to object to State's improper closing argument.
   h. "[Counsel] failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested."
   i. Counsel "failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested."
   j. Counsel failed to call a DNA expert to testify.
   k. Counsel failed to develop trial strategy or adequately communicate to Applicant the theory of defense.
   l. Counsel "failed to request that Judge King add voluntary murder as a lesser included charge to the substantive law, as well as adding voluntary manslaughter, guilty or not guilty, to the verdict form."
   m. Counsel failed to present any evidence of manslaughter/heat of passion.
   n. Counsel offered improper advice to Applicant "about whether to accept or reject the State's voluntary murder plea offer."
   o. Counsel mailed Applicant a letter advising him of the plea offer, but Applicant never received the letter and never discussed the plea offer with Counsel.
   p. Counsel failed to request a pre-trial hearing to determine whether sufficient probable caused existed to arrest Applicant for murder.
   q. Counsel failed to object to the jury charge that malice could be implied by the use of a deadly weapon.
   r. Counsel failed to renew his request to withdraw after Judge Kelly refused his initial request to withdraw, even after receiving a threat of great bodily harm from Applicant.

s. Counsel failed to put on a defense in order to have the last closing argument.
t. Counsel failed to request a mistrial.
u. Counsel failed to object to the excessive use of graphic pictures that went beyond and were not necessary for the proof of the State's case.
v. Counsel failed to request a change of venue based on the highly publicized murder in Cherokee County.
w. Counsel failed to retain a "expert witness soil scientist" to compare and analyze the red dirt found on the victim's body.
x. Counsel failed to request sequestration of the State's witnesses.
y. Counsel failed to request a jury view of the crime scene.
z. Counsel failed to investigate or present mitigating evidence.
aa. Counsel failed to strike juror who Applicant claims was present during his polygraph examination.

2. Prosecutorial Misconduct
   a. "The Assistant Solicitor committed prosecutorial misconduct when she impermissibly bolstered and impermissibly vouched for the credibility of the crime scene investigators and again told the jury that [Applicant] confessed."
   b. "The State committed prosecutorial misconduct when it impermissibly allowed Detective Burgess to read the inmate statements into evidence.
   c. "The State also committed prosecutorial misconduct in its closing argument when it impermissibly referenced the statements of the inmates, as well as, impermissibly bolstering the credibility of the State's investigators and offering improper state of mind speculations regarding [Applicant's] reasons about why he would cooperate with the police investigators. [Assistant Solicitor] Leskanic offered no foundational support for these improper state of mind speculations."
   d. "The State committed prosecutorial misconduct when it failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim."
   e. "The State committed prosecutorial misconduct when it failed to perform DNA testing of cigar butts found in the yard at the victim's house, even though neither [Applicant], nor the victim and residents of the house smoked cigars."
3. The trial transcript does not reflect the actual order of testimony of the State's witnesses.

Attached herewith and incorporated herein by reference are the records of the Cherokee County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). For these reasons, Respondent submits that this allegation should be summarily dismissed.

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

By: _____
ATTORNEYS FOR RESONDENT

May 16, 2017

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS
JOEY LYNN CLARK, #187595, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	2016-CP-11-0509 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Partial Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid;

Mr. Joel Flake Stroud, Esquire
Joel F. Stroud, Attorney, PLLC
PO Box 516
Chesterfield, SC 29709

DATED this 16TH day of May, 2017.

FILED IN THE OFFICE
CLERK OF COURT
2017 MAY 18 A 11:05
CHEROKEE COUNTY, SC

Ashley Hawoth, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF CHEROKEE)

JOEY L. CLARK,) TRANSCRIPT
) OF
APPLICANT,) RECORD
)
vs.)
)
THE STATE OF SOUTH CAROLINA,) 2016-CP-11-0509
)
DEFENDANT.)

June 19th, 20th, and 21st, 2018
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE GRACE GILCHRIST KNIE, Judge.

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

JOEL F. STROUD
ESQ.
Attorney for the Applicant

MEGAN H. JAMESON and JORDAN A. COX
ASSISTANT ATTORNEY GENERALS
Attorneys for the State

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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E X H I B I T S

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PROCEEDINGS

THE COURT: As I told y'all, we had a pretrial conference, and we have this -- we have all day. And so don't feel rushed, and I will allow counsel to make openings and, and closing remarks as well.

Okay. So, when---

MS. JAMESON: Thank you.

THE COURT: So, whenever you-all are ready, we will begin.

MS. JAMESON: May it please the Court?

THE COURT: Yes, ma'am.

MS. JAMESON: Your Honor, this is the matter of Joey Clark versus The State of South Carolina. Docket Number 2016-CP-42 -- excuse me. It's not CP -- it's, it's a Cherokee County case, Your Honor. 2016-509. 2016-CP-11-0509.

Mr. Clark was indicted by the Cherokee County Grand Jury for murder. He was represented by Chase Harbin. The case was prosecuted by Kim Leskanic and Jennifer Jordan out of the Seventh Circuit Solicitor's Office. Leskanic. I apologize.

On March 17th, 2014, Mr. Clark proceeded to a jury trial before the Honorable Howard P. King. On March 20th, 2014, the jury convicted Mr. Clark of murder, and Judge King

sentenced him to 45 years imprisonment.

Counsel for Mr. Clark filed a Motion to Reconsider the sentence, which was denied by the Court. Mr. Clark then filed a timely Notice of Appeal, and an appeal was perfected on his behalf by Appellate Defender Robert Pachak who submitted an Anders brief.

The South Carolina Court of Appeals dismissed Mr. Clark's appeal, and granted, granted counsel's motion to be relieved on August 19th, 2015. The Remittitur was returned to the Circuit Court on September 9th, 2015. Thereafter, on July 20th, 2016, Mr. Clark, through retained counsel, Joel Stroud, filed an Application for Post-Conviction Relief alleging numerous grounds of both ineffective assistance of trial counsel and prosecutorial misconduct. I will defer to Mr. Stroud to summarize the allegations as it is a lengthy PCR Application.

So, I'll hand it over to Mr. Stroud.

THE COURT: What is the date that the Application was filed?

MR. STROUD: July---

MS. JAMESON: July---

THE COURT: It's hard for me to read the clocked date.

MR. STROUD: July---

MS. JAMESON: July 20th, 2016. It's very faint, but --

THE COURT: Okay.

MS. JAMESON: July 20th, 2016.

THE COURT: Okay.

All right. Mr. Stroud, good morning again, sir, and, again, if you-all want to make openings, you're, you're welcome to do so.

Okay?

MR. STROUD: Okay. As she said, it's very long. Rather than take time to detail it, the allegations, it's just, like I said, for the record, I'm just making sure that, in addition to the testimony here today, we will be using as evidence the filed and verified PCR allegations, allegations in, in the Application.

Okay. Let me get my---

THE COURT: And just so we're clear, Mr. Stroud, this -- there was not any supplemental Application filed, correct?

This looks very thorough, but I just want to make sure that this is what---

MR. STROUD: Nope.

THE COURT: ---I'm---

MR. STROUD: That's the final---

THE COURT: Okay.

MR. STROUD: ---one.

THE COURT: The one that was filed on July the 20th, and it looks like it's, in length, over 38 pages with

attachments.

MR. STROUD: That's correct.

THE COURT: Right?

Okay.

MR. STROUD: And one other -- as I explained there, one of the reasons for the length is there -- the -- on the cross-examination of the City -- of the Defendant -- of the -- Detective Henson, there was so numerous that it was almost impossible to select the -- all the pertinent ones. We felt like we needed to put those in there.

May it please the Court?

Mr. Clark's murder trial involved testimony from the State's DNA expert as well as testimony from the State regarding soil science lay opinion testimony. In addition, there was testimony from police investigators regarding the probable cause used to arrest the prosecutor's (sic), Mr. Clark. Because of that, and as a -- in a PCR, if I'm questioning any of the expert witnesses, I'm required to have subject matter experts on the stand, and, therefore, we're gonna have a forensic DNA expert witness, Ms. Meghan Clement, back here. We're gonna have a soil science expert, Mr. Ted Landreth, who Ted -- John Thorp right there, and we're gonna have Mr. -- our private investigator, Mr. Ted Landreth.

And what I want to first say that it's important to

note that the State, on numerous occasions during Mr. Clark's murder trial, admitted that this was a circumstantial evidence case. It's also important to note that trial attorney, Chase Harbin, offered no objections during the murder trial.

In addition, Mr. Harbin never requested a Rule 19 directed verdict at anytime during the murder trial. Further, the trial transcript consistently indicate (sic) that the probable cause used for the arrest and conviction was or involved statements about, about the red soil versus the black soil and the inmates' statements. It's important to note that the inmates' statements were read into evidence, and, in, in our opinion, violation of the confrontational clause.

The inmates were there, ready to testify, but, because of the cross-examination strategy of Mr. Harbin, he opened the door, and allowed the State, on redirect, to bring out these inmate statements. In my opinion, the State never intended to do this. They had the inmates' statements there at the courtroom detention holding cell. They had submitted expert -- and the judge read out to the potential jury -- jurors that the inmates would be there to take the stand, and testify, and be subject to cross-examination.

In addition, the State had said that these -- had told -- Mr. Harbin, during the pretrial and trial, had

thought that these were protected confidential informants. Prior to the trial, and during the trial, the Assistant Solicitor informed Mr. Harbin that no, these inmates who made these statements were not confidential informants who should of made their statement in camera, that they were just ordinary inmates who made some statements.

And it's also important to note that Ms. Winter -- the victim's name was Ms. Winter Wingards (sic). Her body was found at Mike's Creek Road, and Ms. Winter lived at Songbird Lane, and that police investigators and detectives testified that Mike's Creek Road had no red dirt. Only black dirt. Again, pointing out the importance of that testimony, and why we need a soil scientist to clarify that testimony.

Now, what I would like to do, Your Honor, before I call any witnesses, I would like for you to permit me to tell you a little about Mr. Joey Clark. He has -- tell you -- he -- a little bit about his background, and how he spent his time at Broad River.

May I do that, Your Honor?

THE COURT: Yes, sir.

MS. JAMESON: The State would object on relevancy grounds.

THE COURT: Counsel, I'm going to allow it.

MS. JAMESON: Thank you, Your Honor.

THE COURT: Thank you.

MR. STROUD: All right. Mr. Clark was born in Marlboro County. During his life, he's had some scuffles with the law. He learned welding and worked as a welder, and provided for himself and his two sons.

Mr. Clark's life was not picture perfect. However, he was overcoming his past, was looking forward to living a full and useful life. These plans changed when he was accused of murdering his -- Ms. Winter Wingard. Mr. Clark did not have the money to retain a lawyer. Mr. Chase Harbin was appointed to represent him in his murder trial.

Now, it's important to note that the attorney/client relationship deteriorated, and one of the factors was that Joey, in a telephone conversation to his wife at the time, even though he knew that the conversation was being recorded, he made a threat that -- I believe he said something to the effect if Mr. Harbin keeps bringing me bad news, I'm gonna punch him in the nose. And then, of course, Mr. Harbin, at some point, also requested to withdraw, but Joey ended up deciding to keep him, and later on I'll let Joey explain why, but that is a factor in this.

It was important to note that, during the trial, Mr. Clark lost hope and faith in Mr. Harbin's performance. During the trial, Mr. Clark was bewildered when there was no objections offered. Mr. Clark -- and, finally, Mr. Clark was resilient. He's made the most of his incarceration at

Broad River Prison.

Despite the recent trying times that exists in South Carolina prisons today, he is not had any disciplinary infractions. He's completed and received his GED diploma. He's also completed other courses in horticulture and law studies. And, finally, I want -- the purpose of a PCR is to show, of course, that there was ineffective assistance of counsel that rose to the Strickland -- both prongs of the Strickland standard.

I'm here to tell you that I can't tell you if he's innocent, but I do believe that, once we're through with this, the facts will show that he did not get a fair trial and deserves a new trial. And, with that, I would like to call my first witness.

THE COURT: And I tell you what, just to be fair, we're also gonna let the State make on opening.

All right?

MR. STROUD: That would be fine.

THE COURT: Okay. Thank you.

MS. JAMESON: Thank you, Your Honor.

May it please the Court.

I'll be brief. I, I think we need to hear the testimony from the witnesses. We've got both prosecutors here. We've got Mr. Harbin here. We have a variety of experts that are gonna testify.

So, I defer to a closing statement rather than an opening statement cause I think we need to let the evidence unfold before the Court before any argument can be made on that.

One thing I, I do want to make sure to do is, when the State filed its return, it was a return and partial Motion to Dismiss that is before Your Honor, and that was filed on May 16th of 2017. In the State's return, we did move to dismiss the allegations of prosecutorial misconduct that were alleged against the solicitors here.

All of the allegations, and they're set forth in the Application as well as in the State's Motion to Dismiss, were known at the time of trial, immediately after trial, could of been raised on direct appeal. You can't use PCR to raise issues that could of been raised on direct appeal. So, the State moved to dismiss those allegations of prosecutorial misconduct, and would review those allegations at this time.

The allegations are that the assistant solicitors permissibly bolstered and vouched for credibility in their closings, failed to test three different items for, for DNA testing, cigar butts, the fingernail clippings, and a knife, as well as created prosecutorial misconduct when they allowed Detective Burgess to read the inmate -- the statements into the record, and these were all known at the

time of trial, should of been raised in a direct appeal.

And so the State would renew our Motion to Dismiss those allegation against the prosecutors in this case.

THE COURT: Okay. Mr. Stroud, what's your position about that?

MR. STROUD: Your Honor, my position is that, again, as I've highlighted, no objections were made by Mr. Harbin during the entire trial. An Anders brief was the only opportunity, and an Anders brief, by its own definition, says that no issues are preserved.

At the PCR stage, we are trying now to explain what the totality of what went on at the trial that is -- it's not the direct appeal. It's a PCR. And, in that case, we feel like the, at least for the record, we're, we're saying that Mr. Harbin should of objected.

So, he's ineffective on that count, but, to preserve the issues for further -- in case of a Cert Petition is needed, we need to at least get it on record that the State, in doing improper bolstering, improper vouching, and improper mind condition -- state of mind arguments, that were no foundation laid. We have to get that in, and we -- her argument would prevent any of that because we can't control what went on at the PCR hearing, and, to use that against us, in my opinion, is not fair because her own definition shows ineffective assistance of Mr. Harbin in not

preserving those issues.

THE COURT: Okay. I am going to deny the motion at this time, and, of course, everybody understands that this is less formal because there's no jury involved, and it may be that, after reviewing everything, I will decide what weight to place on different issues, and will also decide that issue.

Again, just so the Applicant understands, Mr. Clark, the way these things are handled, I receive the information today.

Okay. And so I'm going to take this under advisement, and, and I say that so that you can take a deep breath and relax a little bit during the proceeding. I know this is very important to you, but I'm going to read everything and it may take a while to make the decision. I'm gonna give your counsel and the State an opportunity to submit anything else that they feel is relevant at the conclusion.

And so I think that you need to understand that.

Okay?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. And so, with that, are we ready to proceed?

MS. JAMESON: Yes, Your Honor.

THE COURT: Okay.

MR. STROUD: I am, Your Honor.

THE COURT: All right.

MR. STROUD: At this time, I would call to qualify, as an expert witness, Ted Landreth to the stand.

MR. COX: Your Honor, we're -- the State's not gonna object. At this particular moment, there has been, been -- no, there are no questions that have been asked yet. There's no foundation laid as to what expertise this witness is gonna have. Once Mr. Stroud lays that out, we would like a chance to voir dire the witness before him being admitted---

THE OFFICER: Yes.

MR. COX: ---as an expert.

THE COURT: Yes, sir, I will allow that.

Okay?

MR. COX: Thank you.

THE COURT: All right. First, let me, let me swear you in.

Good morning, sir.

THE WITNESS: Good morning.

THE COURT: If you will raise your right-hand?

(Witness complies.)

TED LANDRETH, being first duly sworn, testified as follows:

THE COURT: Okay. Thank you, sir. Be seated.

(Witness complies.)

THE COURT: And, if you will, repeat your name and spell your last name for the record.

Okay?

THE WITNESS: Sure.

Good morning. My name is Elbert T., which is Theodore, Landreth, Junior. Landreth is spelled L-A-N-D-R-E-T-H.

THE COURT: Thank you, sir. Please answer any questions by Mr. Stroud, and then don't get up because then the State will have some questions for you as well I feel certain.

Okay?

THE WITNESS: Thank you.

THE COURT: Yes, sir.

MR. STROUD: And just, I don't think we need to remind him, but just want to -- this is the witness who has the medical problem.

THE COURT: Yes, sir.

Okay. I understand. If we need to take a break, we certainly will.

Okay?

MR. STROUD: Thank you.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. STROUD:

Q Would you please state your full name, place of

residence, occupation, and title?
A Elbert Theodore Landreth, Junior. I live at [redacted] Club Circle, Greenville, South Carolina, and I'm a licensed private investigator.
Q What academic degrees do you have?
A I graduated from high school at Carolina High School, and I have a four year degree from Southeastern University.
Q Would you please describe the subject matter of your expertise?
A As I said, I am a private investigator. In this particular case, I served more as a analyst or research person for, for the defense, and which that encompassed reading trial transcripts, looking at all records, photographs, any other things that were associated with the trial.
Q What type of specialized training and credentialing do you have in the field of private investigations?
A In the field of private investigations, I continue to take the criminal -- the continued education units that are required by the South Carolina Law Enforcement Division. I'm -- normally I have about three times as many that -- as I'm required to have.

I've taken the criminal domestic or domestic, I'm sorry, the criminal defense courses. I've taken professional investigation courses. I've taken surveillance

courses, and then, every year, we're required by SLED to go through a particular training that is set forth by SCALI, which is South Carolina Investigators's Association, Association.

Q What -- and I'm sorry.

Is that it?

A Yes, sir, that as far as an invest -- as an investigator. Prior to that, I was commissioned with South Carolina Department of Natural Resources for 15 years. I was a deputy officer with DNR, and at which time, you know, I had to go through a period of time at the Academy, and then, every year, I had to do in-service training, and then also different trainings at Greenville Tech in regards to DNR and the State Constable, which is kind of the same commission.

Q What license do you possess as a private investigator?

A A private investigator's license, which is -- actually it's called a registration, and it's issued by the State Law Enforcement Division, which is also known as SLED.

Q What types of investigations do you perform?

A I have done domestic, I've done business investigation, and then I've assisted quite a good bit in, in criminal defense.

Q Are you presently licensed as an private investigator in South Carolina?

A Yes, I am.
Q Have you previously given testimony in Court as a private investigator?
A Yes, I have.
Q Please give us some examples of the previous experience as a private investigator.
A As far as testifying---
Q Yeah.
A ---in Court?
Q Uh-huh. (Affirmative).
A Domestic cases primarily. Some corporate cases.
Q Okay. What is your experience as a licensed private investigator regarding investigation of criminal matters?
A As a, as a private investigator, you know, we're not involved in a lot -- a whole lot of criminal investigations whereas we have no authority. A private investigator has no authority to, to arrest someone especially, but I have done, as I have assisted you in this case, as far as case research.
Q What is your experience regarding police investigations of a criminal cases as it pertains to procedures and standards of police investigators and detectives assigned to cases?
A As a officer with the South Carolina Department of Natural Resources, obviously it was a State Law Enforcement

commission, I was involved in field operations in the, the Greenville unit.

Also, prior to that, I was involved pretty extensively with Pickens County Sheriff's Office as doing some undercover work for them. Not as a contract -- on a contract basis. Not as an employee. I did the same thing with State Law Enforcement Division.

Q Have you published and written any books or articles?

A Yes, I have.

Q Would you be able to list some of those books and publications?

A I have. They are not related to private investigations. They're not related to law enforcement, but the -- they are basically firearms training and reference guides. One of them being Legally Armed, which is the name of it. The other one is the South Carolina Concealed Weapon Permit Handbook, which is four or five years of that one, and about ten years of Legally Armed. And then also A Licensed To Carry, which is the South Carolina book in regards to carrying a gun in South Carolina. And then also Concealed Carry Wisconsin. I co-authored with Jerry Mojack in, in Milwaukee, Wisconsin.

Q Mr. Landreth, what is a Post-Conviction Relief hearing?

A I'm sorry. Would you repeat that?

Q Mr. Landreth, what is a Post-Conviction Relief hearing?

A A Post-Conviction Relief hearing is, is one of the parts of the appeal whereas the defendant or the person that has been charged and convicted with a crime attempts to get Court help against the attorney that represented him in Court.

Q All right. What continuing education have you taken in the field of private investigations in the last year?

A Criminal defense investigation. I think it was 12 continuing education units. Professional investigations. Surveillance techniques. And then there were several that was, that was at the SCALI, which is South Carolina Investigations Association, meetings in, in Charleston this last year, which I think it was 12 units.

MR. STROUD: Your Honor, I had previously sent, as Exhibit 2, and gave to the State the CV, and I would just like to enter that, if I may, into evidence.

THE COURT: Mr. Cox or Ms. Jameson.

MR. COX: No---

MS. JAMESON: This in Mr. Cox's witness.

THE COURT: Okay.

MR. COX: No objection to the witness' resume being entered, Your Honor.

THE COURT: Okay. That is Applicant's Exhibit No. 2 without objection.

(WHEREUPON, the CV was marked as Applicant's Exhibit

No. 2, and received into evidence at this time.)

MR. STROUD: Okay. Do you have your copy or do you want this one?

THE COURT: I have it.

MR. STROUD: Okay. Your Honor, pursuant to Rule 702---

THE COURT: But we may want to leave that then, sir, with the court reporter.

MR. STROUD: Okay.

THE COURT: You'll be like me and end up with exhibits in your briefcase.

MR. STROUD: All right. Your Honor, pursuant to Rule 702, I would like to tender Mr. Ted Landreth as an expert witness in the field of private investigations, and will turn him over to opposing counsel for any questions about his qualifications.

THE COURT: Okay. Thank you, sir.

Mr. Cox.

MR. COX: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. COX:

Q Good morning, Mr. Landreth.

A Good morning.

Q The copy of your resume that was just entered into evidence, is that the -- is that -- that's the one that you provided to---

A That's correct.
Q ---Mr. Stroud?
It's accurate?
It's been undated to today?
A It's has---
Q Fairly recently?
A Yeah, fairly recently.
Q Yes, sir.
Okay. Thank you.
A Yes, sir.
Q So, Mr. Landreth, you said you are a private investigator, correct?
A That's correct.
Q You were retained by Mr. Stroud to help him build his case for this particular PCR, right?
A No, sir, I was not retained by Mr. Stroud.
Q Then who were you retained by?
A I was asked by the family to assist Mr. Stroud in his case.
Q Okay. Well, the family of the Applicant hired you to help with his case?
A Somewhat. It's more of a pro bono I guess you could call it.
Q Okay. Fair enough.
Now, you are not a lawyer, correct?

A I am not a lawyer.
Q You didn't go to Law School?
A No, sir.
Q And you have no training, based on your resume and what you've testified as your qualifications, in trial strategy or trial advocacy?
A No, I do not.
Q All right. You have no formal training on objecting at trials, correct?
A No, sir, I do not, other than experience as a law enforcement officer, and what times that I would sit in Court.
Q Right.
But you, you, yourself, have never studied the South Carolina Rules of Evidence in order to make objections at trial, correct?
A I don't recall if that was part of the DNR in-service or -- because it's been about 20 years ago now.
Q I understand.
You don't have any formal training on the South Carolina Rules of Criminal Procedure?
A I do remember going through the South Carolina Rules of Criminal Procedure. I do not have a degree in it obviously.
Q Yes, sir.
And that was during your time with DNR?

A That's correct.
Q Now, how long ago was that again?
A It's probably 18 years ago.
Q Yes, sir.
Now, you, you talked a little bit about having testified as a private investigator before?
A That's correct.
Q Around how many times have you testified as an expert?
Not as a private investigator for a case, but as a qualified expert in private investigation.
A This would be the first as far as expert.
Q Okay. Now, your previous testimony, that dealt with, you said, domestic cases?
A Yes.
Q Some corporate cases?
A Yes.
Q But no PCRs?
A No.
Q This would be your first time testifying?
A Absolutely.
Q Any murder trials?
A No.
Q Okay. Let's see. Mr. Landreth, your education background, your, your degree was in public communications?
A That's correct.

Q Okay. That was a four year degree?
A That's correct.
Q Okay. You have any Master's, Master's Degree, a formal doctorate degree in any criminal matters?
A No, I do have an honorary doctorate, but I'm sure that won't carry a lot of weight here today.
Q No, sir.
That honorary doctorate was not in criminal procedure?
A No, sir, it was in the humanities.
Q Okay. Now, Mr. Landreth, while working with -- working for the Applicant's family and with Mr. Stroud, you developed some opinions, correct?
A I did. And the term working is real loosely if you understand what I'm saying.
Q I don't.
Could you elaborate a little bit on that?
A Well, I guess you could say more or less that it was a ministry to try to, to, to help a family.
Q So, your, your goal, when you were hired by the family, was to help this particular Applicant in this particular case?
A That's correct.
Q Okay. Now, Mr. Landreth, without going into the actual opinion --
A Sure.

Q -- you did make some comments on -- in your opinions as to the conduct of trial counsel at Applicant's trial, correct?

That was part of your research, you evaluated his conduct?

A Yeah. Well, I guess you could say that, but what I would do, when I, I would -- for instance, when reading the transcripts or other Court records, I would base my opinion to Attorney Stroud.

Q Now, your research in, in reviewing the record and the, the transcripts, the photos, everything that went on during the trial, you didn't do any outside research as far as other PCR trials, other murder trials?

A No, I did not.

Q You focused -- okay. Your Honor, if I may just have one moment.

THE COURT: Yes, sir.

(Pause.)

MR. COX: Your Honor, I don't have any -- we don't have any -- no further questions for this particular witness as far as voir dire. We would object to him being qualified as an expert under Rule 702, and I -- if you'll allow me, I would comment on it.

THE COURT: Yes, sir, go ahead.

MR. COX: He has admitted that he has no or there was

no indication that he has any specialized knowledge that would assist the trier of fact in this case as is required under Rule 702. The trier of fact being Your Honor. He indicated, during his testimony, that there is inherent bias when he was hired by the family to help out in this particular case. There is no independent analysis that he conducted to alleviate that bias that he has, and we just ask you not to allow this expert or allow this witness to be qualified as an expert in private investigation or other matters in this case.

THE COURT: Okay. Mr. Stroud, what is your position, sir?

MR. STROUD: My position is that Mr. Landreth is not saying he's biased. What he's saying is that the family had limited means. We know that from the fact that he was unable to retain a private attorney.

The family was able to support Joey's Application by finding someone who would be able to provide some initial case review using his background in -- as a private investigator because he is clearly shown that he has knowledge of criminal matters, and it is a stretch to say that, because he's never done this before, and he's not doing it for pay, that -- he's doing this to help me basically. He did work initially through the contact with the family, but there's no bias here in that everything's

been run through me. There was no new investigations.

You can't be biased if you're just reviewing the record, and then reporting that back to an attorney. He has said that he is familiar -- within the last year, he's taken criminal cases.

I don't see any evidence the State has said -- is put on that shows us bias, and they haven't even heard his questions yet.

How can they form this opinion about his intent when they don't even know what questions he has?

I could of chosen a different type of person and the family could of chosen a different type of expert, but, this man, they knew him. They said can you assist. He was vetted by me, and I just don't see how a decision can be made on bias without further specific evidence.

THE COURT: Okay. And so -- and, and it could be, and, and the term bias, I'm not really considering the fact that that term was used.

Okay. And right now the question before me is whether or not he should be qualified as an expert witness, and you're offering him as an expert witness in the field of criminal investigations?

Is that right?

MR. STROUD: Well, no, just as a private investigator who, as part of that job description, through his licenses

and background, has taken more than a lay person about -- on the street about legal matters. He also, as a private investigator, and his degree and his work, he has the ability to assess records, to say Mr. Stroud should look at this for his job was to be the initial person to point out discrepancies that allowed me other than -- of course, I've read this transcript over and over.

I see constitutional errors, but, at the same time, I'm not allowed to testify. I have to have somebody who is able to point out some of the contradictions that led me to fill out this PCR Application, and I guess what I'm saying is let's hear the questions that I'm gonna ask. Let's hear his answers and see.

I mean he -- if you eliminate him as a private investigator, then what we're saying is what, what standard do we use -- does an attorney use when there's very limited money to have someone do due diligence, and where do you, where do you draw the line.

I think it's a blessing that he didn't charge that much. He's -- his background -- he's ethically bound.

Well, let -- may I ask him if he's ethically bound to report the fact one way or the other?

THE COURT: I, I will allow you to question him again with regard to his credentials on reply to what Mr. Cox inquired about, and I would be interested, Mr. Stroud, in

knowing how long Mr. Landreth has been licensed by the South Carolina Law Enforcement Division, and what is required of him yearly to be recertified in that regard. And I know that he said that he had done some domestic investigation -- for domestic relations matters, and some for business related matters.

I, I would be curious about if that, if that has been done on a full-time basis, the number of hours per week devoted to that, how many reports he is given. I know he was asked by counsel if he had testified in Court before, but I also am aware that a lot of times, in these situations, counsel will stipulate to the report of a private investigator without requiring a private investigator to appear and testify in order to be most efficient, and to -- for it to be the least expensive method of handling those issues. And sometimes a private investigator's report can shed so much light on a case that it will be resolved without having to go to Court in a worker's compensation claim or something like that.

And so why don't you delve into that a little bit further to help me?

Okay?

MR. STROUD: Okay.

CONTINUED DIRECT EXAMINATION

BY MR. STROUD:

Q Mr. Clark, you just heard the Judge's concerns.

So, what is required to be recertified and have you -- is there anything in your background that you wish to add that shows how being a private investigator is relevant to assisting in this case?

A Well, first of all, you referred to me as Mr. Clark.

Q I'm sorry.

A It's, it's Landreth. That's okay.

Q Yep.

A As far as the recertification process with SLED, the main issue here is a couple hundred dollars application fee. Then, every two years, you have so many criminal -- training units, continuing education units, that you have to do. And I have normally, at every year, obtained more of those units just for one year than you're required to have for two years because I enjoyed, enjoy taking the courses, the courses.

What was the next question, Mr., Mr. Stroud?

MR. STROUD: One moment, Your Honor.

(Pause.)

Q All right. As far as how -- let me ask you this.

How long have you been working on this case?

A It's approximately about two years.

Q Okay. And---

A Now, that's not -- obviously it's not full-time.

Q Okay. In, in terms of your Court testimony today, as

the, as the, as the judge was saying, often times, private investigators, they may not need to go to Court. Their report suffices.

But what, in your background, would qualify you to say that you can come to this Court as an expert witness just to talk about how you used your private investigator knowledge to review this case, and not offer attorney/lawyer opinions, but offer opinions that are supplemented by the knowledge you have as being a licensed South Carolina investigator who just happens that you -- your report's not sufficient at this, excuse me, point that you do need to testify?

A Mr. Stroud, this is probably not the answer that, that we're looking for, but the private investigator license is just kind of a little extra to -- because of the work that I did for you could of been done by any individual.

Q All right. But---

A First and foremost, I want to be totally honest about what I'm saying, and I don't know how to answer it other than, than being totally honest with you.

Q So, the, the only reason that I used -- I -- when the, when the family said they hired a private investigator, my initial reaction was that okay, this is good because this isn't just somebody off the street like you're saying. This is someone who has some specialized knowledge that anybody doesn't have.

So, what -- when you basically said that anybody could do this, do you still feel that way even though, when I found out about you, I said you have qualifications that I think will be -- qualified you as an, as an expert because I'm not asking for lawyer opinions. I'm asking---

A Sure.

Q ---your opinions about the case review based on your special knowledge of being a private investigator.

A Well, Mr. Stroud, you know, I'm on your side obviously --

Q Uh-huh. (Affirmative).

A -- if we take sides. But as I just mentioned, when you use the word private investigator, it is -- it really has not even -- doesn't have a whole lot of meaning in regards to what I've -- what I did. It has not a lot, not a lot of meaning in regards to what I have done in the past.

Most of what knowledge, I guess you could refer to it, that I've gained in, in courtroom etiquette or whatever the correct term is, is, is through previous years in association with law enforcement, years as a deputy officer with South Carolina Department of Natural Resources, even though you don't work murder cases with -- as a game warden, but I do think I have a little more knowledge of, of what goes on in a courtroom than John Doe or---

Q Uh-huh. (Affirmative).

A -- the average person because, as I mentioned a few minutes ago, I kind of have a passion of -- I have, I have -- as I told the kind counselor a minute ago, I do not have a law degree, but I do have a passion for studying and, and learning as much as I can about law. Not that I plan on being an attorney. I've never been accused of that, but, you know, I do have respect for what y'all do. I have many, many friends that are attorneys. Spend a lot of time with them.

I have magistrate friends in Greenville County that I've spent a lot of room in there -- a lot of time in their courtrooms---

Q Uh-huh. (Affirmative).

A ---listening to, to cases. Oddly enough, they were not murder trials, but they were criminal charges. Some of them were felony charges. I don't know how else to answer your question, Mr., Mr. Stroud.

Q All right. All right. The reason I've called you as an expert witness is that we know the State's detectives were involved in this, and, again, going back to the PCR requirements, since I'm questioning through other experts---

A Sure.

Q ---what the detectives did, I felt that it was incumbent -- that your background was necessary. I mean I'm not trying to put you on as an expert for legal reasons.

I'm trying to say that you, because of your training, did gain certain knowledge, and, when you reviewed your transcripts -- the transcripts, that knowledge allowed you to point out discrepancies to me about police techniques, about what was done at the trial based on the record. So, I feel like that you are an expert, and that you, sometimes, I think you're selling yourself short.

So, is it---

MR. COX: Your Honor?

MR. STROUD: Yeah.

MR. COX: I think we've gone a little---

THE COURT: Okay.

MR. COX: ---off questioning qualifications of the witness. We've gone into argument.

THE COURT: All right.

MR. STROUD: Yeah.

THE COURT: Okay.

MR. COX: And, Your Honor, if I may make one brief reply argument as to this?

THE COURT: Yes, sir.

MR. COX: The State's has no -- we don't -- we, we do not have an issue with this witness testifying as---

THE COURT: Yes, sir, I understand.

MR. COX: ---his investigation of this crime. We just do -- we don't -- he -- we don't believe he can be qualified

as an expert to the Constitutional deficiencies that are the issues at the heart of this PCR hearing. We don't believe he's been qualified, has the qualifications, or can be qualified as an expert in that field.

THE COURT: Okay. And so my understanding is that there, there, there has been a report of this witness that has been reviewed by counsel. Counsel objected to my reviewing it before today.

Now, it's further my understanding that the objections lie in some of the conclusions that were reached by this witness as to the actions of legal counsel during the trial, and that, that those conclusions go to the ineffective assistance of counsel. And so I guess where we may just have to take that up as it comes when -- during the testimony.

What I -- okay. Sir, I'm, I'm reading your CV, and it's on my computer and I'm not real tech oriented.

THE WITNESS: Sure.

THE COURT: Okay. But I'm -- I've been reading it as you've been testifying.

And so you have been a licensed private investigator for how long?

THE WITNESS: Four years.

THE COURT: Okay.

THE WITNESS: And then---

THE COURT: And you've been recertified how often?

THE WITNESS: Every -- each year -- each year you have to be recertified.

THE COURT: Okay.

THE WITNESS: So, that would be four -- I think it's four years.

THE COURT: All right.

THE WITNESS: Prior to that, many years ago I was a PI.

THE COURT: Right.

THE WITNESS: And on top of that, I worked for several different law, law offices in Greenville County as their investigator, investigator.

THE COURT: Okay. And so, with that, this witness is a licensed private investigator.

Okay. He is an expert as a licensed private investigator.

All right. But I do not believe that he can have -- based on that, because he is not also a lawyer.

Okay. I don't think that he can give opinions as to whether or not counsel, at the trial of this case, was effective or ineffective. As stated earlier, I think he can state -- he can testify. He can state what he did. He can state that, if he reviewed the transcript, and there were, you know, 30 objections or, or there were no objections, I think he can say I read the transcript and there were no

objections.

I don't think he can take it a step further and give an opinion about that. I think, ultimately, that is my decision.

Again, I -- there's no jury here, and, and I can determine what weight to give all of this, and I am certainly capable of then, at the end, saying I am not to determine this opinion.

Okay. And so we, we don't have that strict wall because there is no jury here, and I just want to make that clear to everyone. And so, if I haven't confused y'all too much, I, I, I do believe that this gentleman is an expert. He is a private investigator, and that he can give statements and -- about what he has observed. I believe that he could even give certain opinions as in, in the regard of being a private investigator, but I do not believe that he can give legal conclusions.

Okay.

MR. STROUD: All right. Your Honor, may I just add, when I gave this preliminary report, you'll notice it was done back in January.

THE COURT: I haven't read it.

Okay?

MR. STROUD: Okay. But, anyway, I may not even use the report. I, I have an open door policy on discovery. So, I

freely gave it.

THE COURT: Yes, sir.

MR. STROUD: And---

THE COURT: And I'm not trying to interfere with your strategy.

Okay?

MR. STROUD: Yeah, and I'm -- I'm just letting you know I may not even use it --

THE COURT: Okay.

MR. STROUD: -- the record.

THE COURT: And so, with that, are we now ready to proceed with this witness' testimony?

MR. COX: Yes, Your Honor.

THE COURT: Okay. All right. Mr. Stroud.

All right. Sir, do you need a break?

THE WITNESS: Yes, ma'am, please.

THE COURT: Okay. Why don't, why don't we take about five minutes?

Okay. And, sir, you can go out this door right here.

THE WITNESS: Right here?

THE COURT: Okay.

THE WITNESS: Thank you.

THE COURT: All right.

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

THE WITNESS: Thank you, Judge.

THE COURT: Yes, sir.

THE WITNESS: Thank you so much.

THE COURT: All right. Counsel, are we ready?

MR. STROUD: I'm ready.

MR. COX: Yes, Your Honor.

THE COURT: All right. We're back on the record for the testimony.

CONTINUED DIRECT EXAMINATION

BY MR. STROUD:

Q Mr. Landreth, what were you asked to do, as a private investigator, in Mr. Clark's PCR matter?

A I was asked, I was asked to review the transcript and all supporting documents, including pictures, and assist you in any way possible.

Q What materials did you review to become acquainted with this case?

A Like I just said, which is the -- repeat the question please again.

Q All right. What materials did you review to become acquainted with the case?

A The Court transcript, and all supporting documents, which would include emails, letters, Court Orders, pictures, police reports.

Q What was the methodology used to investigate this case?

A I spend a considerable -- well, a lot of time reviewing

all of the documents that I just mentioned, and trying to run a parallel investigation with the -- as the police officer -- the, the deputies with the Cherokee County Sheriff's Department did even though it's kind of a task to do that since it'd been so long since the -- this incident. But I was trying to mirror the case and see if it would lead to the same conclusion that they determined, and, and to look at the transcripts and the other records and documents to see if I see anything that, that I just didn't totally agree with it, and, at such time, I would report to you --

Q Okay. Did you interview---

A -- Mr. Stroud.

Q Did you interview Mr. Clark as part of your investigation?

A Yes, I did.

Q After you met him, what was your impression or just what did you come away with after you talked with him the first time?

MR. COX: Objection, Your Honor. Calls for an improper argument or opinion. Excuse me.

THE COURT: Okay. Mr. Stroud, why don't you rephrase?

MR. STROUD: Okay.

All right. When you in, interviewed him, did he talk to you about the case?

What did he -- what did he say?

MR. COX: Objection, Your Honor. This calls for hearsay.

Q Okay. What did you -- what did y'all talk about or what did you talk about?

A Okay, Mr. Stroud.

MR. COX: Your Honor, objection. It's the same question.

MR. STROUD: No, it isn't.

THE COURT: Okay. Why, why don't we just ask what he did, who he spoke with, and, as a result of speaking with the gentleman, what he did as a result of that.

MR. STROUD: Okay.

THE COURT: Okay.

THE WITNESS: Thank you, ma'am.

Q All right. What -- as a result of speaking with Joey, what did you find out or whatever?

I didn't -- I stayed up very late last night. So, I'm---

A If I may give just a little history on it. I called the South Carolina Department of Corrections, and made arrangements to go down to Broad, Broad River and visit with Mr. Clark. They put us in a conference room. I did not know Mr. Clark, did not know his family, and had a set, a set of questions, and really basically nothing written down. Just common sense questions.

At that time, I had not looked at the transcript. I had not looked at any records or documents whatsoever. I was new to the, new to the case. I asked him to basically tell me a little bit about hisself, tell me about what happened, tell me about how things were going, where he was in, in Broad River. And then, before -- one of the first things out of Mr. Clark's mouth was---

MR. COX: Objection, Your Honor.

THE COURT: Okay. Yes, sir.

MR. COX: The answer is gonna be hearsay.

THE COURT: Sir, you, you can certainly -- well, I, I will---

THE WITNESS: I asked him---

THE COURT: I will sustain that objection.

THE WITNESS: Yes, ma'am.

THE COURT: And, and, again, caution you, sir, not to quote what, what was being said to you.

THE WITNESS: Sure.

THE COURT: Okay?

THE WITNESS: Okay.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: Uh-huh. (Affirmative).

Q That's it or do, do you have more?

A No.

Q Okay. When you read -- please explain if Mr. Harbin made any objections during Mr. Clark's murder trial as evidenced by the transcript that you read?

Do I need to repeat it?

A Repeat that.

Your Honor, I'm in the -- horrible a lot of pain. I just recently had bladder surgery---

THE COURT: Yes, sir.

THE WITNESS: ---for cancer and I'm hurting real bad. So -- and I'll try to continue to go on.

THE COURT: Yes, sir. And I tell you what, if you need to stand up --.

THE WITNESS: That probably would help.

THE COURT: Okay. As long as my court reporter can hear you. Just try to be comfortable and I've been made aware of that.

THE WITNESS: Thank you.

THE COURT: Okay. But that this gentleman has recently had surgery for cancer.

A Would you repeat the question?

Q Okay. Please explain -- all right. Please explain, when you read the transcripts, did you find any evidence that Mr. Harbin made any objections during the trial?

A I did not see any objections whatsoever.

Q Okay. What was your reaction?

Based, based on, again, the trial's you've seen, your knowledge, what was your reaction to their being no objections made during this five day trial?

MR. COX: Your Honor, I'm gonna object to this questioning. It calls for an opinion that this evidence -- this witness has not been qualified as an expert for. This goes to his opinion on the strategy, the, the -- any potential deficiency in the attorney at trial, and that is, as we've said before, is within the -- that's the job of the Court.

THE COURT: Okay. I'm going to sustain the objection.

And, Mr. Stroud, again, as stated prior to this witness' testimony, I do not believe that he is qualified to give legal conclusions.

Q During your investigation, did you become familiar with inmate statements that were read in the record without inmates being put on the stand subject to cross-examination?

A Yes, I did.

Q How did you ascertain this?

A It was part of the records that, as far as the trial records, that I managed to get from your office.

Q Okay. During your investigation, what did you learn regarding whether these inmates were confidential informants subject to protection of their identities?

A I, I had personally read in the transcript that, that

they were not confidential informants.
Q Okay.
A I think that statement came from the assistant solicitor---
Q Okay.
A ---telling Mr. Harbin and also telling the Judge.
Q Okay. Please explain if the assistant solicitor, during direct examination of Detective Burgess, questioned Mr. Burgess about the inmates' statements?
A I'm sorry, Mr. Stroud.
Q Okay. Please---
A You have to repeat that.
Q Please explain if the assistant solicitor, during her direct exam of Detective Burgess, questioned Detective Burgess about the inmates' statements?
A No, she did not.
MR. COX: Your Honor, we're gonna object. This -- under the Best Evidence Rule. Your Honor, he's simply testifying to what he read in the record. This is not calling for any opinion for private investigation as to when he reviewed or after reviewing the record. He's simply just stating what he read that is already in the record Your Honor has.
THE COURT: Okay. I am going to allow him to testify to, to the things that he did in the course of his

investigation, and I, I understand that that -- that the transcript from the trial in this matter is part of the record. However, I think he is allowed to say that he reviewed the transcript, and that's what he noticed about the transcript.

Okay. And, and I think we're all -- are we almost through---

MR. STROUD: Well---

THE COURT: ---with the transcript?

MR. STROUD: We are.

THE COURT: Okay.

MR. STROUD: Yes, ma'am.

THE COURT: I will overrule that objection.

Mr. Stroud, repeat your question, sir.

Q Okay. Please explain if the assistant solicitor, during direct examination of Detective Burgess, questioned Detective Burgess about the inmate statements.

A No, sir, she did not question according to the transcript.

Q Okay. Please explain, when you read the transcript in the section regarding Mr. Harbin's cross-examination of Detective Burgess, did he question Mr. -- Detective Burgess about the inmate statements?

A Yes, he did.

Q Did the assistant solicitor, during her redirect of

Detective Burgess, question Detective Burgess about the inmates' statements?

A If I'm understanding you correctly, yes.

Q Okay. Did Detective Burgess read the inmates' statements into the record as evidenced during the redirect by the Assistant Solicitor?

A Yes, he did.

Q Did the inmates who wrote these statements ever take the stand under the oath and testify about their statements based upon your reading of the transcript?

A According to the transcript, they did not.

Q During your investigation, did you read the five inmates' statements that were read into evidence?

A I did.

Q Okay. Mr. Landreth, before I ask you the next question, I want to read a portion of the trial transcript on Page 442 during redirect by the assistant solicitor of Detective Burgess. The assistant solicitor states the following:

At the time the State would offer State's Exhibit 145, which is a statement by Bryant Phillips, into evidence.

Mr. Harbin then states no objection, Judge.

Then the Court replies: All right. It would be admitted into evidence without objection.

Then, on Page 593 of the transcript, during his

discussion of the jury charges, Judge King made the following comment:

I was a bit surprised, Mr. Harbin, that the statements came in as to what they said without the individuals coming forth.

As a private investigator, what was your reaction to the failure of Mr. Harbin to object?

MR. COX: Your Honor, objection.

THE COURT: Okay. And that objection is sustained.

Q Okay.

THE COURT: And, counsel, I'm assuming you're objecting because it calls for an opinion?

MR. COX: Yes, Your Honor.

THE COURT: Thank you.

Q Okay. Mr. Landreth, did the transcript provide documentation that the inmates were available to testify and were on the State's potential witness list?

A Yes, according to the transcript.

Q And, Mr. Landreth, in your interview with Mr. Clark, what questions did you ask him?

A Mr. Stroud, I asked Mr. Clark if he had a -- any kind of relationship or friendship with the inmates that were serving time with him in the Cherokee County Lockup or Detention Center. I also asked him if he told the inmates why he was in the Cherokee County Detention Center. I asked

Mr. Clark if there was anything that, that he said to them that they could of misunderstood or that they could -- that, that would lead them to believe that he confessed to killing Winter Wingard.

Q Okay. Mr. Landreth, from your reading of the closing -- of the transcript, did Mr. Harbin, in his closing argument in the trial transcript on 615, did he state the following:

But let's give credit to the State that I get that there is probable cause to believe that Joey committed the crime. I mean they presented evidence. I mean I'm not trying to insult your intelligence, but there is evidence that suggests that he could of done it. But this is not a probable cause hearing.

Did, did you -- when you read -- when you read that, in your, in your role as a private investigator, had you ever seen or heard, during the closing argument, an attorney say there's evidence in there convict?

A I've never heard of that before. I've never been in a courtroom and heard, heard that type strategy I guess you could refer to it.

Q Mr. Landreth, during your investigation, did you discover evidence that Attorney Harbin needed DNA and forensic expert testimony and assistance for the murder trial of Mr. Clark?

A Yes, I found a -- I know -- a Court Order, and I think it -- the Court Order was from Judge, Honorable Judge Roger Crouch (sic) where it stated that, the complexity of the case, that the, that the defense needed -- that he was allowing some, some funds for him to obtain the services of a outside DNA expert.

Q Please explain if you found evidence in the transcript that a DNA expert was retained to testify at Mr. Clark's murder trial.

A Yes, sir, I did find evidence. I found some statements from IntelliGenetics and also Doctor Daniel Demers where Mr. Harbin had contracted with his firm to -- for case research, review, and for testimony.

Q Mr. Landreth, please explain if, in the transcript, you found evidence that the murder -- that Mr. Clark's murder trial was continued because Doctor Demers was out of the country.

A Yes, sir, I found an email that was from Mr. Harbin to the Assistant Solicitor stating that he would need a continuance.

MR. COX: Your Honor, objection. The question was did he find any evidence in the transcript as to this case being continued. The witness is testifying that he reviewed emails from Mr. Harbin that were to another party. I guess my objection is hearsay and unresponsive.

THE COURT: Okay. So, my question would be how, how were these emails obtained?

Were they part of the Court's record concerning a continuance?

MR. STROUD: They were.

THE WITNESS: Yes, ma'am.

THE COURT: Okay.

MR. COX: Your Honor, we're not aware of that being a part of the record.

MR. STROUD: Well, okay. Maybe in this -- let me look back. I have it -- all right. I don't think it was ultimately a part of -- he's right. I don't think it was a part of the record. This was -- it was just an email that---

THE COURT: How was it obtained, counsel?

Do you know or do you think he knows?

MR. STROUD: Let's see.

MR. COX: Your Honor, if I may have a moment?

THE COURT: Sure. Sure.

(Pause.)

MR. COX: Okay. Your Honor, we'll withdraw the objection.

THE COURT: Okay. All right. Thank you.

Q Okay. I lost my place.

Okay. Please explain if, during Mr. Clark's

March 17th, 2014, murder trial, did you find any evidence in the transcript that Doctor, that Attorney Harbin actually used Doctor Demers to testify as his expert witness?

A No, sir, I did not find any evidence in the transcript that he was there to testify.

Q And, Mr. Landreth, I'm now going to ask questions specifically about the State's testimony that there was no red dirt on Mike's Creek Road, that there was only black fertile soil on Mike's Creek Road. Then I'm going to ask you questions about the State's testimony that the red dirt stains on Ms. Winter Wingard's body and clothes came from the red dirt on Songbird Lane. Then I'm going to ask you some questions about what -- your investigations as it pertained to the color of the soil, and why soil color was important during the trial of Mr. Clark.

Please explain, from the transcript, what you learned about any testimony regarding the color of soil on Mike's Creek Road.

A Mr. Stroud, when I was reading the transcript, I was kind of overwhelmed as to the, the number of references there were as to the lack of no red dirt on Mike's Creek Road. It was, as I said, kind of overwhelming, and if I can describe that a little further?

It began to look a little peculiar, in my opinion, because it was just the page after page after page for a

while stating there was no red dirt on Mike's Creek Road. It was all black fertile soil on Mike's Creek Road.

Q Okay. From the transcript, did you learn anything about the color of the dirt on the stand -- the red dirt stains on the body as being from dirt found on Songbird Lane?

A According to the transcript, the transcript does state, and it was one of the investigators from the Sheriff's Department or detectives, that said that the, that the red dirt stains on the deceased body, that that is not word for word, but said the red dirt stains on her body was the kind of dirt -- kind of red dirt that came from [redacted] Songbird Lane.

Q Did you find any -- in the transcript, did you find any other evidence about the detective's further testimony regarding the, the matching of the color?

A Would you explain that in a little more detail?

Q Okay. What -- in the transcript, one of the detectives, did they -- did you find any evidence that, in response to a question by the assistant solicitor, that he -- that she asked was the, the stain or the color of the red dirt, when he was testifying about Songbird Lane, that he matched -- about whether it matched?

A Well, if I understand what I think you're saying --

Q Uh-huh. (Affirmative).

A -- is that the investigator said that the red dirt stains on the deceased body had, obviously, what I just said, which red dirt stains, and it was the kind of dirt that came from Songbird Lane.

Q What steps did you take, as a private investigator, to investigate the color of the soil on Mike's Creek Road?

A After reading the transcript numerous times, I began, I began to question the red dirt -- the lack of no red dirt on Mike's Creek Road, and the fact that there was only black fertile soil on Songbird Lane. I mean on -- I'm sorry. Mike's Creek Road. I decided that the only way to know for sure exactly what was on Mike's Creek Road was to make a trip to Mike's Creek Road.

And so I drove to Mike's Creek Road, and personally looked at the soil on Mike's Creek Road. And not only on Mike's Creek Road, but at the location where the body had been found.

Q What steps did you take to investigate the color of the soil on Songbird Lane?

A I did exactly the same thing. I drove to Songbird Lane, walked around the property, and noticed that wherever there was a bare spot in the yard where there was no vegetation, vegetation or weeds or whatever, there would -- there was red dirt.

Q From these trips, what did, and, and your

investigation, what did you learn about the soil color on, on Mike's Road (sic)?

A I was surprised when I got to Mike's Creek Road because I had -- after reading the, the testimony from the investigator and the detective from Cherokee County, I assumed that the soil on Mike's Creek Road would have been black, black fertile soil as the transcript stated. But when I got to Mike's Creek Road, I noticed it was not black fertile soil. It was a considerable amount of red dirt on Mike's Creek Road. It kind of shocked me.

Q Okay. From reading the trial transcript, were you able to determine what the State's theory was about all this testimony about red dirt stains on the victim and her clothes?

What -- why did they -- did you find anything in the, in the transcript that---

A I got the feeling -- you know, the, the whole time, as I read, I was feeling like well, maybe I'm trying to feel what the jury might of been --.

MR. COX: Objection, Your Honor. Speculation --

THE WITNESS: Okay.

MR. COX: -- to what the jury was figuring out.

THE COURT: Sustained.

MR. COX: Thank you.

A As I was reading the transcript, I began to personally

believe that the soil on Mike's Creek Road was black soil, and---

Q All right. But -- may I?

What I'm asking you is, from the transcript, were you able to ascertain what the State's importance about these red stains on the victim and her clothing?

A It appeared to me that the prosecution was trying to link Mike's Creek Road to Songbird Lane.

Q Okay. All right. So, their theory then, when they linked it, can you elaborate on that from the transcript?

What -- you said they kept bringing up the soil dirt and the soil.

So, did they ever, in, in your reading of the transcript, did they ever come out and say why it was so important?

A Well, the body of the deceased had, according to the transcript, had a considerable amount of -- well, matter of fact, the transcript said the body was covered with red stains, red from the red dirt, and there's also stated that, on Mike's Creek Road, there was no red dirt. It was all black fertile soil.

And they also -- that the transcript stated, one of the investigators, their theory was that a person drove a vehicle with the deceased in the car, pulled her body out of the car, and, and dragged the body from the road bed to its

final resting place, which with was 15 feet, and the body was left there well -- covered with red, red stains.

Q Okay.

A I found, found it interesting that there was no notice of black stain or black dirt stains on the deceased knowing that she had been pulled, and if my recollection is correct, she weighed in the vicinity of 225 -- I mean 265 pounds. And so, if a person dragged a person through the, the soil, I don't understand why there were no black soil also on the body.

Q Thank you. I know this was difficult with you being in pain, and, at this time, I'm going to request that your findings not be entered as an exhibit, but I would request that Exhibit 13, which is the State's list of potential witnesses, the Defendant's potential list, the Motion to Re, to Reconsider the Sentence be entered at this time.

Also, Exhibit No. 7, this was a email that we were talking about.

Bear with me one minute, Your Honor.

THE COURT: Yes, sir.

(Pause.)

MR. STROUD: All right. In addition, Exhibit No. 21, the expert order for expenses that he referred to and -- all right.

MR. COX: Now, just for clarification, we, we do not

have any objections to these particular exhibits that he's about to read for the court reporter.

THE COURT: Okay.

MR. STROUD: Exhibit No. 13, which is the State's list of pretrial -- of potential witnesses during the March 17th trial.

Exhibit No. 14, the potential witness list of Chase, of Chase Harbin during the March 14 trial.

And, Exhibit No. 21, which is Ex Parte Order, Order for expenses signed by -- it looks like Judge Couch.

THE COURT: Read those numbers one more time.

MR. STROUD: Okay.

THE COURT: 13, 21 --?

MR. STROUD: 13, 21, and 14.

THE COURT: Okay. Counsel, are those being entered without objection?

MR. COX: Yes, Your Honor.

THE COURT: Okay. So, the Applicant's Exhibits No. 13, 21, and 14 have been entered into evidence without objection.

(WHEREUPON, the State's witness list was marked as State's Exhibit No. 13. The Defense witness list was marked as State's Exhibit No. 14. The Ex Parte Order was marked as State's Exhibit No. 21. All of the above exhibits were received into evidence at this time.)

Q Mr. Harbin (sic), at this point, I'd like for you to answer any questions the State has for you, but I, just for a little while, I'd like for you to be subject to recall.
A Sure.
Q But if you get where you just absolutely have to go, tell me, and we'll, we'll---
A You refer to me as Mr. Harbin.
Q Oh, Mr. Harbin. Yeah.
And you are Mr.---
A Landreth.
Q ---Landreth.
All right. Okay. I'm bad with names.
THE COURT: Okay. Counsel, are you ready for cross-examination?
MR. COX: Yes, Your Honor, and I, I just have a few questions for cross.

CROSS-EXAMINATION

BY MR. COX:

Q Mr. Landreth --
A Sure.
Q -- are you all right?
A I'm okay right now.
Q Okay.
A Thank you.
Q Mr. Landreth, you, you testified that you reviewed the

transcript in full for this case?
A I did.
Q And you used that to help develop your opinion or your expert opinion in your testimony here today?
A Correct.
Q Okay. How many trial transcripts have you reviewed in your time as a private investigator?
A Ten or more.
Q Ten or more?
A Yes.
Q How many murder trial transcripts?
A One.
Q Just this one?
A Yes.
Q Okay. Now, you testified as to the dirt stains on the victim's body that was -- that testimony introduced at trial, correct?
A That's correct.
Q And you went out to the scene to observe the color of the dirt?
A Correct.
Q Right?
A Yes.
Q That's because you found it surprising that what the testimony was at trial about the color of the dirt?

A Correct.
Q You only went out there one time?
A No.
Q How many times?
A Five.
Q Five times?
A Yes.
Q Five different time?
A The latest was yesterday.
Q Okay. At, at the time -- the first time you went was August 16th, 2016?
A I don't---
Q That sound about right?
A I think it was October.
Q Of 2016?
A Of 20 -- of 2016.
Q Okay. Now, the victim passed away on December 10th, 2010, correct?
A Correct.
Q That's when her body was found?
A Correct.
Q That's when the stains from the dirt were placed on her clothes?
A Apparently.
Q Is it possible that, from December 10th, 2010, to

around October, 2016, the scene, the dirt, could of changed?
A Counselor, I guess anything is possible, but I'm, I'm -- just like I'm not an attorney---
Q Okay.
A ---I'm not a soil expert.
Q Yes, sir.
A So, your guess is as good as mine.
Q Yes, sir.
Now, when you went out there to develop -- to help develop your theory as to the color of the dirt --
A Sure.
Q -- you didn't conduct any test to---
A No, sir, I did not.
Q ---make that determination?
A I just took pictures.
Q You just took pictures?
You just got out of the car and walked around a little bit?
A I did.
MR. COX: Okay. Your Honor, just a moment.
THE COURT: Yes, sir.
(Pause.)
Q Mr. Landreth?
A Yes.
Q Other than reviewing the transcript and the evidence

that was presented at trial, and going out to the scene and interviewing Mr. Clark, you didn't do any other forms of investigation or perform any investigation tactics for this case?

A Not a whole lot to, to conduct as many years as it had been. I was -- it's the scene or the date of the murder.

Q All right. Thank you, Mr. Landreth.

Your Honor, I have no further questions.

THE COURT: Okay. Any redirect, counsel?

MR. STROUD: None. None.

THE COURT: Okay. Thank you.

All right. So, sir, you are free to step down from the witness stand. However, it's my understanding that you are were -- was this witness under subpoena?

MR. STROUD: He was.

THE COURT: Okay. That you have not yet been released from your subpoena.

THE WITNESS: Okay.

THE COURT: If you would, hang around.

All right?

THE WITNESS: Can I go to the mens restroom?

THE COURT: Yes.

THE WITNESS: Thank you.

THE COURT: And then come back in the courtroom.

THE WITNESS: I will. Thank you.

THE COURT: All right. Yes, sir, thank you. Watch your step.

Next witness.

MR. STROUD: Okay. One second here.

(Pause.)

MR. STROUD: At this time, Your Honor, I would like to call to the witness stand our DNA expert, Ms. Megan Clement, and we'll try to get her qualified as a DNA expert. But let me start out, out for some -- would y'all be willing to stipulate, instead of -- stipulate as to her being an expert in the case?

MS. JAMESON: I'd like to do a bit of voir dire on what she reviewed in this case.

MR. STROUD: Okay. All right. So -- okay. Do you want me to go ahead and ask my questions to qualify her or --?

MS. JAMESON: Certainly, yeah, to get her qualified.

MR. STROUD: Okay.

THE COURT: Yes, ma'am, if you will please come forward.

Good, good morning.

THE WITNESS: Good morning. It is still morning.

THE COURT: All right. If you'd raise your right-hand.

MEGAN CLEMENT, being first duly sworn, testified as follows:

THE COURT: Okay. Thank you, ma'am. Please be seated and make yourself comfortable.

(Witness complies.)

DIRECT EXAMINATION

BY MR. STROUD:

Q Would you please state the full name, place of residence, occupation, and title?

A My name is Megan Clement, and I am an independent, excuse me, forensic DNA consultant. I---

THE COURT: Yes, ma'am, if you will, spell your last name?

I'm sorry to interrupt.

THE WITNESS: Certainly. It's C-L-E-M-E-N-T.

And I reside in Northern Virgina in Occopon, a small town.

Q Okay. What is the position you currently hold?

A I'm an independent forensic DNA consultant. I have and developed a -- Clement Consulting, Limited Liability Company.

Q What type of degrees do you hold?

Where and when were they obtained?

A I obtained a Bachelor of Science in Biology from Westfield State College in Massachusetts in 1983, and a Master of Science in Forensic Sciences from the University of New Haven in Connecticut in 1985. And I've also attended

graduate level courses at the University of New Mexico in Albuquerque as well as obtained graduate level course credit from the University of Virginia through courses that I actually took at the FBI Academy in Quantico, Virginia.

Q Would you please describe the subject matter of your specialty?

A My specialty is forensic DNA testing as well as serology testing.

Q Are you board certified as a specialist?

A I am. I am board certified by the American Board of Criminalistics as a Diplomat in Molecular Biology.

Q What type of specialized training and continuing education do you have in the field DNA forensic testing?

A Well, besides the original classwork that I took actually which started in Albuquerque because, when I first started in the forensic field, DNA was not being used. So, we did take graduate level courses at the University of New Mexico in Albuquerque. I attended courses at the FBI Academy. I attended one which was a four week class, and then subsequent two week class.

I attend -- attended numerous seminars, numerous workshops. Every year I have to have continuing education very similar to the licensing for PI. We have to have a certain number of continuing education credits. It's a requirement that not only do we obtain or, excuse me, attend

workshops, but that we also keep up on literature reviews, that we participate in the field. So, it's not just a matter of sending in your annual fee. I mean you literally have to document everything that you've done, everywhere you've gone, everything you participated in.

Q How long have you been -- how long have you been practicing DNA forensic testing and analysis?

A I have been practicing DNA testing and analysis since about 1990.

Q Okay. Please describe any memberships and professional associations that you're a member of regarding the field of DNA forensic science.

A I am a member of the American Academy of Forensic Sciences as well as the Southwestern Association of Forensic Scientists.

Q Have you given testimony in a -- in Court before as a DNA forensic expert?

A I have, yes.

Q Please describe the number of times just that you've given Court testimony.

A And specifically---

Q Approximately. Approximately.

A ---dealing with DNA, it is, I believe, just slightly over 370 times. I've also testified in Court dealing with blood alcohol analysis and serology testing independently.

Q Are you available as an expert witness for any party?
A Yes. Absolutely. As a matter of fact, greater than 90 percent of my testimonies have been on behalf of the prosecution.
Q What types of testing, analysis, and interpretation of physical examination of DNA have you been qualified to perform?
A I have been trained and qualified and testified in basically all aspects of DNA testing. The traditional, autosomal DNA testing, which is the most common type of testing that's performed in cases throughout the country. I have been qualified in Y-STR testing, which looks only at male DNA. And also mitochondrial DNA testing, which is inherited only from the mother by the children. And so basically all aspects of, of DNA testing methodologies.

MR. STROUD: Okay. Your Honor, at this time, I would request that we enter into evidence Exhibit 3, which is the CV of Ms. Megan Clement.

MS. JAMESON: No objections from the State.

THE COURT: Okay. So, Applicant's Exhibit No. 3 is into evidence without objection. Thank you. And I do have my copy pulled up.

MR. STROUD: Okay.

THE COURT: All right.

(WHEREUPON, the CV was marked as Applicant's Exhibit

No. 3, and received into evidence at this time.)
Q All right. All right. At this time, I understand that the State would like to ask questions. So, I'm gonna hold off, pursuant to Rule 702, and let them ask her questions. Then I'll come back and see if we can get her in as an expert under Rule 702.
THE COURT: So, at this time, Mr. Stroud, just to be clear for the record, you are offering -- is it Doctor Clement?
THE WITNESS: No, I have a Master's.
THE COURT: Okay.
THE WITNESS: I don't have a Ph.D.
THE COURT: All right. Megan D., Megan E. Clement as an expert in the field of --?
MR. STROUD: Forensic -- is it DNA?
Forensic --?
THE WITNESS: I usually use the general forensic biology because that includes both serology and DNA testing.
MR. STROUD: Okay.
THE COURT: Okay. All right. Thank you, sir.
Now I will allow the State to cross-examine this witness as to her credentials and on that issue only.
MS. JAMESON: So, Your Honor, may I go into what materials she was given for this case?
THE COURT: No, ma'am, not as to her qualifications.

Not, not for her to be qualified as an expert in this field. You can then -- he, he will then examine her as to what she specifically did with regard, I'm assuming, with regard to---

MS. JAMESON: Yes, Your Honor.

THE COURT: ---this matter, and then you will be able -- allowed to cross-examine her on that.

MS. JAMESON: Yes, Your Honor. We have no objection to her qualifications as to forensic DNA expert. We do have some anticipated objections---

THE COURT: Yes, ma'am.

MS. JAMESON: ---to her report, and any of the testimony, and we'll object at the appropriate time.

THE COURT: All right. Thank you.

And so, as I understand it, Ms. Clement has been designated as an expert in the field of forensic biology?

THE WITNESS: Yes.

THE COURT: Okay. All right. Without objection.

All right. Mr. Stroud.

MR. STROUD: Yes.

CONTINUED DIRECT EXAMINATION

BY MR. STROUD:

Q Ms. Clement, how did you first become involved in the Joey Clark PCR as it relates to the DNA evidence that was gathered from the testimony, from the trial transcript, and

any other documents that you studied?
A I believe I was contacted by an attorney in North Carolina asking if she could forward my information to you, and then we had a subsequent phone conversation about the particular case, and they moved forward from there.
Q Okay. What information were you given to become acquainted with this case?
A I was given a copy of the transcript. I was given a copy of some notes that were -- appeared to be a preliminary information or report that was submitted by a -- well, it was understanding a DNA expert to the defense counsel. I was given the reports from the South Carolina Law Enforcement Division or SLED. I was provided some -- the underlying data, the actual case file materials, and I believe, I believe that was all I was provided.
Q Okay. What background information were you given as to why the, the attorney felt like he needed a DNA expert with, with a PCR hearing?
A DNA can be a complicated subject matter, and it was my understanding that you simply needed assistance in understanding the DNA, understanding what the DNA expert, who was originally hired, what their concerns were, whether they were addressed during the trial, and basically to give an overall view of the presentation of that DNA.
Q Okay. In the transcript, when I was telling you about

the case, what other concerns did I have?

I guess what I'm trying to say is I told you this was a PCR case, that I couldn't really introduce new evidence.

Why did I specifically say that I was looking at what I thought -- did I tell you what I thought were the reasons that I was not, as you say, I was not qualified, but it seemed to me that if I was going to rebut the testimony or the evidence that, that was done on cross-examination---

MS. JAMESON: Your, Your Honor, I would object.

MR. STROUD: Okay.

MS. JAMESON: This is leading and a compound question. Counsel is testifying.

MR. STROUD: Yeah.

MS. JAMESON: And I believe it goes beyond the scope of her expertise in forensic biology regarding serology and DNA.

MR. STROUD: All right. Let me, let me rephrase it.

THE COURT: Okay. Well, I will sustain the objection, and on both that it was leading, and it is a compound question.

MR. STROUD: Compound question.

THE COURT: But it, it may just be helpful to ask her what her understanding was of her being hired---

MR. STROUD: Okay.

THE COURT: ---or being asked to participate in this

case.
Q Okay. All right. What was your understanding -- why did I need, in this particular case, a DNA expert because it was a PCR?
A It was my understanding that you were wanting to hire an independent DNA expert to evaluate whether the lack of a DNA expert at the time of the trial being present hampered the defense basically, whether there were things that the defense expert had originally, in his preliminary report, had brought up as concerns that were not brought up in the trial, and, had an expert been present, whether those things may have been broached either through cross-examination, clarification questions, and/or through direct testimony.
Q Why is DNA evidence generally used in a criminal trial?
A Oh, DNA evidence is simply used in a criminal trial generally to make an association of an item of evidence to either an individual or a particular scene.
Q Okay. In what types of criminal cases is DNA most useful?
A Well, that actually depends on the evidence---
Q Okay.
A ---and the results. I mean it could be useful in nearly any type of case. Generally, you know, it's most useful in cases where there's an unknown assailant, and you have a DNA profile from, you know, generally say in a sexual

assault case, from the body of an individual, and then you can make an association to a particular assailant.

Q Okay. From the transcript, what did you learn from the DNA evidence that was used as a factor in Joey Clark's case from the State's, I guess, cross-examine or State's direct examination?

A Could you repeat the question?

Q Okay.

A I'm not quite sure---

Q All right.

A ---I understand it.

Q All right. What -- at -- you, you read the tran -- you read the transcript concerning the State's DNA direct examination, and what did that evidence help prove or show in Joey Clark's case based on the -- just the transcript?

A Based on the transcript, I believe that the DNA evidence that was presented proved that there had been some sort of sexual encounter between the victim and Mr. Clark at some point before her death.

Q What is transfer DNA?

A Transfer DNA is simply DNA which is transferred from an individual to either another individual or an object.

Q In your review of the State's DNA testimony, and the doctor's preliminary DNA report, was transfer DNA mentioned during the murder trial?

MS. JAMESON: Your Honor, I object to any opinions based on Doctor Demers' report as impermissible hearsay. This is not -- let me rephrase, Your Honor.

This is not expert testimony pursuant to 702 or 703. She can't rely on Doctor Demers report because that's impermissible hearsay. So, it's essentially hearsay within hearsay to be relying on his report to form the basis of her opinions.

THE COURT: Okay. Mr. Stroud.

MR. STROUD: My response to that is our private investigator visited and tried to locate Doctor Demers. He was unsuccessful at that. He also went to Atlanta to try to find and get a, a release form so that we could get more fully the records. We were unsuccessful in that.

The only -- this DNA report came -- was given to me by Chase Harbin. I had to have -- because I was questioning the DNA expert's testimony at the trial, I had to find some way to get the DNA expert to form a basis whether there was constitutional issues or other concerns because my theory was that, because Doctor Demers was hired, was told to -- was told -- the judge that he simply lacked information sufficient for this type of case, and he needed a DNA expert.

Also, due to the fact that there was a trial scheduled, and because Doctor Demers was out of town, he had to request

and received a continuance.

So, I was left with not -- without using this report because the, the State's testimony in this -- in the trial transcript was not gonna be sufficient. We had to have some other thing. The State's -- if I had tried to go to Columbia or somewhere to get the State's original DNA data, that was beyond the scope of what my mission was at the PCR level because I didn't want any testimony. I didn't want, at that point, anything that would be introducing new evidence.

What I wanted was the basis for my theory that, had Doctor Demers been there, the outcome of the trial would have been different either because he would of testified, as he was paid to do, or he would of augmented the cross-examination done by Chase Harbin.

So, in order to prove what I thought was a Constitutional error, I couldn't just rely on the testimony -- on the DNA. I received this report from Chase Harbin.

What was I suppose to do with it?

Just let it sit there because I'm trying to prove that this, in a PCR matter, was ineffective to the Strickland standard. So---

THE COURT: Okay.

MR. STROUD: ---at that point, I, I think I don't have

any choice but to rely on this preliminary report.

MS. JAMESON: Your Honor, if I may respond briefly?

THE COURT: Counsel.

MS. JAMESON: I, I don't think that Mr. Stroud has responded to the fact that this is hearsay. Doctor Demers isn't here, was never subject to cross-examination cause he was never called at trial. He -- I under -- I understand that he tried to get him, but that doesn't excuse his duties, and the Rules of Evidence, and this is hearsay, and I've yet to hear a response for why it's not hearsay and should come in.

Additionally, I believe he stated that he is trying to seek, from this expert, opinion testimony of constitutional deficiencies of counsel, and that's not something this expert can testify to. That's within your purview pursuant to Green and Mc -- Green and McKnight that the State's already testified to before, and there's no reason that the underlying -- I believe Ms. Clement testified that she had received the underlying data and reports. That's the appropriate thing for her to base her evidence -- her expert testimony on. Not based on this hearsay report. Particularly based on her qualification.

So, it's, it's patently hearsay and shouldn't be able to come in. This is not one of those situations, under 703, where it's relying on why the accepted knowledge. This is

another opinion's -- expert's opinion on the facts of this case, and that expert isn't here to be cross-examined by the State.

MR. STROUD: Okay. And I would urge to -- I would argue that this is not hearsay because it was a communication between, even though it was an email, between Chase Harbin and the State -- and the man who was paid by the State to help Chase Harbin prepare an adequate defense. It can't be hearsay when the man is not -- it's an exception because he's not available.

MS. JAMESON: Your -- Your Honor, I don't believe he's shown anything to show that he's not available. It doesn't qualify as an exception to the hearsay rules, and Mr. Harbin's not a party to this action. And, again, I don't believe he's sufficiently shown that this is -- this is not hearsay, and it's patently hearsay trying to back-door in through this expert.

THE COURT: Anything else, Mr. Stroud?

MR. STROUD: That's, that's it.

THE COURT: Okay. I am going to allow Ms. Clement to testify because she has been qualified as an expert, and experts can rely on inadmissible hearsay in forming their opinions. And so, with that, again, by explaining, I'm not saying that the report from -- is it Doctor Demers?

MR. STROUD: Uh-huh. (Affirmative).

Yes. Yes, ma'am.

THE COURT: Okay. I, I don't -- I'm not saying that that is the truth.

Okay. But she can testify that, in forming her opinion, okay, she has relied on that report. And I understand and can certainly weigh the weight that, that that can be given. I, I certainly understand that, from prehearing communications with counsel where both parties were present, that there have been great lengths made to obtain the information, and it was not available due to facts -- factors beyond counsel's control.

And so, with that, I will allow Ms. Clement to continue her testimony.

Yes, sir.

MR. STROUD: Thank you, Your Honor.

All right. Let me repeat the question if I remember where I am.

In your review of the State's DNA testimony, and Doctor Demers preliminary DNA report, was transferred DNA mentioned?

A Yes, it was.

Q Would you please explain how it was used at Mr. Clark's murder trial?

A Through my review of the transcript, there were multiple areas of the testimony where transfer DNA came up.

It was defined by the State's expert as to what transfer, secondary transfer, what primary transfer is, and then what secondary transfer is, and there was much -- a number of other areas within the transcript where transfer DNA was discussed.

Q When we were initially talking, did we specifically inform you that Doctor Demers was suppose to testify, but, instead of testifying, it appeared from the transcript that he relied on cross-examination?

MS. JAMESON: Your Honor, objection. Leading and testifying.

MR. STROUD: Okay.

THE COURT: Okay.

MR. STROUD: All right.

THE COURT: That is sustained.

Q All right. What information did we give you regarding your task regarding cross-examination, and how it was part of, of the trial counsel's strategy?

MS. JAMESON: Your Honor, I would object. That's beyond her expertise. She was admitted as an expert on serology and DNA from testing. Not on trial strategy or constitutionality of counsel's decisions. Again, that is in the Court's purview.

MR. STROUD: All right.

THE COURT: Sustained.

Q Okay. Was cross-examination an effective tool to use when the DNA expert did not testify?

MS. JAMESON: Your Honor, same objection.

MR. STROUD: All right. I will just right now I'll just---

THE COURT: That is sustained.

Q All right. Well, let -- let's just leave that one alone.

Please tell the Court the strengths and weaknesses of the -- Mr. Harbin's DNA testimony, testimony.

MS. JAMESON: Your Honor, same objection. Unless we can get some clarity, I need to know what he means by strengths and weaknesses cause that sounds like, again, something's that within the Court's purview.

MR. STROUD: All right. What I'm trying---

THE COURT: Sustained.

MR. STROUD: All right.

THE COURT: Okay. Mr. Stroud, yes, sir, maybe just rephrase, and let her talk about what she did.

MR. STROUD: Okay.

What, what did you do in terms of analyzing the, the information you received?

A The first thing I did was actually read the preliminary report from Doctor Demers. I wanted to see what his points were -- where he was focusing his points of concern. I then

went and actually read the transcript to see if the points that were raised by Doctor Demers to the defense counsel were covered within the course of the trial. I also went and looked at the case file and the raw documentation of the raw data in the case file to see if the concerns that Doctor Demers had expressed were indeed visible and, and relevant in the case file.

I wanted to make sure that I was seeing the same things that he was seeing. And then I went back, again, and read the transcript again to see -- to determine whether -- just a second time to, to be sure that what I read the first time -- if something was covered or if it wasn't covered.

Q Okay. In your expert opinion, did it matter or was the failure of Doctor Demers to be present in trial -- at the trial, was that finding that you found significant?

MS. JAMESON: Your Honor, objection. Same objection. That's within the purview of the Court---

MR. STROUD: It's to---

MS. JAMESON: ---to determine prejudice.

MR. STROUD: All right.

THE COURT: That would be sustained.

Q Okay. In, in -- what is your professional opinion regarding the fact that no defense DNA expert witness was available to testify?

MS. JAMESON: Your Honor, objection. Same objection as

before. That's within the Court's purview to determine the effect of it. She's an expert on serology and DNA, and we're well outside the scope.

MR. STROUD: Okay.

THE COURT: Sustained.

Q All right. Did you produce a report regarding your findings that in -- as it regards DNA in the Joey Clark case?

A I did produce a report, yes, which outlined the, the various concerns that Doctor Demers had expressed to Mr. Harbin, which were either not fully covered in the cross-examination or the testimony and/or were not brought up at all. And so there were -- yes, I did produce a report that outlined those.

Q All right. Could you further explain your findings in, in this report?

MS. JAMESON: Your Honor, I would object. Again, this goes to what's in the purview of the Court. This report discusses things that counsel should or should not have done in the impact on trial. That is, again, within the purview of the Court.

THE COURT: Mr. Stroud, any response?

MR. STROUD: All right. Again, I would say that it may be -- the ultimate issue may be up to you. However, you've got to be able to hear her opinion, and you've already said

that the report -- she's able to use the findings in this report. So, my response would be let her say what she -- hear what she says. Then you can make the decision as, as the trier of fact.

MS. JAMESON: Your Honor, if I can briefly respond?

I do believe this expert can develop an opinion and testify as to what she would of done at trial, but she can't testify as to what Mr. Harbin should have done or what expert he could of called because, again, that's within the purview of the Court. And I'm anticipating -- her report doesn't have the analysis. It just has conclusions that Mr. Harbin was deficient and it prejudiced the outcome of the trial, and he should of been there, and, again, that's within the purview of the Court.

THE COURT: Okay. Again, I have not reviewed the report as of yet, but I will allow the witness to -- I, I cannot allow the witness to make legal conclusions.

MR. STROUD: Right.

THE COURT: Okay. And so I need to caution you about that, Mr. Stroud. And if you can form your questions, again, I guess in asking her what she would of done differently if---

MR. STROUD: Okay.

THE COURT: ---if she had been called as a witness in this case.

MR. STROUD: All right.

THE COURT: How about that?

MR. STROUD: Let's do that.

THE COURT: Okay. And I'm not, I'm not trying to interfere with your strategy, sir.

MR. STROUD: Yeah.

THE COURT: But, but we do need to hear -- to get through her testimony.

MR. STROUD: Okay.

THE COURT: Okay.

MR. STROUD: All right.

All right. So, Ms. Clement, if you had been testifying at this trial, what would you have done?

A There are a number of things.

First of all, I would of been testifying for the defense. So, I -- there would of been a -- probably a lot more clarification questions that would have been formed.

The first thing that I would have made sure I testified to was the definition of the word a small amount of DNA. The small amount of DNA were discussed in the trial transcript, but never really defined. Some of these samples had so little DNA it literally was maybe five to ten cells worth.

People have different definitions of small, and small to one person may be a drop of blood. Small to another

person may be a spec of blood. And so I would have made sure that I defined or gave some explanation for what small was in the context of some of these samples.

The second thing I would do is I would of made sure that -- there was a lot of testimony about transfer, and the potential for transferring DNA. But what wasn't brought out was the fact that, through the, the sole indication that there was DNA from Mr. Clark -- there was a lot about it being transferred from Win, excuse me, Ms. Wingard's body to say a branch or a briar, but it was also in her mouth.

So, even if she was speaking, if she was screaming, his DNA was there to potentially be transferred. That was never brought out.

There was no discussion about how easily DNA is transferred, and there has been a tremendous amount of research done in the field which does discuss how easily DNA can be transferred from one item to another item. The fact that on the briar and the twigs, and I think, I think was a third -- I don't know whether it was a branch, but I think there were three items that had mixtures of three individuals, and, from the trial transcript, it looked like there was an attempt to explore that, but there -- but no hypothetical question was asked as to how three peoples' DNA ends up in -- on three different items of evidence.

That's a, a rare type of situation, and I think, in the

trial transcript, there's, there's a comment about it isn't impossible for a third DNA to be present, and when, in fact, there was a third DNA, and that was made by the defense. So, there was a third DNA. And then he goes on to say something about it had to have been brought by the two people who were there, and, and it's sort of like oh, if there were two people there. And that was -- there were way more then, then that.

I mean that certainly is, is just one potential situation, but it was like he was suggesting that there were only two people there when it could of been a whole lot of other different hypothetical situations.

Let's see. What else would I have brought up?

There was, there was discussion in the transcript about samples being concentrated because of the low quantity of DNA, but that wasn't the only process in the procedure where there was manipulation. There was also an increased injection, which is part of the actual DNA analysis. That was never -- that I would of brought up in trial.

I think there was another one, but I can't think of what it is offhand right now. I'm sorry.

MR. STROUD: Okay. At -- Your Honor, at this time, I would like to enter into evidence, and this may take a minute because I got to find them again.

THE WITNESS: I remember what the other one was if I

may?

MR. STROUD: Yeah.

MS. JAMESON: No objection, Your Honor.

THE COURT: Okay. Yes, ma'am, please continue.

THE WITNESS: I'm sorry.

The other one was the statistics that were offered at trial. Some of these samples had very common statistics, and in the testimony -- although, in the report, it's a number given such as one in 97 or one in 1,000 and something or one and three thousand and something. And those numbers are fairly common. And, and that was not really expressed. I think I would of expressed that a lot more.

And the other thing in the trial transcript is that number was then turned into 99 percent of the population would be excluded. But -- and that sounds like a very impressive number. But I think, in order to put it into prospective, I would of made sure that a jury understood what does it mean to exclude 99 percent, and, and that was not addressed in the, in the trial.

THE COURT: Thank you.

MR. STROUD: Okay. There may not be -- I think we've -- this probably should come in maybe under Mr. Harbin.

So, at this point, what I'd like to do is turn, turn off -- turn you over to the State and have -- please answer

any questions they have on cross-examination.
A Certainly.
THE COURT: Yes, ma'am.
MS. JAMESON: Thank you, Your Honor.
May it please the Court?
THE COURT: Yes, ma'am.
CROSS-EXAMINATION
BY MS. JAMESON:
Q Ms. Clement, you testified that you were given the raw underlying data, correct?
A Yes, I was.
Q What specifically were you given?
A I was given a packet of materials, and I -- honestly, it was, I believe, all of the bench notes, which included the notes made from the analyst as far as the serology was concerned, extraction, quantitation, amplification, electropherograms. I mean basically the case notes, case file.
Q Were you given any of the reports?
A Yes.
Q How many reports were you given?
A I don't know exactly how many. I know there were multiple reports.
Q Do you know if you were given all the reports?
A I believe all of the items that were testified to

during trial were included in the reports. So, I think I received all of the reports, but I, I can't say a hundred percent.

Q And you were also given the trial transcript, and Doctor, Doctor Demers notes, correct?

A Yes.

Q It sounds like the basis of all your opinions so far come from the transcript, and Doctor Demers notes.

Is that a fair classification?

A No, because I -- when I looked at the case file itself and the underlying data, I certainly agreed with the, with the points brought up by Doctor Demers.

Q How many times did you look at the case file, bench notes, notes from the analyst, all of those reports from the SLED agent?

How much time did you spend on those?

A Oh, I probably -- probably five or six hours. There was quite a bit of material because there were quite a number of samples that were tested.

Q Did you test any of the evidence that was collected --

A No.

Q -- by law enforcement?

A No, I did not perform any DNA testing.

Q But you're trained to do DNA testing?

A I am, yes. I, I don't have a lab. I don't work in a

laboratory anymore.
Q When was the last time you worked in a laboratory?
A I worked in a laboratory up until April of 19, oh, excuse me, 2017.
Q So, you didn't test any of the evidence that was testified to at trial, and you didn't test any independent evidence like the knife or the cigar butt or anything like that?
A No. No, I did not.
Q So, you don't know what could of been gleamed from additional testing of those materials?
A No, that's impossible to know unless I'm actually testing them.
Q Have you talked to Doctor Demers?
A I have not, no.
Q So, your opinions here today are disagreeing with how the DNA evidence was presented at trial, correct?
A No, actually I, I don't have any -- I believe that the SLED agent testified accurately. She answered all of the questions that were asked of her.

What I believe is that there were a lot of "clarifying questions" that could have been asked that were not, and a lot of additional questions which should have been asked, which were not. But her testimony, I believe, was accurate for what she was asked and how she responded. Absolutely.

Q But you haven't done any testing underneath the underlying material?
A No, I have not.
Q And since you haven't done any of that testing, you can't testify to a reasonable degree of scientific certainty about Doctor Demers report or the bench notes or anything from SLED, correct?
A Well, independent testing isn't required in order to determine whether the testing that was performed was reasonable, and, again, the testing that performed appeared to be performed accurately. The results, I mean there's no question as to what the results are. I don't have any issue. I don't -- I believe that the testing was done correctly, and I believe that the results were accurate.

So, I'm not saying that the testing was incorrect, and I don't believe that you have to retest in order to say that something is -- that you agree with the results that were obtained.

Q I believe you testified that you testified for the State about 90 percent of the time that you've testified in about 375 criminal proceedings, correct?
A It was slightly over 370, and, yeah, approximately 90 or greater. I believe greater than 90 percent of those have been for the gov -- for the prosecution.
Q Do you have any background on analyzing DNA's effect at

trial?
A I'm sorry. Can you ask that again?
Q Have -- you don't have -- your expertise is in analyzing DNA's effect at trial, correct?
It's, it's on DNA?
A Well, and part of our training is how to present DNA in a criminal proceeding, certainly, and how to be effective in helping the jury understand what the results are, and what the limitations are.
MS. JAMESON: Moments indulgence.
THE COURT: Yes, ma'am.
(Pause.)
A But to answer your question, as far as the effect of DNA, no, I don't know that that even has been -- I mean other than the CSI effect, and everybody wants to hear that DNA is present.
Q And I believe you testified you would of further defined and gone into what small amount of DNA is, but you would agree that it, it was discussed in front of the jury that it was a small amount of DNA, correct?
A Certainly. Yes.
Q And transfer DNA was discussed before the jury?
A It was, yes.
Q And there was discussion about how some of the samples had three peoples' DNA on them, not just victim, and

Mr. Clark, correct?

A That is correct.

Q And I believe you testified you would of gone into, to more hypothetical questions, correct?

A Not just hypothetical, but the fact that, given that Ms. Wingard did have Mr. Clark's DNA on her, on her body, in her body, in her mouth, that that went with her everywhere that she went. And so the fact that the two DNAs were found in some of those samples could simply be a phenomenon of the fact that she had it on her, she brought it with her. Just because there's two DNAs there doesn't mean that both people were there.

So, that DNA could of been there simply because she was bringing it with her to wherever she was going, and the fact that the third person's DNA, there were similarities between the samples, whether it was a third person. And so, if we have similar DNAs from these, from this third minor individual, that third -- actually one of them I don't think -- I think it was more concentrated than Mr. Clark's. Yeah, I don't know that that was really brought up either.

Q There was a discussion about it being such small samples, and they had to be concentrated, and additional things had to be done, correct?

That was discussed on direct examination and cross-examination, correct?

A Yes, the fact that they had to be concentrated, yes. But not the increased injection time.

MS. JAMESON: Moments indulgence, Your Honor.

THE COURT: Yes, ma'am.

(Pause.)

MS. JAMESON: No further questions, Your Honor.

THE COURT: Any redirect, counsel?

MR. STROUD: No redirect.

THE COURT: Okay. Any objection to this witness being excused?

MR. STROUD: None.

MS. JAMESON: No objection, Your Honor.

THE COURT: Okay. All right. Ms. Clement, thank you, ma'am.

THE WITNESS: Thank you.

THE COURT: You are excused.

And, with that, we will adjourn for lunch until two o'clock.

MR. COX: Two o'clock, Your Honor?

THE COURT: Yes.

MR. COX: Okay.

MS. JAMESON: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. COX: Thank you, Your Honor.

(WHEREUPON, Court was in recess for the lunch hour.)

THE COURT: Hope everybody had enough time to get something for lunch.

MR. STROUD: Barely.

THE COURT: And are we ready to begin?

MS. JAMESON: State is, Your Honor.

MR. STROUD: And we are.

THE COURT: All right. Next witness.

MR. STROUD: I'm gonna do something I think is dangerous, but I'll try for one more time.

(Pause.)

MR. STROUD: Okay. At this time, Your Honor, I would like to call our soil expert, Mr. John Thorp, to the stand.

THE COURT: Okay. Yes, sir. If you will please come forward.

(Witness complies.)

THE COURT: Good afternoon, sir.

THE WITNESS: Good afternoon.

THE COURT: If you would, raise your right-hand.

(Witness complies.)

JOHN THORP, being first duly sworn, testified as follows:

THE COURT: Please be seated. Make yourself comfortable, and answer the questions of counsel.

DIRECT EXAMINATION

BY MR. STROUD:

Q If you'd please state your full name, place of residence, occupation, and title.
A My name is John Holden Thorp, Junior. T-H-O-R-P. I live in the Town of Mt. Pleasant, South Carolina on Old Colony Road.
Q What is the position you currently hold?
A I am the sole proprietor, chief executive officer, and janitor of Land & Soil Consulting. I'm a one man show.
Q Okay. What academic degree do you hold?
Where and when obtained?
A I hold a Bachelor of Science Degree in Agronomy, Crops and Soils, from Clemson University. 1979. Cum laude.
Q Would you please describe the subject matter of your specialty?
A I'm a licensed professional soil classifier. More generally, my specialty is soil mapping, description, and interpretation of soils.
Q Do you have any special relations within this field?
A I do. Surface hydrology related to disbursal of waste water, domestic, and municipal. Also wetlands identification and delineation, which involves soils, plants, and hydrology.
Q What license do you have and how long have you had your, your license?
A I was licensed as a South Carolina soil classifier in

1986. Thirty-two years ago.
Q Please describe any memberships, professional organizations related to the field of soil science that you're a member of.
A I'm a member of the Soil Science Society of America. I am a founding member and board member of the South Carolina On Site Waste Water Association. I am a certified delineator of wetlands by United States Army, Army Corps of Engineers, and my licensure by the State of South Carolina LLR as a soil classifier.
Q What types of testing, analysis, and interpretation of physical exams of soil are you qualified to perform?
A Almost anything outside the engineering or geotechnical field, but specifically soil identification, soil mapping, soil classification, and basically interpreting the soil properties for my client's variety of uses.
Q Okay. Can you briefly describe and tell us the number of tests and examinations you have done in the past as it relates to soil analysis, interpretation, and explanation of test results?
A I have personally made soil maps of approximately 575,000 acres in the Southeast from the Piedmont of Virgina to the southeast coast of Plano, Texas. In the course of that work, I have probably written and recorded over a hundred thousand soil descriptions. And, in the course of

those surveys, collected, had lab analysis performed, and evaluated the lab results on several thousand samples.

I have also performed hydrology calibration studies for specialized or engineered septic systems ranging from a regular house up to a half a million gallons a day for the Town of St. Matthews sewage disposal fields.

MR. STROUD: Okay. Your Honor, at this time I would like to tender Exhibit 4, the CV of Mr. Thorp.

MS. JAMESON: No objection, Your Honor.

THE COURT: Okay. Applicant's Exhibit No. 4 will be admitted into evidence without objection. And this is the CV of John H. Thorp, soil and environmental consultant.

MR. STROUD: Right.

THE COURT: Thank you, sir.

(WHEREUPON, the CV was marked as Applicant's Exhibit No. 4, and received into evidence at this time.)

MR. STROUD: Your Honor, at this time, pursuant to Rule 702, I would tender Mr. Thorp as an expert witness in the field of soil classification, and direct him to answer any questions the State may have about his qualifications.

MS. JAMESON: Just brief---

THE COURT: Ms. Jameson.

MS. JAMESON: Briefly, Your Honor.

May it, may it please the Court?

CROSS-EXAMINATION

BY MS. JAMESON:

Q Mr. Thorp, how many times have you been qualified as an expert in Court?

A This will be my fourth time.

Q Those three prior times, what Courts were you qualified in?

A I don't know their exact jurisdiction, but they were in municipal Charleston. I was engaged as an expert witness by both prosecution and defense in civil matters. Not criminal. And, before I was asked to testify based on pretrial disposition or being deposed, those cases were settled before going to trial.

Q So, how many times have you actually testified in Court as an expert?

Those four times?

A No, it never went to actual Court setting. This is the first.

Q So, this is the first time you've ordered---

A Yes, ma'am.

Q ---you've been offered as an expert in, in Court in---

A In a trial---

Q ---South Carolina.

A ---per se, yes.

Q Okay. So, you've never testified in a criminal case before?

A I have not.

MS. JAMESON: Moments indulgence, Your Honor.

(Pause.)

MS. JAMESON: Your Honor, the State has no objection to his expertise in the field of soil classification.

THE COURT: Okay. And so Mr. Thorp has been classified as an expert on the subject of soil classification without objection.

MR. STROUD: Your Honor, next I'll go into the direct exam of Mr. Thorp.

DIRECT EXAMINATION

BY MR. STROUD:

Q Mr. Thorp, how did you first get involved with the Joey Clark PCR matter as it involves soil classification?

A Several months ago I received a phone call from you making me aware of the possible need for my services as an expert witness. We discussed my background and the general nature of this case or the hearing.

Q Okay. What introductory information did I give you regarding the need for the soil scientist regarding the soils found at Mike's Creek Road and at [redacted] Songbird Lane?

A You made me aware that there was issues involved with the identification of similarities or differences between or among the two sites, Songbird versus Mike's Creek Road.

Q Okay. What information and documents did you receive

from me regarding the soil, how the soil -- the color of the soil played the role in the arrest and murder trial of Joey Clark?

A I received the entire transcripts, and I was made aware of the multiple references to red dirt and black dirt, and, at least, their initial significance with regard to the actual or not actual location of the crime or crime scenes.

Q Ms. -- at -- after you spoke with me, and after I gave you these documents, did Mr. -- did you receive any other documents from any of the other members of the team?

A I did. I received map locations of the Songbird Lane neighborhood. I did not know which specific house it was at that time. I also received from Mr. Landreth---

Q Uh-huh. (Affirmative).

A ---a latitude and longitude, through Google maps, of where the body was found along Mike's Creek Road.

Q Okay. Did you review these documents and information that you were given?

A I did.

Q And how -- what was the method of reviewing them? Did you have to do any work?

A The first thing I did was go to the publically available county soil maps produced by the National Resource Conservation Service of Cherokee County. Actually the National Soil Survey on the web, and I zoomed and looked at

the soil maps and their labeled soil types across the whole area at a broad scale, and then zoomed in at each of the two locations. I looked at the soil labels and familiarized myself with the name and the characteristics at least as mapped of the soil series involved. And then I also looked at aerial photographs from Google maps and another source. And I also looked at the topographic maps to get a sense of the slope or terrain.

Q Okay. After doing these steps, when you read the transcript, was there information in the transcript that told you how the soil became a factor in the murder trial of Joey Clark?

A I did. I read the entire---

MS. JAMESON: Your Honor, I believe this is beyond the scope of his expertise.

MR. STROUD: All I'm asking, Your Honor, is he, he received the transcripts. The transcripts had the information in there of why the State felt that the soil was the factor, and I'm not asking to give an opinion on that. Just as his review of the documents, did he a -- read that and understand why it was important from the State's prospective.

MS. JAMESON: And, again, that's beyond the purview of his expertise, and what, what he's here to testify for.

THE COURT: I think that possibly the question could be

rephrased, Mr. Stroud, to ask Mr. Thorp why he would think it would be important. Not why the State thought that it was important.

MR. STROUD: Okay.

THE COURT: Does that make sense?

MR. STROUD: Yeah.

THE COURT: Okay. Counsel, any objection to him phrasing it that way?

MS. JAMESON: No, Your Honor.

THE COURT: Okay.

MR. STROUD: Okay.

Why, after you got these transcriptions read, why did you think it was important in, in preliminary understanding of what you were going to do?

A Again, after reading the entire transcripts, and based on my, you know, second hand just reading the document, understanding there are two locations involved, and underneath each location is some type of soil, and said soils have or could or, my perception from reading it, was they could have similarities or differences.

And my comprehension of the transcripts was that the, the prosecution was alleging distinct differences on the basis of color. And I saw multiple, I think 12 to 15 references, of the two colors, and, and appeared that it was being asserted that the differences were distinct, and that

the soil residue of, of red color could have only stained the victim's body at the Songbird Lane site, and that any red color could not have come from the Mike's Creek Road site because it had "all black dirt." That seemed incongruous to my mapping experience in the Piedmont landscapes.

Q In reading from the transcript, did you determine that the testimony about this red dirt came from experts, soil classifiers, as to an opinion as, as to who was giving these opinions on the soil color?

A The comments that I read about the soil color were from several individuals in the trial. I believe one, probably two of the investigators or detectives, described the soil color. I believe the attorney for the defense mentioned it at least once. I'm not intimately familiar with all that, but it, it seemed to be a recurring, and important theme in the evidence.

Q Okay. And when you read the transcript, did you determine, from the State's introduction of these witnesses/detectives/investigators that their backgrounds indicated that they had soil training?

MS. JAMESON: Your Honor, objection. Calls for speculation, and I don't believe there's been a foundation that he is investigated, you know, the backgrounds of these people. It would be outside of his expertise, and calls for

speculation.

THE COURT: Well, I'm going to overrule that. I, I, I think that, that counsel is asking, just based upon the transcript, if it was a detective, if it was, you know, a lay witness versus an expert witness. I'm not certain.

MR. STROUD: That---

MS. JAMESON: Your Honor, and it's -- I'll withdraw the objection if that's the question. I believe the question was did they have any background or educational expertise, and we don't know that from the transcript. And this would not be the witness to get this in through.

THE COURT: And, and I think that counsel is merely asking, from the, from the reading of the transcript, did these people have any -- in other words, were there any expert witnesses called with regard to the same field that this gentleman is an expert in.

MS. JAMESON: If that is the question---

THE COURT: I think---

MS. JAMESON: ---I'll withdraw that.

MR. STROUD: Yeah, that's the question.

THE COURT: I think that's where he's headed. Not sure, but---

MR. STROUD: Yeah, it is.

THE COURT: All right.

MS. JAMESON: Thank you.

THE COURT: Yes, sir.

You can answer.

A Okay. So, I'm -- the people who offered testimony in the transcripts, I recall, before they spoke about the soil, they were asked about their training as detectives or investigators, and there was a lot of training and I looked carefully. I did not see any soil training. I might add that I'm the current Chairman of the South Carolina Soil Classifiers Advisory Board, which supervises the licensure of soil classifiers under LLR. And those names that were in the transcripts are not among our active roster of licensed soil classifiers.

Q Okay. From reading the transcript, what -- when those -- when these detectives/investigators were giving this testimony about the soil, what was the nature of that testimony that they gave?

A In the context of their comments, it seemed to be basically a visual description of simple soil color, and I only saw two, three adjectives used. Red, black, and fertile.

Q Okay. In your opinion, again based on this testimony, that was this description based on scientific soil color standards?

A Barely. In the, in the standard methodology of soil descriptions, we have a color book which has over 200

different colors that are used to more qualitatively, not subjectively, map soil colors.

If I may---

Q Yeah.

A ---show?

The -- it's much like a earth tone version of what you see at the Lowe's Paint Center. There are three parameters involved in determining soil color. Each page is what we call hue, and then, on the vertical axis, is what we call value, which is the intensity of the color, and on the x axis is chroma, which is degree of brightness or dullness.

So, this is what I use, and this is what most trained soil classifiers use, including D.H.E.C. personnel, doing perc test, and also Corp of Engineers personnel doing wetlands determinations.

Q Okay. Now, again, the methodology from the transcript, was it -- you, you said it was visual, but was it -- and it was not entirely scientific.

Can you further discuss what you would of done if you had been the State's expert witness talking about soil that they didn't do?

A Well, I would of used my standard methodology. I would of matched multiple samples at each site to its appropriate color and recorded that. And I would of used -- they have numerical descriptors. For example, at the Songbird site,

on a Cecil soil, highly eroded, two to six percent slope, the topsoil is gone due to centuries of clearing and erosion. The subsurface layer is gone for the same factors, and most of that landscape broadly across the county, you are looking at the now surface soil, which was once the subsoil. And, and that's the -- obviously, the contact point for the victim's body under whatever circumstances.

So, I would have described that in detail, not knowing the exact locations, and also the same at the Mike's Creek site.

Q Okay. Further talking about the transcript and these -- match -- the matching of the soil that you read, can you state the significance of -- that they were attempting to show between just using standard visual colors, black, hue, red, there, you said it was not quite scientific, but --?

A In the -- the color red exists in this book, but only in a subset of the color chips. The color black, as a one word verbal descriptor, exists in this book, but only in a subset of the color chips. There are other nuances based on their position in the chart. So, when I say somewhat, it -- but, honestly, it -- it's a layman's visual, and it's simple, but imprecise.

Q Okay. Now, based on the review of the transcript, review of the materials that you were sent by

Mr. Landreth --
A Uh-huh. (Affirmative).
Q -- would you -- were you able to make a conclusion from those that you put in, in your opinion in a preliminary report?
A Yes, a remote conclusion. I could look at the soils as mapped at both sites. I could apply the maps, which are not precise, but at the county level, at the landscape level, they are a good first indicator. The soils looked valid on their face, the soil maps, and the soil types mapped in both areas made sense based on my experience. But with regard to the exact locations, I could only predict or speak in probabilities. I could not determine per se.
Q Were, were you able to develop and explain the concerns or the findings from this report?
What, what exactly was in this report that---
A Well---
Q ---that relates to your soil opinion?
A Well, is my report in the record or will it be?
May I ask?
Q I guess I -- we could try to get it in.
A Well, I can, I can synopsize it by memory, but---
Q All right.
A ---basically, in, in simple terms, the soil maps predicted two soil types known as Cecil and Madison. They

both are weathered or derived from the same geologic parent material which is prevalent all over the Piedmont and Cherokee County. The degree of erosion is correlated to the steepness of the slope, and the coloration is largely based on degree of erosion, and the remaining amount of humus, which is black in color, the remaining amount of humus on the surface.

Could you repeat the question?

MR. STROUD: Your Honor, would it -- could I refresh his memory with, with this -- his report?

THE COURT: Certainly.

A Thank you.

Well, I won't read it verbatim, but --.

Q I'm gonna let you just skim over it --

A Sure.

Q -- and then --.

A Thank you.

Q All right. Now that you're more familiar and had a chance to review this, you were -- you -- what were these findings?

A Again, there -- the soils at both sites were mapped Cecil and Madison. They are very, very, very, very similar soils derived from the same parent material. They occur in the same landscape position, and, as mapped, they have various slope phases, which indicates slope, which causes

then different rates of erosion. Different rates of erosion expose the red subsoil at different depths over time.

Both of the series, Cecil and Madison, are classified exactly the same in our formal soil taxonomy much like biologist or zoologist use. They are both fine, which means cleggy. They are kale anemic, which is the predominate clay mineralogy. They are euthermic, which is our temperature regime. They are typic. Kanhapludults, which, I'll spare you the details, but that, that em -- embodies a set of characteristics that are common to both.

They are classified the same. Their primary difference is the mica content in the lower subsoil, but they are nearly identical from the surface to about 24 to 36 inches. Below that, they only, if the -- if properly mapped with the mica, which is an unweathered mineral in the subsoil.

So, beyond that, I can answer other questions, but that -- that's my first technical understanding of the areas.

Q Okay. Could you please explain why, at this, at that point in time, it was not necessary for you to visit the sites to produce your report?

A Well, I wasn't being asked to make a absolute determination. I was being asked to use my remote ex -- information to put in context the comments about the soil that I saw in the transcripts. So, I guess my remote

initial conclusion was that it was curious to me that black soil would exist in this highly eroded red clay landscape.

However, it was evident to me, on its face, with the Google stick pen location just to the west of the bridge where the body was found, that there is a different soil type there mapped as recent alluvial land, map symbol MV I believe, which means that that center area around the active ephemeral stream is dynamic, and its soils are not residual or weathering in place. But they are deposited by the forces of erosion, and the fluvial conveyance of the eroded sand, silt, and clay in the streambed.

And so I knew that was different, but the black descriptors still was a little confusing to me or I thought it wasn't likely because, in that landscape, especially after being cleared for so many, in cases, centuries, but at least decades, very little humus persists in sloping, high energy, high aquatic energy landforms. And so I thought, if there would be any, it would be in that area.

So, I didn't say it was impossible, but I just thought it was improbable.

Q Did you, on Monday, June 18th, 2018, visit Mike's Creek Road and [redacted] Songbird Lane?

A Yes, I did.

Q Please explain why you visited the sites.

A At your request, to assist your effort here.

Q Okay. When you visited the sites, did you see anything that would contradict your report?
A No.
Q What additional information, as it pertains to soil color in the Joey Clark matter, did you learn from your Monday, June 18th actual visits to the sites?
A Well, on the first site, which I now know is [redacted] Songbird Lane.
Is that correct?
Q That's correct.
A Okay. That even though the house was removed, and I realized six, seven years has passed since the original crime and the original observations, there were still bare patches of soil covered by grass and weeds, and I actually went to several of those, and got out my color book, and recorded the colors. And it made sense to me that the soil map is right there, and that that was indeed red soil or, as we say, 10R4/8.
Q Now, when you -- what additional information, as it, as it pertains to soil in the Joey Clark matter, did you learn from your visit at Mike's Creek Road on June 18th?
A After we left the first site, we proceeded to the western end of Mike's Creek Road and proceeded eastward. Along that drive, I would, as a mapper, and always looking at road cuts, and saw what Mr. Landreth saw, which is on the

road cuts where there was no vegetation in places, the red subsoil that's typical in those sediments. And then, as we proceeded down slope towards the streambed where the bridge is, there was a higher degree of erosion, more gravel and stones near the surface, and the main difference is the Mike's Creek Road site has a mature or full forest canopy right there in the streambed. The sides have more trees than the bare Songbird loan -- Lane site.

So, the topography, and the road cuts, and the vegetation all matched up from my initial report, which was based on the aerials and the public soil maps. So, there was nothing remarkable to me at that point.

Q Okay. When you visited the Mike's Creek Road, were you -- in the transcript -- well, you -- did you notice -- let me back up now.

Prior to your June 18th visit, in the transcript, did you find statements made by the detectives that they be, believed that the -- there were drag marks at Mike's Creek Road?

A I do recall that.

Q Okay. So, on June the 18th, when you visited the site, what else did you do?

You -- I was with you. So, I know you took some -- you know, you looked and you dug and everything.

But did you sort of react, based on the testimony that

you had read in the transcript, the, the dumping of the body?

A Could you make that question clear?

Q Okay.

A I don't quite know how to answer that.

Q All right. When you visited the Mike's Creek Road on June -- on Monday, June the 18th --

A Uh-huh. (Affirmative).

Q -- we know -- you already testified that you looked at the soil and did things like that, but did you do anything else in terms of trying to take the information that you garnered from the transcript, and sort of recreate what the transcript says about how the -- this was the dump site, how, how that occurred?

A May I restate it as more of a scientific process?

Q Yeah. Yeah.

A I had a, shall we say, an initial theory going in, which is based on the transcripts, the descriptors, I was anticipating, if those were accurate and factual, that I would see a preponderance of soil -- surface soil with a black color.

Q Uh-huh. (Affirmative).

A I had not ruled that out in my initial map assessment because of the stream position and the forest canopy cover.

May I elaborate on how I described and investigated the

soils there as a --?
Q Yes.
A -- process?
Q Uh-huh. (Affirmative).
A Okay. So, when we got out of the vehicle, it was -- I was told that the actual site was on the opposite side of the road of the cross, which made me, in my mind, dismiss that picture which I had received, and its soil color.
Q Uh-huh. (Affirmative).
A That was the wrong side of the road. So, we went to the other side of the road, and I had my soil sampling spade, which is just a narrow shovel, I had my color book, I had a tape measure, and I had flag pins. And so, based on what Mr. Landreth told me in his recollection or the -- I believe it was the actual copies of the photos that were taken when the body was discovered --
Q Uh-huh. (Affirmative).
A -- we walked to that side of the road, and there was a tree that seemed to be a good reference tree with regard to the photo with the body, and the tree where we were because, initially, it wasn't clear to me exactly where the body was. But I believe, based on the pictures, Ted guided us to within eight or ten feet of the actual location east to west. North to south, from the road towards the fence line, it was evident to me that an older fence was partially

present, and was attached to the left side of that tree. But there was a relatively new, un-rusty, tautly pulled new fence right behind it further north about three or four feet.

So, from the edge of the road prevalent gravel cover at a right angle in a northward direction, I pulled a cloth tape, and it measured exactly 18-feet to the old fence connected to the tree. We call that transect.

Along that transect, I lightly scraped the top of the soil less than an eighth of an inch, and placed a flag pin there, and then I have my distances, but basically I'm at 3-feet, 11-feet, and 16-feet away from the road.

Q Uh-huh. (Affirmative).

A A small scrape was made and, and several around to make sure there was consistency, not variability, and I record the color at each of those points on the transect. And, I guess, if you're asking for a reaction, I'd rather call it an observation or a conclusion --

Q Okay.

A -- that I did not see what I would call black dirt. We prefer to use soil, but that kind of confirmed my suspicion that most of that had been eroded long ago, and wasn't present. I might add that the farthest sample or observation point from the edge of the road was across what we call a grader or a roadside ditch. It's really a -- not

even a ditch. It's just a small V that runs the water off the road and then on down towards the stream. That portion had eroded about 12 to 18-inches at that point.

So, if, if you can envision this in cross-section, here's where we parked our car.

Q Uh-huh. (Affirmative).

A Here's the level part of the road with the traffic and the gravel. Then there's a little five to six foot section with decreasing or almost no gravel, and then it descends on about a 45-degree angle to the V-ditch, if you will, and comes back up, and then there was about another two, I'd say 2-feet of more level area before it got to the fence. So, it's like---

Q Uh-huh. (Affirmative).

A ---that. So, gravel, partial gravel, and, and soil, which was at transect point 17.5YR58, which is reddish, 2.5YR4A, also reddish, and 2 5YR58. These are not the exact same colors at -- as at Songbird Lane, but they are one or -- there (sic) are one page away -- may I show?

Q Yeah.

A Okay. So, there's a range of colors that are acceptable within the Madison and Cecil series, but the, the expected one, and there's variations in the soil, and there's variations in human color perception, but the, the reddest of all hue pages is 10YR. And, at the Songbird Lane

site, it was 10YR58, this chip right here.

So, at the Mike's Creek Road at observation one, it was 2.5YR, which is one page over, still in the red group, 58.

So, this chip versus this chip. This degree of these two right under my finger was Songbird Lane, observation points one, on Mike's Creek Road. Observation point -- is this too much information?

Q No.

A Okay.

Q Unless the judge tells you to stop.

A Observation number two was 2.5YR48, which is slightly browner, but still right in the same group. That's my second observation going away from the road towards the woods.

The third one, which is across the greater ditch and near the barbwire fence, is 2.55YR right in-between 4-8 and 5-8. Right here.

So, they are not identical, but within 240 color chips in this book, they are extremely close. I consider colors like this, on the left column, black, in, in the imprecise term.

Q Uh-huh. (Affirmative).

A So, they were very similar, but I would say, based on that trip, there was no black dirt where, in the transect between in the road and where we believed the body to have

been. But, furthermore, I looked across the fence and down in the very tosla (phonetic), the ravine, and I did not see any black soil there either. In fact, it was more severely eroded because that's where the highest energy and volume of water exits the road greater ditch to enter the stream. There were exposed stones, and that's lower subsoil exposed there.

Q Okay. Now, a, a -- again, because I was there and Ted was there, what did you have -- think about having me do cause, you know, we pulled the car up, and I was---

MS. JAMESON: Your Honor, I've allowed a lot of leeway, but he's, he's testifying.

MR. STROUD: Okay. Okay. All right.

THE COURT: Okay. I'll sustain that.

MR. STROUD: Yeah. All right.

THE COURT: Mr. Stroud, let's not---

MR. STROUD: Okay.

THE COURT: Ask a question.

MR. STROUD: All right.

In addition to, to looking at the soil on Mike's Creek Road on June 18th, what else did you do regarding the information that you had gained from the transcript about the drag marks?

A I did my mind's eye imagine a limp human body being removed from a vehicle or being allowed to fall out of a

vehicle, and I guess try to envision how that body might get from the vehicle across the area of my transect to its final resting place against the fence, and what kind of surface soil it might contact. And we spoke about that.

Do you want me to opine further?

Q Only if it's relevant.

A Well, it just -- it seems to me, you don't have to be a scientist, but it seemed to me that, that the soil that I observed, unless the body was utterly lifted over to the site, if it was dragged, then it would have to encounter that, and some amount of that residue would end up on either the body, and/or the clothing in that -- course of that movement.

Q All right. Now, in -- Mr. Thorp, are you aware of other soil testing, testing methodologies, other than visual, that could of been used to discern differences between soil, colors found at different physical locations?

A Yes.

Q Who were these testing -- were these testing methods available in 2010 and 2014?

A Yes.

Q What are these other testing methodologies?

A They're several. The most common, assuming that discreet samples were properly collected, sealed, conserved, and then analyzed, one of the methods of analysis would be

physical. Percent sand, silt, and clay. The physical makeup of mineral soil.

There's also multiple tests for analyzing the percent carbon or amount of humus. Again, humus is the particle that gives soil a darker black color. Chemically, under routine lab methods, pH could of been determined. That can differ that depth and across distances as well as just basic anions, cations, elements, kind of like the stuff you would expect from a soil fertility test for your garden or foreign field.

Getting a bit more technical and scientific or detail, there is a technique called x-ray refraction. I have not performed that test. I'm aware of it, and I have discussed it with some of my colleagues to understand it. But, in, in simple terms, again, properly collected, sealed, conserved samples are prepared and subjected to a, a x-ray beam at a certain angle, and when that x-ray beam passes through the soil, it exits and reveals, not unlike a spec -- a prism splitting up light, light into its multiple wave lengths, but the x-ray is altered as it passes through the soils, and specifically reveals the mineralogy of the clay.

There is a analogue re-parallel between x-ray diffraction, and the next one, which is called x-ray spectroscopy. Those are parallel to like DNA testing or almost at the molecular level identification. But in x-ray

diffraction, those reliably reveal the clay structure. Clay and kaolinitic landscapes are what they call one-to-one lattice clays. They're not expendable. They're not shrink swell, and they have a distinct look, crystal like look.

In x-ray spectroscopy, that is not using the same refraction method. It's -- it more uses x-rays to provide a signature almost like a wave length with spikes. Each of the spikes are actual elements such as iron or, you know, mellitum or just, just like your periodic table. The spectroscopy reveals the, the elements. The diffraction reveals the structure of the clay minerals.

Those are very, very distinguishing. They can show great differences or they can show great similarities, but it all depends on the nature of the samples.

Q Okay. Based on your broad soil mapping experience across the Southeastern U.S., would you describe the soils in Cherokee County as generally uniform or highly variable?

A Well, let's talk about scale. I would call them generally uniform in the distances of say 20 yards to 2,000 yards. In other words, that distance in that parent material.

Q Uh-huh. (Affirmative).

A The only real differences are, again, the degrees of erosion, and degrees of residual surface soil. So, generally broadly they are very uniform, but the closer and

closer you look, you can get more spacial variation. But, in general, the Piedmont is, is a uniform soil landscape.

Q And I think you may of answered this, but why is that in Cherokee -- why is it that way in Cherokee County?

A I, I can't speak to the whole county, but that type of landscape, hundreds of thousands, if not millions of years ago, today's soils are weathered or altered through the forces of, of vegetation, water erosion, man, and plants, and animals. But the, the original sediment, which are metamorphic and igneous rocks, it -- it's just broad there. There's not like in a river bottom where you have lots of busy sandbars and clay pockets. It's, it's emanating from the same parent material.

Q Okay. How does soils in South Carolina Piedmont develop red or black colors?

A The red color is derived from oxidation of the iron in the soil. These sediments in the Piedmonts have high iron content. So, when iron is exposed to moisture, much like a nail or a piece of metal, it, it rusts. And so what you're seeing in red color is actually oxidized or rusty iron.

The longer it, it is -- remains dry, the redder it is, and it varies by iron content. When you determine water tables or, in the case of septic, the depth to the seasonal high water table, those red colors change. They are -- become reduced, a chemical process from prolonged

saturation. So, oxidation makes iron soils turn red. Moisture, or reduction, dulls them or turns them gray.

With regard to black, there are very few parent materials that are inherently black. They're not in this region. They're in the Midwest and in the other continents.

So, black generally implies degree of humus content or organic matter, which is formed from the decomposition of glitter fall by soil microbes, and microfauna, and the plant's tissue is broken down, broken down until it is merely humus or carbon. And so black soils typically have their surface in tact, and the -- depending on how wet or how dry they are, that determines the thickness of the surface soil, that the horizon, the humus layer.

So, not to overkill it, but just so you understand, soils that remain dry have thin, thinner black surface because the soil microbes are in an aerated environment, and they can eat or consume the humus. That's their food.

So, when you move down into the low country where I mostly operate, swamps or wetland soils have much thicker accumulations of humus, and they have higher concentrations of it because it's an anaerobic environment, and the soil microbes can't consume it.

In the Cherokee County case, you have dry soils that don't accumulate humus much, but the main factor is the deforestation of those landscapes, the exposure to the plow,

the exposure to erosion. Most of the topsoils are -- have long gone down the streams that may be in the low country at this point, but those are highly eroded soils without a lot of input to develop humus.

Q All right. Could you please apply these factors that you've spoken about to the Songbird Lane site versus the Mike's Creek Road site?

A Sure. On the Songbird Lane site, that area is on a broad ridge. It's high on the landscape, and slightly convex. So, over time, that was a piece of land that could of been settled or farmed or made into pasture, and, thus, most of it's surface soil, and shellfish layer have, have long been eroded. It doesn't have virtually no black topsoil there. A, it was cleared for a neighborhood, and, at least in the backyard, it was disturbed for the -- by the installation of the septic system and its trenches. And I don't believe it has been vegetated long enough to accrue much humus. It either erodes or the soil microbes consume it.

On the Mike's Creek Road site, that's a little different. It's in a lower landscape position, which -- and it does have over stored vegetation. So, there were some nuances. Again, they're not identical, but the litter fall from the trees did produce substrate for humus formation. But, in that particular location, before the road was put

in, it was subject to erosion. When the road was put in, when that first bulldozer came in and took down the trees, it was gone, and then, when the gravel was laid down, whatever was left, was buried. And then the forces of rain and erosion and road maintenance pretty much removed it.

It's a, it's a -- it's not only naturally eroded. It's a highly altered by the road construction maintenance process.

Q Okay. In your experience as an expert soil mapper and classifier, what kind of changes could have occurred since 2010, until June, 2018, that would have taken away or somehow explained why the detectives said it was black soil?

A Well, if, if, if it indeed it was correctly and precisely described as black, I, I can develop ideas or theories.

Q Yeah.

A It seems improbable, but in the course of road maintenance in, in places like that, there is erosion. There's sometimes supplemental soils brought in to build up or, or level out the shoulders or the portions of the road that have eroded, but it's uncommon engineering practice, and not really good engineering practice, to bring in humus rich topsoil because it's greasy when wet, and it's also highly erodable. I don't know. Unless someone put some asphalt down, but that's not soil.

Q And this Mike's Creek Road, is it the kind of road that the county would probably invest in a lot of expensive topsoil or whatever?

MS. JAMESON: Objection. Calls for speculation.

MR. STROUD: Okay. All right.

THE COURT: Sustained.

MR. STROUD: Okay. All right. At this time, I would like to enter Mr. Thorp's Exhibit No. 8, his soil report.

MS. JAMESON: One moment.

THE COURT: Counsel.

MS. JAMESON: Moments indulgence, Your Honor.

(Pause.)

MS. JAMESON: We have no objection.

THE COURT: Okay. And what exhibit is that?

MR. STROUD: Well, Exhibit 8, soil report of John Thorp dated May 5th, 2018.

THE COURT: Okay. And that will be admitted without objection.

Exhibit No. 5, and I have that.

THE COURT: Okay.

MR. STROUD: Thank you.

(WHEREUPON, the soil report was marked as Applicant's Exhibit No. 8, and received into evidence at this time.)

Q All right. At this time, Mr. Thorp, please answer any questions the State has for you and --.

MS. JAMESON: May it please the Court?

THE COURT: Yes, ma'am.

CROSS-EXAMINATION

BY MS. JAMESON:

Q Mr. Thorp, I believe, when you started testifying, you said you didn't know the exact location of where Winter's body was discovered, correct?

A Yes, ma'am.

Q And then it seems like you said you did, and then you knew within 8 to 10-feet.

So, can you clarify?

Do you know the precise location the body was covered?

A Not precise.

Would you like to speaks (sic) in, in units of precision or distances?

Q Yes.

A I believe, based on the tree reference, that my transect was within 5 to 8-feet of the photograph. But all I had was the photograph taken by the initial scene investigators.

Q So, you were provided with photographs because I believe you also testified that most of your information came from Ted Landreth, correct?

A Yes. When we were on site, later that evening, I was -- I viewed the photographs in the course of that

discussion.
Q Okay. And do know if these, these were his photographs or if they were from the case file?
A I believe they were reproductions from the case file.
Q Did these photographs actually have the body in them or was it---
A Yes, ma'am.
Q ---after it'd been removed?
A Yes, ma'am.
Q Okay. So, you know the general area within 5 to 10-feet?
A I believe so. I might also add that, in addition to my linear northward transect, I also went east/west along that road to see if there were any areas of black soil. So, I feel like east to west, left to right, I also covered at least 5 to 10-feet off either side of my transect.
Q When you were describing the Mike's Creek location from yesterday, you said you saw numerous places that had red dirt. I know that's simplifying it, but, but you saw red dirt there yesterday at Mike's Creek, right?
A Along the roadside embankment on either side of the road, yes.
Q And the, the body here was surrounded by briars and vegetation and tree branches, correct?
A I read that in the transcripts, but I can't confirm

that.
Q These areas where you saw the red dirt alongside the road embankment, is that the area where the body was discovered?
A No, it's just along Mike's Creek Road, but I only observed that from the western end to the bridge area. I did not observe on the east end.
Q Did you speak to anyone related to the underlying case, any of the investigators or --?
A No, ma'am.
Q Okay. The only people you spoke to about this case were Mr. Clark's attorney and investigator, correct?
A And Anita Hall.
Q But no one who investigated the underlying case, correct?
A No, ma'am.
Q And this crime was committed in 2010, correct?
A I believe, according to transcripts, I accept that.
Q Okay. So, you visited the scene more than seven years later?
A Yes.
Q Can you testify, to a reasonable degree of scientific certainty, that there wasn't red soil where the body was found in 2010?
A Yes.

Q How can you?
A Well, in my opinion, a, a reasonable amount of certainty, relies on the existing soil, the natural forces at work at that site. Again, I spoke to the erosion of the native black topsoil, and the unlikelihood that new black topsoil would develop over the course of seven years. That takes decades, if not more, in the soil forming processes. And it seems reasonable (sic) likely to me that, that those conditions would persist and not change. And that, that, that I just don't think it's likely.
Q You don't think it's likely, but you, you don't know that there wasn't dark soil in December, 2010 when the body was discovered in that area?
A I was not there. So, I do not know that as a certainty.
Q And I believe you testified there are different ways that the soil in an area can change, whether deforestation, additional soil being brought in, correct?
A Those are among the factors, yes.
Q And both the soil at -- I believe you testified the soil at the Songbird Lane was in the red group family, correct?
A It is -- it is on the 10R color page, which is the reddish page in the book we use to describe, yes.
Q And I actually wrote down when you were testifying

before, when you went to the first site, you actually described it as red soil at first, and then you clarified which page on, on the color page, but you described it as red soil, correct?

A I believe so.

Q In layman's terms, it is red soil, correct?

A Yes, ma'am.

Q Does a person need specialized education or training to observe color differences in soil?

A Not gross color differences, but that's the difference between a layman and a professional. For example, the speaker over my head is black. The stripe on the flag is red. That's not incorrect, but that's why we have this.

Q But, but layman's term is red soil, and you did use the term red soil, correct?

A Indeed.

Q You testified regarding some other soil testing methodology that, that would of been available at the time of the murder and the time of trial.

Have you done any of these testings with the soil here?

A On this site?

Q Yes, on, on the Songbird Lane or the Mike's Creek site.

A No.

Q And your report discusses possibly testing samples from Winter's clothing.

Have you done any testing on samples of Winter's clothing?

A No.

Q You testified that, based on your experience, the soil in Cherokee County is generally uniform, correct?

A At broad scales, yes.

Q Do you recall this testimony coming out during trial, and one of the investigators admitting that there was red soil throughout Cherokee County?

A My recollection is, near the end of the trial, the defending attorney alluded to there being red soil all over Cherokee County.

Q And one of the invest -- do you recall whether the investigator agreed with that?

A I do not recall.

Q All right. And so you're not saying there isn't dark or black soil anywhere in Cherokee County?

Just generally most of it is red, correct?

A Generally, yes. It is not an impossibility.

Q And you can't testify that it was impossible that there would of been dark soil on Mike's Creek Lane on December, 2010?

A It's not impossible. I think it's highly improbable.

MS. JAMESON: Moments indulgence, Your Honor.

THE COURT: Yes, ma'am, take your time.

(Pause.)

Q You discussed x-ray refraction, and I think you said you had never done it, but you've discussed it with some of your colleagues and friends.

You didn't perform that here, correct, obviously cause you haven't done it before, right?

A No, that's a highly specialized technique, and I am not trained to perform that.

Q So, you can't account for its reliability based on personal experiences?

A No, but it's used all the time by professionals and researchers.

MS. JAMESON: No further questions, Your Honor.

THE COURT: Any redirect?

MR. STROUD: Give me just one second.

(Pause.)

MR. STROUD: Just one question.

REDIRECT EXAMINATION

BY MR. STROUD:

Q Mr. Thorp?

A Yes.

Q You, you were asked, within -- as a -- as an expert, within -- could you state with certainty that there was never any black dirt there.

Can you further explain what probabilities or could

it -- is it possible for any soil scientist to make that observation?

A You mean a percentage statistical likelihood of the---

Q Yeah.

A ---presence of black soil at that site at that time?

Q At that time.

A It would be conjecture in my opinion.

Q Okay. Would another soil -- would -- is soil technology so advanced at this point that any scientific method could state, beyond what you have said, is the reasonable degree of certainty?

A Actually, yes. If, if, if the initial crime scene investigation on Mike's Creek Road, if a evaluation and sample collection was done similar to what I did yesterday --

Q Uh-huh. (Affirmative).

A -- those samples could have proven or disproven the presence or absence of dark topsoil, humus rich black dirt. That would of answered it 100 percent if it was professionally collected, properly sampled, sealed, and analyzed, either visually or the method -- measured carbon content. That would of been the answer.

Q Thank you.

MS. JAMESON: No further questions, Your Honor.

THE COURT: Okay. Is there any objection to this

witness being excused?

MR. STROUD: No objection.

MS. JAMESON: None, Your Honor.

THE COURT: All right. Thank you, sir.

THE WITNESS: Thank you, ma'am.

THE COURT: Thank you for being here.

THE WITNESS: Okay.

THE COURT: You may be excused.

THE WITNESS: All right.

THE COURT: Okay. Why don't we take about ten minutes, and that will be our afternoon break, and then we are going until 5:00.

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

THE COURT: Okay. Counsel, are we ready to proceed?

MR. STROUD: I am ready.

MS. JAMESON: Yes, Your Honor.

THE COURT: Okay. Thank you.

MR. STROUD: Okay. At this time, Your Honor, I would like to call Chase Harbin to the stand.

THE COURT: Okay. Good afternoon, Mr. Harbin.

THE WITNESS: Good afternoon.

THE COURT: Will you raise your right-hand please?

(Witness complies.)

CHASE HARBIN, being first duly sworn, testified as follows:

THE COURT: Thank you. Please be seated. Make yourself comfortable.

Yes, sir.

DIRECT EXAMINATION

BY MR. STROUD:

Q Good afternoon, Mr. Harbin.

A Good afternoon, Mr. Stroud.

Q I'm going to first ask some general questions about the murder case of Mr., Mr. Joey Clark.

Did the State appoint you to represent Joey Clark?

A Yes, sir.

Q Did you request funds from the State to retain expert witnesses?

A Yes, sir.

Q Did the State grant the funds?

A Yes, sir.

Q They did.

Okay. Mr. Harbin, who was the victim that Mr. Clark was accused of killing?

A Winter Wingard.

Q Did the State have any---

THE COURT: Just, just one moment if you don't mind. I think maybe you might be a little too close.

THE WITNESS: Too close. I'm sorry.

THE COURT: Yes.

Okay. Let's try that.

THE WITNESS: All right.

THE COURT: All right. Thank you.

Yes, sir.

Q That it -- did the State have any eye witnesses to the murder?

A Not to my recollection.

Q Okay. Did the State identify the deadly weapon that was used to kill Ms. Winter Wingard?

A I do not believe so.

Q Did the State provide a time of death for Ms. Wingard?

A I do not believe they did.

Q Did Mr. Clark confess to you that he murdered Ms. Winter Wingard?

A No.

Q Did the State provide you with an actual signed confession written by Mr. Clark confessing that he killed and murdered Ms. Wingard?

A No, sir.

Q Mr. Harbin, during the trial, did the State inform the jury that this was a circumstantial evidence case?

A I, I believe they did. I'm, I'm kind of taking it on what I've heard in the courtroom that jives with my recollection, yes, sir.

Q Okay. Did you tell Mr. Clark that the evidence was

circumstantial against him?
A Yes, sir, I'm sure that that would of -- those -- that exact term would of come up in our discussions, yes, sir.
Q Okay. Why did you agree with the State's assessments that this was a circumstantial evidence case?
A And, and I'm gonna go back to what I've heard over the course of today.
Q Uh-huh. (Affirmative).
A If -- the references in kind of the admission, if you will, to the jury that there was a certain amount of evidence that, that is, is there. So, what -- and, and if I -- if I go too far, you can stop me, but what my intention there was to say, you know, I'm not going to expect you to believe that there is zero evidence in this case.
Q Uh-huh. (Affirmative).
A That there is some amount of evidence, but the point that I was attempting to make was that that amount of evidence was enough to get you arrested, but it was not enough to get you convicted.
Q And that was what you had told Joey, right?
A Well, it's, it's certainly what I told Joey that our, our strategy was going to be, and I, I don't make a habit of guaranteeing any of it.
Q Yeah. Right.
Okay. From the time of your appointment up 'til the

time of the March 17th, 20 -- 2014 trial, what was your trial strategy regarding the Joey Clark matter?

A I'm not sure that's a question I know how to answer kind of in a very direct fashion, but, obviously, in any circumstantial case, what you're trying to do is highlight the reasonable doubt that, that is available. And, in this particular case, they had some things that, on their face, might seem impressive like DNA. People are impressed with the words or the letters DNA. Things like that.

But, ultimately, I didn't know or I didn't believe that the DNA, in and of itself, really proved a whole lot because he lived with Winter. I think the third, the, the third sample that we heard the expert talk about---

Q Uh-huh. (Affirmative).

A ---I believe Doctor Demers had hy -- hypothesized that was probably her mother because I think the alleles were very similar or something like that. And, and, and I think that the, the primary physical evidence in the case was the semen found in her mouth. And I, I, I wanted to have the jury not be kind of attracted to that singular piece of evidence because they were in a relationship. So---

Q Uh-huh. (Affirmative).

A ---the fact that there was sexual contact between them should not have really been surprising to anyone.

So, kind of take the sting out of what would otherwise

be, you know, kind of their, their main, you know, piece of evidence connecting Joey to Winter that night. The, the other obvious big piece of evidence is the or big pieces of evidence is the statements from the, the jailhouse informants.

Q All right.

A And you may want to ask specific---

Q Yeah, I am.

A ---questions about that.

Q Yeah.

All right. Did your trial strategy include, at some point, deciding to present new evidence so you would have the last closing argument?

A That, that was exactly what it was. And I will tell you that I normally, well not normally, but, in that case, I don't know that I was dead set on having to have the last argument, but, to my recollection, Joey did not want to testify. And if, in that particular case, not having a client that wanted to get on the stand, I wanted to have the, the last argument. If he -- if the jury was not gonna have the ringing in their ears of Joey saying that I'm innocent, and I didn't do it, then I wanted to have the last, the last argument.

Q Okay. Mr. Harbin, I'm now gonna ask some questions about DNA as it pertains to Mr. Clark's murder case.

After reviewing Mr. Clark's situation, please tell us if you determined that this case would require a DNA expert witness.

A I -- well, I -- certainly the, the funds that I requested, and, and that order that was signed would, would be evidence of that opinion. I certainly am no DNA expert. I felt that I needed the guiding hand of somebody to make sure that I was looking at what the State had to see whether it was something or nothing.

Q Okay.

A And, and---

Q Okay.

A ---Doctor Demers was able to provide that kind of base level knowledge to interpret what they had, to interpret what -- the strengths and weaknesses of that, and to, to direct me how to approach that, that evidence.

Q Okay. Mr. Harbin, did you request a continuance from a trial date that had been previously scheduled for Mr. Clark's murder trial?

A I vaguely recollect that I did, but I don't recollect the specifics of when and why.

Q Okay. What was -- okay. So, you don't recollect the reason that you, you needed this continuance?

A Well, let, let me rephrase that. I, I do recollect that it had something to do with his schedule.

Q Yeah.
A But I, I don't remember exactly what date---
Q Okay.
A ---that would of been.
Q Okay. Did the Court grant the continuance?
A I, I don't recollect whether or not there was a continuance of that, and then a separate trial date, and I say that specifically because I, I know that there was or I recollect a conversation with Doctor Demers that he was potentially unavailable for the actual trial date that did actually occur. But he was back in -- I believe the Atlanta area is where he was, if I'm, if I'm right about that---
Q Uh-huh. (Affirmative).
A ---that he was going to be available, if necessary, to travel and appear in Court if I called him.
Q Okay. You -- do you remember when you got permission from the State to retain Doctor Demers?
A I don't.
Q Okay. Do you remember when you executed a formal contract with Doctor Demers?
A No, sir, I do not.
Q Okay. But you did execute a formal contract because I didn't see that in the file anywhere?
A I, I -- well, I guess it probably depends on what your definition of formal contract is, but there was a bargain

for exchange. He told me how much it was gonna be. That was the basis for my request for the, the expert fees. I know that sometimes the Court will cap.

Q Uh-huh. (Affirmative).

A Kind of expect us to operate within a certain spending level.

Q Okay.

A So, I had to have that particular expectation.

Q All right. At the time that you had this bargain or whatever, what services did -- was Doctor Demers going to provide?

A So, he was able to take the case file, and, and he read, you know, the regular police reports as well so that he had a context for the, the DNA---

Q Uh-huh. (Affirmative).

A ---I'd say stuff. That's about how much I know about DNA, apart from an expert, but the, the DNA testing and the results. So, he was able to basically pick apart, not only what I was reading, but also kind of the, the background information that you and I probably wouldn't be able to read as, as we could German, you know, and, and tell me---

Q All right.

A ---this is what the SLED expert is going to say. This is what you can get her to admit to. This is the weakness in this particular kind of testing. This is what it says,

and this is what it doesn't say, right, kind of relative---
Q Okay.
A ---to what your expert---
Q All right.
A ---was---
Q All right.
A ---referencing.
Q All right. Now, under this bargaining -- during this bargaining time, how did you did -- how was the case DNA review/case consultation defined?
A I don't know if I can define it better than simply to say that he was going to review the case file that he could review, and, and I believe he got the entire case file that I had. Now, he didn't get -- I believe we had some records like cell phone tower records and stuff. He wasn't interested in that obviously.

I want to say that he actually was able to -- I'm hesitant to say that -- I've got a recollection of him telling me that he was actually able to speak with the SLED expert over the phone. And, and, and that was one of the things that he was able to tell me in our subsequent conversation that you can ask her this question, you should expect this answer, if you get that answer, you can ask her the next question, and so on.
Q All right. How did Doctor Demers deliver documents to

you?
A Electronically.
Q Okay.
A But, when you say documents though, I don't, I don't believe he -- I don't recollect that he wrote a, a report as such or at least, if he did, I don't recollect it. But I, I -- what I recollect mostly is long conversations where he is essentially giving me a primer over the telephone---
Q Uh-huh. (Affirmative).
A ---on kind of the basics of, you know, DNA for Dummies, and then kind of getting into a little bit more specific, where necessary, and explain to me enough terminology that I could follow the testimony of the SLED expert so that I could ask intelligent questions to get the kind of answers that we were---
Q Okay.
A ---hoping to get.
Q All right. At -- I'm not, I'm not gonna introduce this as an exhibit, but just sort of refresh your memory and everything -- Your Honor, could I show him -- this was the report.

I tell you. Chase was commendable in giving me a tremendous amount of information. I had boxes, but this, in all the information he gave me, this was the only thing I had related to Doctor Demembers (sic) that he -- whatever

his name was.
A I believe it's Demers.
Q Yeah.
THE COURT: Are, are you showing him that for him to refresh his recollection?
MR. STROUD: Yeah. Uh-huh. (Affirmative).
THE COURT: Okay. I will allow that.
MR. STROUD: Okay.
MS. JAMESON: Mr. -- and what, what are you giving him?
MR. STROUD: Oh, okay. This was the -- the preliminary report or email or whatever. That, that was the only thing that we had that he gave us. It's -- I'm not introducing it as an exhibit or anything right now.
MS. JAMESON: Is it---
MR. STROUD: Let me show you.
MS. JAMESON: Is it seven pages?
MR. STROUD: Yeah.
MS. JAMESON: Okay.
THE COURT: And I have not reviewed that document for the record.
A Okay. I, I'll apologize that I do not remember the specifics of this, but definitely, in looking at it, it, it rep -- it -- it's rep -- it's something that he gave me.
Q Okay.
A If you need to ask some specific questions, I'm happy

to look at it.
Q Okay. All right.
A And when I say gave me, I'm certain that that was emailed.
Q Okay. All right. Just for clarification, we're calling this report a preliminary report.
Is that what -- the terminology as you phrased it as or how?
A I don't know that I would of assigned a name to it. Honestly, it's just notes from him to me.
Q Okay. All right. Now, he, in this bargain that y'all struck, did, did you ever receive a formal bound report from Doctor Demers maybe incorporating this or anything or was this the only -- I think you may of already said this.
Is, is this the only document that you can remember getting?
A I believe that, that would be the only thing in writing, and that would be on purpose. If he were to draw up a formal report, it would be something to discovery. It would only help the State---
Q Okay.
A ---understand things that I'm not obligated to help them understand. And so, you know, every edge you can get.
Q All right. Mr. Harbin, you -- when you visited Joey, did you ever take this report and explain to him, even

though it -- well, I'm gonna -- is it all right if I call it a report cause that's a --?

A Sure. I, I know to what you're referring to.

Q Yeah.

Did you ever take it with him and sit down and say I've got this about the DNA, let's go over it or anything like that?

A I do not recall having a, a session with Joey where we went over---

Q Okay.

A ---you know, the kind of specifics of DNA. I -- obviously we discussed the existence of those tests---

Q Uh-huh. (Affirmative).

A ---and, and what the State's goals were in trying to tie him to Winter, and, and particular locations, and that kind of thing. But I, I do not recall certainly not going over kind of a line by line---

Q Okay.

A ---you know, that type of deal with Joey in that kind of report, no, sir.

Q All right. What other services did Doctor Demers provide?

A Well, I mean I think it's all encompassed in that same idea, but he did a really good job of, of giving me kind of a roadmap to how to cross-examine the, the SLED agent. And,

and I will say that, much to my surprise, almost everything he told me that she would, I'll say admit to, in the sense that she is saying things that I believe to be helpful to our case.

Q Uh-huh. (Affirmative).

A But almost, to my rec -- to my memory, anyway, almost everything that he predicted or, you know---

Q Uh-huh. (Affirmative).

A ---said that she would be able to provide information wise was, was correct. And, and so that is probably a question on down the road.

Q Yeah.

A But that's one of the reasons he wasn't called.

Q Okay. All right. How much did Doctor Demers get paid for this report?

A I, I do not recollect, sir. I, I really don't. I, I don't recollect whether he charged by the hour or whether it was a flat fee.

Q All right.

A And I'm, I'm certain maybe something is in the file.

MR. STROUD: Okay. Your Honor, the State's probably gonna object, but we can deal with that I guess. I would like, since he doesn't recollect any -- anything about what he was paid, I would like to refresh his memory with invoices cause these were the invoices that were in the file

that he gave us, and then we had---

THE COURT: Yes, sir, I think he just referenced that the invoices might have been in the file. And so I will allow you to present those to him to see if that refreshes---

MR. STROUD: Okay.

THE COURT: ---refreshes his recollection.

MR. STROUD: Okay.

There's the dates for you.

A Okay.

(Pause.)

A Is this a copy, I guess, right here?

Q Yes, it's -- I made two in case the Judge wanted to see it or something.

A That looks like the initial, and then the full review. I'm kind of guessing on that. That's a -- that's another copy right there.

Q Okay. All right. Right now my -- I guess my question is, in looking at the invoices, it appears that initially $500.00 was gonna be charged for the case review consultation.

Now, did that, in, in your definition of case review, was that $500.00 possibly for the email that he did send you?

A I, I doubt it. I think -- and I, I don't recollect

specifically, but it would make sense that that $500.00, which, obviously, is much less than the other invoice for kind of---

Q Uh-huh. (Affirmative).

A ---what might be a full review would of been him looking at the case to tell me whether I would be wasting my money to hire him almost like you and I might do to initially review a case.

Q Uh-huh. (Affirmative).

All right. And now the, the other significant thing I thought that was interesting about the March 7th is that, on March the 12th -- well, March 7th, he had -- you had requested an invoice saying that he would be there for testimony, but---

MS. JAMESON: Your Honor, I have to object. He's testifying.

MR. STROUD: Okay. Well -- all right.

THE COURT: Okay. Yes, sir.

MR. STROUD: Yeah.

THE COURT: Please phrase it as a question.

MR. STROUD: Okay. All right.

In the March 7th, 2014, invoice, what was appropriated -- was there any distinction made between the case review part of the bargain y'all struck and the testimony?

A I, I don't recollect specifically honestly. I, I don't know how much you really want me to, to speculate. I don't know if it's really speculation. I believe that to simply be him telling me what a day of testimony would cost.

Q All right. All right. Because what I see is that -- and let me refresh. If I may, I would like to refresh his memory on Exhibit 21.

(Pause.)

Q This is the most -- probably the most confusing part of my question.

All right. This is already been entered into an exhibit. It's Exhibit 21 where, on March the 12th, 2014, five days before, you had requested and Judge Couch had signed an order for you to spend up to $2,250.00 where here it---

THE COURT: Was it 2,250?

MR. STROUD: Yeah. Two thousand---

THE COURT: Okay. Thank you.

MR. STROUD: Oh, no, it was $2,200.00.

THE COURT: Okay. Thank you.

Q Okay. And, in here, he says, and you requested that, because of the serious of the charge pending, it would be necessary to provide effective assistance of counsel. Such payment is appropriate.

MS. JAMESON: We have no objection to this document

coming in. It's part of the General Sessions---

MR. STROUD: Yeah.

MS. JAMESON: ---record. That might move things along a bit.

MR. STROUD: All right.

And it, as far as March 12th is going, you were still saying case review, case consultation, and testimony, okay, and you were gonna address that.

All right?

A Okay.

Q Okay. All right. And now the, the question that I have is, on March 7th, you got a -- an invoice from Doctor Demers?

MS. JAMESON: Your Honor?

MR. STROUD: All right. All right. Okay.

MS. JAMESON: He's testifying.

MR. STROUD: All right. Well, I'm not---

MS. JAMESON: This is direct examination.

Q Okay. All right. What I'm -- okay. What on -- what happened on March the 7th in, in terms of this invoice, March 7th invoice?

What was the -- what was he billing you for?

A I, I do not specifically recall what had already happened as far as how much time I had spent with him, if that was the equivalent of some amount of hours, if that was

a guesstimate by him.

Certainly it's my experience that you get an idea from the expert---

Q Uh-huh. (Affirmative).

A ---about approximately what their expenses will be so that you can request that in advance, but that -- I don't have a recollection of the specifics of that invoice or --.

Q All right.

A -- at what time---

Q All right.

A ---we spent that money.

Q All right. Now, may I refresh your memory again?

A Yeah, it -- as, as much as, as much as it could, sir.

Q Yeah.

Okay. All right. On the March 7th invoice that you requested from -- you said the testimony -- wait. The breakdown would be $500.00---

MS. JAMESON: Your Honor, I don't believe he's properly refreshing his recollection. He's just reading documents---

MR. STROUD: Okay. Well, who---

MS. JAMESON: ---into the record.

MR. STROUD: Okay.

THE COURT: Yes, sir, if you will just hand it to him---

MR. STROUD: Yeah.

THE COURT: ---and let him review it.

Q Okay.

A This appears to be an invoice totaling $2,200.00, which would match up with the amount of money that I requested from Judge Couch.

Q Okay. And, and the date on it?

A June 23rd of 2014. Case review consultation, $2,250.00 with a $1,000.00 credit.

Q Okay. And -- okay. You see -- there's the difference between the two in terms of what the services -- okay. Okay.

A Yes, sir.

Q All right. All right. So, my question to you is how did you negotiate with Doctor Demers on March -- at, at -- on the, the prices because, on March the 7th -- this is the invoice. Then you still had the intent to use testimony because of---

MS. JAMESON: Objection.

MR. STROUD: All right. All right.

THE COURT: Okay. I'm going to sustain that.

Q On -- I'm trying---

THE COURT: Just rephrase your question, sir.

Q ---to reconcile these two documents.

THE COURT: And, sir, do you want to offer the documents into evidence?

MR. STROUD: All right. Let's try that or are y'all gonna object?

MS. JAMESON: On relevance.

THE COURT: What are these documents please?

MR. STROUD: These are documents that show payments were made for the services of Doctor Demers.

THE COURT: Are they receipts or copies of checks or---

MR. STROUD: They're both, invoices and copies of the checks, and there's a discrepancy that amounts -- let me see that one.

THE COURT: And what are the exhibit numbers please?

MR. STROUD: Exhibit No. 23 is a June 23rd invoice showing a $1,000.00 credit. Twenty-one -- Exhibit Nos. 21 through 24.

THE COURT: And, and if you will go through each one and explain what they are please.

MR. STROUD: Okay. All right. Give me one second.

(Pause.)

MR. STROUD: All right. These are extra. Bear with me one moment please.

(Pause.)

THE COURT: Okay. Okay. Exhibit No. 21 -- I think this one's already been entered.

Is that one stuck in there?

The ex parte -- the March, the March 12th, 2014?

MS. JAMESON: I think you've already shown it to him to refresh. I'm not sure if it's in the Court's Exhibit, but we don't have any objection to that.

THE COURT REPORTER: It is.

MS. JAMESON: It was in the General Sessions file.

THE COURT REPORTER: Twenty-one's already in.

THE COURT: Okay.

MR. STROUD: Okay.

THE COURT: All right. So, 21 is in.

MR. STROUD: And it was the ex parte order for expenses dated March the 12th.

THE COURT: Okay. And so let's hand that to the court reporter.

THE COURT REPORTER: I think I already have it. Those are his copies.

THE COURT: Okay. She has the original.

MR. STROUD: Okay. Thank you.

All right. Exhibit No. 22 is the March 7th, 2014, letter or invoice that shows that the case review consultation was $500.00. That -- on March the 7th, testimony for 1,500.00, and travel mileage per diem, 508 miles round trip, was $200.00.

Exhibit No. 23 is an -- the, the -- after the trial, Mr. Harbin requested funds from the State saying that he needed to find -- to pay the final bill. The exit --

Exhibit 23 is the June 23rd, 2014, invoice from Doctor Demers where he has said that it's the case review consultation charge was $2,250.00 with a $1,000.00 credit.

THE COURT: Okay. And so let, let me just make sure. Who is -- Exhibit No. 22, who is that addressed to, the invoice for $500.00?

Okay.

MR. STROUD: That is addressed to Chase Harbin. It only reflect---

THE COURT: Okay. And then Exhibit No. 23, who is that addressed to?

MR. STROUD: To Chase Harbin.

THE COURT: Okay.

MR. STROUD: On the request of Mr. Harbin saying please send me invoices because we got to get this money ready to be paid.

THE COURT: And how were those documents obtained, sir? How did you obtain those documents?

MR. STROUD: They, they were part of the file.

THE COURT: And how did you obtain you file?

MR. STROUD: I -- once I -- may -- I was -- I got the PCR case, and did my application or not -- got -- didn't do that. I made contact with Mr. Harbin and said please make available all the files that you have. And rather than me copying them, he had his law -- his secretary, Christine,

box everything up in about five big boxes. Over a period of time, I went through all the information, and got these in there.

THE COURT: And so these were part of Mr. Harbin's file, and Mr. Harbin provided the file to you?

MR. STROUD: Uh-huh. (Affirmative).

THE COURT: Okay. Counsel, what is your position with regard to these exhibits?

MS. JAMESON: Those are just invoices from the file. You're not introducing the check, right?

With, with these three, no objection.

MR. STROUD: Oh.

MS. JAMESON: They're part of his file, Judge.

MR. STROUD: All right. Well, I was gonna do the -- I'm gonna, in a minute, do the check.

THE COURT: Okay. And so, right now though, Exhibit No. 22 is an invoice, No. 23 is another invoice?

MR. STROUD: Right, dated -- 23 is dated June 23rd after the trial.

THE COURT: Okay. And so Exhibit's 22 and 23 are admitted without objection.

MS. JAMESON: Thank you, Your Honor.

MR. STROUD: Okay.

(WHEREUPON, the invoices were marked as Applicant's Exhibit Nos. 22 and 23, and received into evidence at this

time.)

THE COURT: All right. Exhibit -- the -- Exhibit 24 -- where's the other check?

Bear with me please.

THE COURT: Yes, sir.

(Pause.)

MR. STROUD: Okay. All right. On 9/16/2014, after the trial, in response to the invoice, Chase Harbin wrote a check to Daniel Demers in the amount of $1,250.00, and apparently -- and in response to the invoice, it was for case consultation and review.

MS. JAMESON: Your Honor, I think we need some testimony to lay the foundation for this.

MR. STROUD: Yeah.

MS. JAMESON: At this, this point, there's just documents from the file, and he's testifying as to what they are.

THE COURT: Okay. All right.

MR. STROUD: Okay.

THE COURT: So, Mr. Stroud, if you want to ask him about that?

MR. STROUD: Okay.

All right. All right. I may have asked this already, but how much did Doctor Demers get paid for the -- what we're calling the preliminary report, but it was that seven

page document or whatever that he produced the email?
A I, I don't believe that I can answer that question because it wasn't broken down in that fashion. Your, your, your question presupposes that it was kind of itemized by a line or something, and I believe, the best of my recollection, and it is hazy at best, but---
Q Yeah.
A ---best of my recollection is that initial invoice was not really, in fact, an invoice. He might of called it an invoice, but it was an estimate. It was for $2,200.00 I believe was the total of that. His final invoice was 2,250.00. And I honestly don't know where the $50.00 discrepancy would of come from---
Q But---
A ---but the, the down payment or the---
Q But my question---
MS. JAMESON: Hold on.
A ---credit of $1,000.00.
Q My question, my question to you, though, is one document says originally case review was $500.00. The other document says that the bulk of the money that you requested from the State was---
MS. JAMESON: Your Honor, objection.
MR. STROUD: All right.
MS. JAMESON: Leading. We're on direct. He's

testifying---

MR. STROUD: All right.

MS. JAMESON: ---to it.

MR. STROUD: All right.

THE COURT: All right.

MS. JAMESON: And I'd ask that Mr. Harbin---

MR. STROUD: He doesn't---

MS. JAMESON: ---be able to finish his questions (sic).

THE COURT: Okay.

MR. STROUD: My -- I'm doing this because every time I ask the question, he doesn't reelect -- he doesn't recall making this -- okay. How -- what -- what changed that originally you, you had made this bargain with this man, requested State money, what changed that the value of the case review consultation, producing this report, was 500.00. The bulk -- what changed to cause you to end up with a final payment in the amount of $2,250.00 when the man didn't testify, and he was also charging you the travel, the five -- the money for the 500 and how many miles?

Just what changed in that you determined that you didn't need him at testimony. It looks -- you know, did you -- did he do all -- so much extra work?

What, what happened?

A I believe that you are mistakenly assuming that what he labeled as an invoice was, in fact, an invoice. I, I

believe, and this is, again, to the best of my recollection---

Q All right.

A ---however many years ago, was that he was simply providing me with a roadmap for how much his expenses would be. So, I requested that amount of money to spend. And so he would of said, had I driven, it would of been $200.00 to drive there, and $1,500.00 to sit in a chair and answer questions. After that -- and, and you also presuppose that that $500.00 is a report, which I do not believe it was because he didn't write what I would consider a report. That was an email with notes to me. And so it was not an itemized item where he charged $500.00 for that particular communication.

The best I can make out of those documents that you have---

Q Yeah.

A ---and, admittedly, my memory -- I have no memory of writing that check. In fact, that's not my handwriting. It's Christine's. You know, she would of handled that, and that would of been the---

Q But you are responsible for that?

A Yeah, absolutely. Absolutely.

Q Yeah.

A But that -- the sense I can make out of that is that I

had $2,200.00 to spend. It ended up actually being 2,250.00. As I said before, I don't know where that $50.00 discrepancy came from.

Q Well, what services -- okay.

MS. JAMESON: Your Honor?

Q Well, my question---

MS. JAMESON: I'd, I'd ask that Mr. Harbin be able to finish his answers.

MR. STROUD: Okay.

THE COURT: Yes.

MR. STROUD: Okay.

THE COURT: Please let him finish.

MR. STROUD: Yeah. All right.

A And so, I believe that that $1,000.00 credit that is on -- I don't know what number exhibit it is.

Q Uh-huh. (Affirmative.)

A But the $1,000.00 credit, the balance of $1,250.00 would of been essentially the, the down payment or the deposit on the expert, and an -- that's not an unusual thing where they ask for half or, you know, some percentage of the total fee up front. And as for what he did, it would of been however many hours we spent on the phone communicating, and however many hours he spent actually reviewing that prior to our conversation.

And I believe that, had he traveled and had I asked him

to travel to Court, then his bill would of been more than $2,200.00. But you're, you're, obviously, missing -- and this might be my fault for simply not making enough copies or documenting things in my file that, that I gave you, but you don't have the $1,000.00 check that I wrote him that he clearly gave credit for---

Q We do---

A ---before the final invoice.

Q Okay. All right. We just had the email where you had said that you did write the check because he had a balance -- and he said there was, on this email, he said there's a thousand dollars went to case review consultation.

A Okay.

Q All right. So, my question to you is, on March the 12th, you were still planning for him to testify in light of the fact -- what changed?

In, in -- on March the 12th, you had requested and got an ex parte order to spend the bulk of the money for his testimony cause that's what the invoice says, and the final payment is the exact amount that would of been paid had he testified -- had he come and testified and driven the five---

MS. JAMESON: Objection. Testifying and compound question.

MR. STROUD: Okay.

THE COURT: Okay. That's sustained.

Mr. Stroud, though, I, I think I -- you've asked it several times.

MR. STROUD: Yeah.

THE COURT: And I, I think the question would be whether or not this counsel remembers.

MR. STROUD: Okay.

THE COURT: Because I believe the question is what changed.

MR. STROUD: Yeah.

A I, I don't believe anything changed. Again, I think that you are taking the, the paper that's labeled as invoice at face value. I don't blame you for that, but I don't believe that was an actual invoice for services already rendered. Obviously it wasn't because he hadn't already testified in Court.

How or, or when we discussed what his hourly rate would be, and whether we went -- I simply don't remember whether he had a conversation about hey, I've got more hours in this then I thought. I, I, I simply do not remember that, but if the thrust of your question is did I, at some point, determine that I was never gonna call him as a witness, then the answer would be no, that I made that decision after cross-examination of the SLED agents.

Q All right. So, he was -- you had brought him there.

He was at -- present?
A No. No, sir.
Q All right. But, if you needed him that day, he would get on a jet and come that day?
A It would of been the next day to my recollection.
Q All right. All right. Again, I think I've beaten this, but it's (sic) just seems like a lot of money to pay for someone who---
THE COURT: Okay.
MR. STROUD: Yeah. Okay.
THE COURT: Yes, sir.
MR. STROUD: All right.
THE COURT: I -- don't forget that each of you will be allowed to make a closing.
MR. STROUD: Okay. Okay. Thank you.
THE COURT: Thank you, sir.
Q All right. Okay. Mr. Harbin, when did you inform Mr. Clark that Doctor Demers would not testify in his March 17th 20th 2000 (sic) murder trial?
A Probably right after we finished with the cross-examination of the SLED agent. Probably sitting at a table if not during a break perhaps, you know, in holding or something, but---
Q All right. How did you use the DNA report prepared by Doctor Demers in the March murder trial?

A As I said before, Doctor Demers did a really good job of explaining to my lay, you know, mind --
Q Uh-huh. (Affirmative).
A -- of how that testimony from the SLED agent was gonna go, and I keep saying SLED agent, but the---
Q Yeah.
A ---scientist, the chemist. So, he gave me kind of a roadmap that I was able to follow, and, as she testified, I knew what, what point I wanted to extract out of the middle of that, you know, mass of information that's otherwise pretty difficult to understand.
Q Uh-huh. (Affirmative).
A And so he -- I, I, essentially, had, you know, so many points that I wanted to, to make, and, and---
Q Okay.
A ---when she was done with her testimony, I wanted to have how many things come out of that eight or ten points that I wanted to make---
Q Okay.
A ---or three. I don't remember how many.
Q All right.
A But it worked. To my recollection, it was, it was -- went a lot more smoothly, and we got a lot of the information, and, again, kind of the admissions, as I'll call them, from the State as---

Q Uh-huh. (Affirmative).
A ---to the, the weakness of the DNA testing or the uncertainty of exactly what that meant---
Q Okay.
A ---you know, as to the culpability---
Q Okay.
A ---for tying Joey to the crime.
Q All right. How did you use Doctor Demers case review, case consultation service, services in Joey Clark's 2000 murder trial?
A I would think that's the same answer that I just gave.
Q Okay.
A That's---
Q Okay. Which is some tele -- if I understand correctly, you, you said you spent a lot of time on the telephone?
A That's correct. That's correct.
Q Okay. All right. Mr. Harbin, the record shows that DNA expert, Doctor Demers, never testified during the March 17th murder trial. Even though, on Page 35, Line 12 of the trial transcript, the witness list shows that you intended for your DNA expert witness to testify.
MS. JAMESON: Your Honor, these aren't questions. He's just---
MR. STROUD: Well, I -- they're---
MS. JAMESON: ---leading and testifying.

MR. STROUD: Well, they're gonna---

THE COURT: Okay.

MR. STROUD: I'm, I'm leading him down, and then I'm gonna ask the question.

MS. JAMESON: This is direct examination.

MR. STROUD: All right. Well, I'll ask him---

THE COURT: Okay.

MR. STROUD: It will be hard for him to answer the question that I have---

THE COURT: All right. Just, just one moment.

All right. I will sustain the objection.

MR. STROUD: Okay.

THE COURT: Mr. Stroud, is there a way for you to rephrase the question?

MR. STROUD: Yeah.

All right. He may not understand it because that was -- all right. Well, why did you no longer need Doctor Demers testify (sic) even though you had previously required a continuance because his being out of the country, and on, during the trial, you had shown -- you had produced a witness list showing that you had intended for Dock Demers to testify, and that was during the March 17th trial.

A To the best of my recollection, that witness list, as with all witness lists, would be the potential witness lists, and, and you make decisions on the fly as the case

develops as to who you call, and who you do not call. And the reason that he was not called was that we were so successful in eliciting the information that we wanted to get from the SLED agent that we were able to, you know, put that in our pocket, and still retain last argument because we had already discussed with Joey, and Joey just did not wish to testify.

Q Okay. All right. What was your trial strategy in lieu of having Doctor Demers present at the trial to assist the cross-examination of the State's DNA expert?

A To essentially tell the jury that the State's witness, the, the State's own witness, told you what I wanted to tell you.

Q Okay.

A So, in other words, I didn't need an advocate that potentially would be viewed as biased. I used the State's witness against them is what I was trying to do.

Q Okay. Now, did you hear today's testimony by DNA Expert Ms. Clement?

A I did, yes, sir.

Q Okay. Do you agree with her assessment that it would of been helpful had somebody testified as you originally planned?

A Well, not, not to be glib, but we didn't win the case. And so I second guess everything for that reason. But, in

the moment, we got all of the information that I knew that we could get out of her, and, and I'm certain that I didn't do things perfectly, and there, you know, could of been better ways to do it. But I thought that we covered quite a lot of the territory that you went over with your expert today.

Q Okay. So, if I understand you correctly, you're saying that you did offer effective assistance of counsel?

MS. JAMESON: Objection, and leading---

MR. STROUD: All right.

MS. JAMESON: ---questions.

MR. STROUD: Okay.

THE COURT: Sustained.

Q All right. Did you offer effective assistance of counsel just with your cross-examination?

MS. JAMESON: Calls for a conclusion, and the ultimate issue that's before Your Honor, the trier---

MR. STROUD: Okay.

MS. JAMESON: ---of fact.

MR. STROUD: All right.

THE COURT: I, I think that Mr. Harbin can answer that question.

A I, I, I believe that particular portion of the trial, the cross-examination of the SLED agent, went about as well as I could of expected it to go, yes, sir.

Q Okay. All right. Mr. Harbin, where was Ms. Winter Wingard's body found?
A On -- I've forgotten the name of the road now, but the creek along the side of the road.
Q Okay. How many crime scenes did the police believe there were, there were connected to the killing of Ms. Wingard?
A Can you define what you mean by a crime scene?
Q All right. In the trial transcript, it lists the house, the vehicle, and Mike's Creek Road where the body was found.
A Okay. That, that -- I would agree with that.
Q Okay.
A Certainly there was evidence in all three of those places---
Q Okay.
A ---or at least potential evidence in all three of those places.
Q Okay. Did the State believe that a struggle occurred between Mr. Clark and Ms. Wingard at Songbird Lane?
A To my recollection, that was part of their theories that that would of been---
Q Oh, okay.
A ---at, at, at least if not at the beginning, at some point of, of the altercation or the extended altercation.

Q Okay. When did you find out that the investigators thought that the dirt at Mike's Creek Road only consisted of black fertile soil with no red dirt?

A I, quite honestly, don't recall kind of the, the vocabulary that's been stressed today about black fertile soil. I, I certainly appreciate the difference between red clay that we would all, you know, as lay people, refer to as red clay, and, and the difference in darker dirt with sediment near water, near creeks, and whatnot. And so I, I remember their being, and I remember getting, you know -- I, I remember some force of my argument being why are -- why is the State making a big deal about this red mud. It's everywhere, and it's---

Q Uh-huh. (Affirmative).

A ---and, you know, that was kind of my thought that we don't need an expert for this. We all know red mud's everywhere, but I, I honestly don't remember the, the specifics beyond that.

Q Okay. How did you discover that this information would be relevant, and used for the arrest and convictions of Mr. Clark?

A I don't know that I understand the thrust of your question.

Q Okay.

A If I can try to answer it more accurately, if I---

Q All right.
A ---I knew.
Q Throughout the transcript, the, the detective, on direct and your cross-examination, said that red dirt -- that the -- there was red dirt here, and the black soil there.

So, my question is -- and during the preliminary hearing, you had -- your notes in there also said that you knew that.

So, I'm trying to understand what, what -- did the police tell you -- when did the police tell you that they were going to use the red dirt as one prong of the probable cause to arrest Joey?
A I, I don't recollect being told by the police or the prosecution any specifics like that, and, and, of course, he would of been arrested before I got, you know, involved in the case. So, that would of been, you know --
Q Okay.
A -- in the past already.
Q All right. Did you or anyone from your office visit Mike's Creek Road?
A Yes, sir, I did.
Q All right. You visited.

Okay. And did you visit Songbird Lane?
A Yes, sir.

Q Okay. Did you take pictures of Mike's Creek Road and Songbird Lane?
A I, I don't recall if I did. I, I know that there was an extensive library of pictures from the State. So, if, if I didn't, it may of been something referencing what they had provided me.
Q Okay. How did you investigate the color of the soil in and around the crime scene at Mike's Creek?
A I don't know that I made a big deal out of the discrepancy in the soil color other than that anticipating the State wanted to make an argument that something had begun at one place and led to another. And, and that would be, as, as was pointed out in direct and cross with your soil expert, that red clay is a little bit different then the sandier, you know---
Q Uh-huh. (Affirmative).
A ---darker dirt around a creek area.
Q What did you tell Mr. Clark or his family about why the State thought that the color of the soil was a factor in his arrest and conviction?
A I, I don't know if I would of framed it the way that you're asking the question, but --.
Q Okay.
A -- certainly we would of discussed that the State had a theory that essentially that some type of altercation began

at their residence, and then, at some point or another, that their theory was that he had transported the body to or, or -- well, I'm not sure when -- if, if I knew or if we were, I guess, trying to figure out when they knew she actually died, but that, that Winter was transported to the creek.

Q Okay. How did the State use the pictures of the soil color during the murder trial?

A Can you, you repeat that question?

I'm sorry.

Q All right. How did the State use the numerous pictures of the soil color during the murder trial?

A My only recollection of the mention of, of soil color is for -- is, is the mention of red mud, and I believe, forgive me if I, if I get this wrong, but I believe that they were essentially saying the red mud must of come from the house. And because she had red mud on her when she got to the creek, that that red mud didn't come from the creek. So, in other words, the altercation didn't start and end at the creek. That was my understanding of the case, and, and the theory they were advancing.

Q All right. How did you impeach the testimony of the detectives regarding the color of the soil?

A I don't think that I, I -- again, I don't think I, I approached -- I don't think my case theory was the same as, as kind of the thrust of your questions. So, I don't know

that I---
Q Okay.
A ---would of directly impeached them about the soil color.
Q All right. Mr. Harbin, I'm now going to ask you questions regarding the PCR Application allegation that your cross-examination of Detective Burgess sabotaged any chance that Mr. Clark had of getting a fair trial. Allegation 1 in the PCR says Mr. Harbin's cross-examination of Detective Burgess opened the door for the improper admission into evidence of the inadmissible inmates' statements which were read into evidence by Detective Burgess during assistant solicitor's redirect of Detective, Detective Burgess.

What did you discuss with Mr. Clark regarding these inmates' statements?
A Well, I mean, first of all, Joey denied, you know, denied his, his involvement in this steadfastly and throughout. Said he never made statements like that. We discussed well, how those statements would have come to be, and, and the, the thought was that these details were kind of implanted either into the general population or specifically to these guys.
Q Uh-huh. (Affirmative).
A To my recollection, a couple of these were kind of frequent fliers, if you want to call them, to the jail --

Q Uh-huh. (Affirmative).
A -- you know, the -- for whatever, you know, misdemeanor here and there, and that they were, for lack of a more complete description, easily either manipulated or, or encouraged to speak.
Q Okay.
A And, and so that, that would of been the -- kind of the initial conversation there.
Q All right. Please explain whether you told Mr. Clark that you would be cross-examining Detective Birch (sic) about inmates' statements?
A I don't know if I would of made that exact statement. Obviously, he would of known that I was gonna ask the detective questions after the State's---
Q Okay.
A ---direct.
Q Mr. Harbin, how did you explain to Mr. Clark what your trial strategy would be regarding these inmate statements?
A So, this is probably the single most difficult question of, of the case for me --
Q Uh-huh. (Affirmative).
A -- looking back. So, there -- if I, if I, if I get this wrong, you can correct me, but so there's four jailhouse informants that wrote statements that were available to testify for trial. There's one guy that was

incarcerated in North Carolina, and there were three guys that were essentially on the street in the Gaffney area.

I was able to -- my investigator went and spoke to the guy incarcerated in North Carolina.

Q Uh-huh. (Affirmative).

A And the information I had at that time, and confirmed again when he got transported to the courthouse, was that he was not going to be a witness that we wanted to put on the stand. And he, he was speaking in kind of those terms. Kind of warning us off if you will.

Q Uh-huh. (Affirmative).

A I was able to find two of the remaining three informants. One was very combative, and, and did not want me on his property. Like I knocked on his trailer door, and he started yelling and telling me I couldn't -- you know, I wasn't allowed to talk to him, and I wasn't allowed to be there, and committing some kind of crime or another. So, I didn't actually speak to him, speak to him. I just saw him. But certainly I took that as somebody that I was not gonna consider a potentially helpful witness.

Q Okay.

A The third, the third one that I was -- I don't remember which name is which. I apologize.

Q Okay.

A But I was able to speak with him at his parent's house,

and he was, I'll say, helpful, but extremely, extremely reluctant, and inconsistent, and, and the manner in which he would of been helpful would have been to have to present to the jury some conspiracy that the police had concocted this, which I know that's not, that's not a -- like a light -- not a thing to be taken lightly.

So---

Q Uh-huh. (Affirmative).

A ---it was not something that I wanted to do unless that was something we could go full boar with, and, and I had simply no proof of that other than this kind of wishy washy younger apparently kind of scared and confused kid.

Q Okay.

A The statements themselves were all inconsistent. The, the fellow from North Carolina, the guy that was incarcerated in North Carolina --

Q Uh-huh. (Affirmative).

A -- he -- if, if I'm correct, his statement basically said Joey said he killed his wife, and he stabbed her in the kitchen.

Q Uh-huh. (Affirmative).

A That was the same theory put forth by the detective at the preliminary hearing, and we kind of made him look like -- a little bit like a fool because there was zero forensic evidence that anything had occurred inside that

house in the kitchen.
Q Uh-huh. (Affirmative).
A And so my thought, at that time and throughout the trial, was that, absent any ability to rehabilitate himself, that particular informant would look like just a flatout liar cause he was provably a liar because even---
Q Yeah.
A ---the State, at that point, admitted that nothing occurred, at least not a violent stabbing, inside the house.
Q Uh-huh. (Affirmative).
A The, the other informants, my assessment, at that time, was that, if I could pick apart their words on a statement, and avoid the ability for them to rehabilitate themselves, that that might be the biggest win that we could get.
Q Okay.
A So, it puts me in the position of doing something that the State would completely not, not, not expect at all. And I, and I remember. I went to law school with Jennifer. I, I didn't know Kim, but I, I got to know her over the course of us -- and I think they were as shocked as anybody in the courtroom that I opened the door. And, and I'll admit, if it's something wrong, then, you know, the Court can tell me I did it wrong, but I did it on purpose.
I baited them---
Q Okay.

A ---into putting those statements in so that that's all I had to deal with. They were boxed in. I knew what their statements were. I could pick it apart. I had it ready for closing. This guy was a liar. This guy didn't tell the some story as this guy didn't tell the same story as this guy.

Q Okay.

A Right.

Q All right. Mr. Harbin, in the trial transcript on Pages 364 through 373, during the direct exam of Detective Burgess, no questions or answers were asked or given without the inmates' statements.

Why -- irrespective of what you just said, why did you think it would be in Mr. Clark's best interest to reveal to the jury the existence of the inmates' statements during your cross-examination of Detective Burgess?

A All right. Again, this is several years ago, but, to the best of my recollection---

Q Uh-huh. (Affirmative).

A ---his direct testimony was not the best direct testimony I've ever heard from an officer. He -- my -- again, I'm struggling to remember as much as I can for you.

Q Uh-huh. (Affirmative).

A I don't think he did very well on, on, on direct. I don't think -- I mean I think he could of done a lot better,

and the State's case would of been helped if he had -- had he been a little more confident answering questions, a little bit more---

Q Uh-huh. (Affirmative).

A ---thoroughly. And I thought that, if, if that -- I had already contemplated trying to introduce those statements to explain to the jury how we got here, to explain to the jury how the cops had already made up their mind that Joey killed her.

Q Yeah.

A Already made up their mind, and really didn't bother to do any significant investigation thereafter, which is a point that you're trying to make, and, you know, and through your experts. So, we're kind of on the same page in that manner.

Q Uh-huh. (Affirmative).

A And so with, with the kind of -- and, and I don't mean to insult this officer. He was, you know, doing what he could. But with -- the, the manner in which he kind of bumbled through his testimony, and my effort was to tie him to a sinking ship so that his idea of the case, his probable cause, was weak, and that that probable cause---

Q Uh-huh. (Affirmative).

A ---which I highlighted to the jury, I believe, in my closing, was all the evidence they had. So, sure, it's

enough evidence to arrest him, but we never got any more significant evidence than this, and now they're asking you, not only to arrest him, but to convict him on the same amount of paltry evidence.

Q Okay. Mr. Harbin, was Bryan Phillips one of the inmates who gave a statement?

A That name rings a bell.

Q Okay. During your cross-examination of Detective Burgess on Page 384, Lines 20 of 24 of the trial transcript, why did you ask Detective Burgess the following question:

What is the pertinent information that you are able to gather, through your investigation, as it pertains to Mr. Phillips and his interview?

A. They said that -- when I asked him, he said that he and some of the guys had asked him what he was in for, and he said they got him for killing his girlfriend. He said they found her butchered to death.

Well, why did you ask that?

A I, I don't recall why, why that specific question at that specific moment.

Q Okay. Why did you ask Detective Burgess the following:

You found Mr. Phillips to be a credible witness?

A. With his statements and others, yes.

A I believe that I had information at the time that I don't remember whether I was able to flesh out that -- and,

and you can -- I don't know if I can ask a question.

If Mr. Phillips is the fellow that's nicknamed Skeet?

Q I really don't remember that good.

A But there was somebody named, nicknamed Skeet that had a reputation for being a little crazy. And so, if I was -- and, and that he was known---

Q Uh-huh. (Affirmative).

A ---like known to law enforcement. It's not that large of a town. And so I don't know whether I was able to, to get him to -- sometimes you ask a question just hoping they'll stumble into something.

Q Yeah.

A And, and I, I don't recollect that he did, that he opened the door so that I could basically tell the jury that everybody in the police department knows he's crazy and unreliable. But that's certainly the picture I was attempting to paint.

Q All right. Please explain how it benefited Mr. Clark when you asked Detective Burgess questions that confirmed Inmate Phillips was a credible witness.

How did that benefit him?

A Well, I, I don't think -- I think I'm asking a rhetorical question, and, at that point, that he's not a credible witness when I---

Q Yeah, but, but you---

A ---asked him---
Q ---you told them that he was -- you said -- you elicited information that he was credible. You found -- you asked this, this direct question.
MS. JAMESON: What page are you on?
MR. STROUD: Page 384.
You know that -- my original---
MS. JAMESON: Are you going by big or small?
MR. STROUD: I'm going by the, the original ones.
MS. JAMESON: Okay. Thank you.
MR. STROUD: Yeah.
You said why -- you found Mr. Phillips to be a credible witness.
A. With his statement and others.
How did that benefit in anyway Mr., for Mr. Clark that confirmed that yeah, he's a credible witness?
A I, respectfully, I believe you're misreading that quote.
Q Okay. Well, I don't---
A I mean I think---
MS. JAMESON: I don't believe that's on 384. Look at---
MR. STROUD: Okay. Let me---
(Pause.)
MR. STROUD: I apologize, Your Honor. What's happening

is -- well, I, I, I took the original, and then this one has the numbers transposed on it.

You said 380 what?

THE COURT: Yes, sir.

MS. JAMESON: 386.

MR. STROUD: Of the court reporter's---

MS. JAMESON: Of the court reporter's page number. Not the record on appeal.

MR. STROUD: Okay.

THE COURT: It is hard to tell the difference.

MR. STROUD: 86.

Okay. All right. Yeah. I -- I'm wrong. It is 386.

MS. JAMESON: Your Honor, may I approach and provide the witness a copy of the transcript?

THE COURT: Sure.

And so the page that we're looking at is 386.

MR. STROUD: 380---

THE COURT: But the bigger number is 411.

MR. STROUD: That's correct.

THE COURT: The one that, that jumps out at you.

MR. STROUD: Yeah.

THE COURT: Okay.

MS. JAMESON: You got it?

THE WITNESS: 411 at the top there?

MS. JAMESON: Yes.

THE COURT: Okay. Yes, sir.
Q And it's Number 9, Line 9.
A I'm, I'm sorry.
Can you repeat your question?
Q All right. Okay. All right. You found it in the transcript, right?
A Yes, sir, I did.
Q Okay. My question was please explain how it benefited Mr. Clark when you asked Detective Burgess questions that confirmed Inmate Phillips was a credible witness?
A Well, there's, there's a question mark by that statement you found Mr. Phillips to be a credible witness. So, I didn't say it you found Mr. Witness---
Q Well---
A ---Phillips to be a credible witness.
Q Well---
A I would of been asking it perhaps with a hint of incredulity to say really---
Q But you can't---
A ---you found him to be a credible witness.
Q That was your question. Then his answer was with his, with his statement, and others, yes. And then you go on to say well, left -- we'll come back to Mr. Phillips. Let's talk about the others.
A I'm sorry. What -- was there a question?

Q All right. Yeah.

How did it benefit Mr. Clark when you asked Detective Burgess questions that confirmed Inmate Phillips was a credible witness?

A I respectfully disagree with your assessment that my question confirmed as if I'm endorsing his belief that he's a credible witness, but certainly the thrust of my questioning would of been to have the jury -- to suggest to the jury that Mr. Phillips is, in fact, not a credible witness, and that the officer had his trust misplaced.

Q Okay. All right. Why did you ask Detective Burgess to confirm that Inmate Phillips statement referenced that there were other people that were -- supposedly witnessed this alleged confusion?

And I said Page 306 -- let's see if I'm --.

A Is that -- are you referencing Line 10 that says with his, with his statement and others?

Q All right. Let's see.

(Pause.)

Q Okay. I'm sorry. It's 387. Page 387, the little, the little number, where it says Number 7.

The statement that Mr. Phillips gave, can you confirm whether he referenced there were other people that supposedly witnessed this alleged confession?

A That's right. So, I asked him about the fact that

Mr. Phillips had said that he, I guess, heard this with witnesses around, and then, several lines down, I, I asked, and in this voluminous discovery that I've received, I don't have information about those three fellows. I presume that you immediately followed up and went to talk to those guys to confirm Mr. Phillips statements.

And the point that was attempting to be made was that the investigation was a little sloppy, and that he is trying to hang his hat on these jailhouse snitches, and he's not following up with the details of each statement to verify whether or not anybody can actually tell the same story at the same time.

Q Okay. Please explain how it was a reasonable strategy to ask Detective Burgess cross-examination questions that confirmed that there were other inmates who supposedly witnessed Mr. Clark's alleged confession given the fact that, prior to your cross-examination of Detective Burgess, the State had not brought up any discussion of these inmates' statements?

A Well, there's a two part answer because the reason that I wanted the statements in was because I didn't want them to testify.

Q Okay.

A Because I knew what was in the statements, and, and I thought that was the best thing that we could tackle. It

was a known quantity. I could address that in closing. I have no idea what these folks are gonna either make up or, you know, whether they're telling the truth, whether they feel like telling the truth that day or not. I have no idea.

But with reference to this specific line of questioning, I believe that I was trying to make the point that that detective did not talk to the people that Mr. Phillips said witnessed what he heard which seems to me---

Q All right.

A ---to be a pretty gaping hole in his, in his investigation.

Q All right. And so you -- do you believe that he was the proper person to be asking these questions to make that point that you're -- you were trying to make?

A I think he'd probably be the only person cause he was the one that took the statement to my recollection. If I'm wrong---

Q Okay.

A ---please let me know.

Q All right. Did you ask Detective Burgess the following question:

So, you did not participate in any of the interview of Joey Clark and Beverly Patrick?

MS. JAMESON: What page are you on?

MR. STROUD: Mine's 387, but, unfortunately, my trusty transcript is in the motel. So, 387. It may be the next page because it's looking like -- it's 412.

(Pause.)

MR. STROUD: 387 and 412. I lost my -- so, you've not participated.

All right. You said 387.

All right. Can you give me the line numbers?

(Pause.)

MR. STROUD: I apologize, Your Honor. So you did not participate.

Okay. All right. It says so you do not participate in any of the interview, the interview with Joey Clark?

This is where they had to stop, and have an out of court statement hearing because --.

THE COURT: Counsel, do you want to take just a moment to find the statement that you're looking for?

MR. STROUD: Yeah, let's do that.

THE COURT: Okay. Let's take a couple of minutes.

MR. STROUD: Yeah.

THE COURT: All right.

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

THE COURT: And, counsel, as soon as you're ready.

MR. STROUD: All right.

THE COURT: We're, we're gonna go for about another seven or eight minutes---

MR. STROUD: Okay. All right.

THE COURT: ---and adjourn for the day.

MR. STROUD: We're getting, we're getting close.

THE COURT: Yes, sir.

MR. STROUD: I promise you tomorrow I will bring my transcript.

THE COURT: Okay.

(Pause.)

THE COURT: Okay. Counsel, are we ready for another five minutes?

MR. STROUD: Give me one minute.

(Pause.)

MR. STROUD: All right. I didn't -- the last -- we'll come back to that question tomorrow.

Is that all right?

THE COURT: Yes, sir, then are you, are you saying that you have nothing further in the next three or four minutes?

MR. STROUD: Well, no, if I can come back to that question, I'll just go with my next question.

THE COURT: Okay.

MR. STROUD: The next---

THE COURT: Yes, sir, we are back on the record and continuing.

Thank you.

CONTINUED DIRECT EXAMINATION

BY MR. STROUD:

Q Okay. Mr. Harbin, prior to assistant solicitor's redirect of Detective Burgess, did an out of the presence of the jury conversation between Judge King, the assistant, and yourself take place?

Page 401.

(Pause.)

Q All right. Chase?

A Yes, sir.

Q It is -- it is 401.

The question is, is an out of Court -- out of the presence of the jury between Judge King and assistant solicitor discussion take place.

THE COURT: Okay. Counsel, is this a question for Mr. Harbin?

MR. STROUD: It is.

THE COURT: Okay.

MR. STROUD: But we were trying to verify that we are on the right --.

THE WITNESS: There, there appears to be a bench conference on Page 401 beginning with all right. You may step down.

Is that what you're referring to?

Q I think so. Yeah. Okay.
A That's, that's essentially the introduction of the idea from the State that they want to be able to introduce the statements as a whole because the statements themselves were referenced during my cross-examination.
Q All right. And the, the -- and the statements were the voluntarily statements of Beverly Patrick and Joey Clark?
A No, we're not -- I'm sorry. I, I may of misunderstood. I, I, I think that what I was reading I believe to be the statements -- I thought were the statements by the jail house informants. I don't know if that's correct or incorrect---
Q That is you got---
A ---after reading further.
Q Yeah, because the 401 at the bottom is talking about Jackson v. Denno hearing, and that would -- that was because -- and, and it's---
THE COURT: Okay. Mr. -- but, but, Mr. Stroud, I just want to make sure that are you, are you addressing your -- these statements to Mr. Harbin or, or to counsel?
MR. STROUD: Okay. I'm addressing it to Mr. Harbin. However, because there's confusion right now about -- I put on my stuff 401.
All right. It mentions the statement, and the statement is referring to, Line 10, on the interviews --

this statement as to prior bad acts, acts of violence. The statement -- what I'm trying to say is the statement that I'm referring to is not the inmate statement. It's Joey Clark's and Beverly Patrick's voluntary statements. If you look at Number 20 on 401, Line 12, Your Honor, we instructed the detective not to mention the statement. We had not held a Jackson v. Denno, De Niro, (phonetic) hearing.

A Respectfully, I believe that, if you look a couple pages back, I believe it makes clear that that specific comment by the Judge was made in reference to the jailhouse informants' statements that I referenced in my cross-examination of Detective Burgess.

Q Is that -- all right. Why would they need a Jackson v. De Niro (phonetic) hearing on the jailhouse statements?

A I believe that the State as just -- in that particular case, was trying to protect the record if they were going to introduce the written statement of the jailhouse informants. I, I could be wrong, but that's what I thought---

Q All right.

A ---was going on at that particular time.

Q All right. Okay. And then it goes on to say I believe that, in Greenville County, and the rest of the statement is pretty much a self-serving statement. However, now that the door's been opened, we have the burden of proof, and I don't want the jury to think we're withholding something from

them. We've discussed it at the outset of the trial that we are not seeking to put his statement in. That we are not requiring a Jackson v. Denno hearing. So, the defense was aware of that. However, now that they have opened the door, the jury's going to want to hear that statement. And my position is that our statement comes in, which -- all right.

Are there---

THE COURT: Okay. And so, Mr. Stroud, is there a question with regard to that part of the transcript?

MR. STROUD: It, it is, and he -- Mr. Harbin is saying that the Jackson v. Denno hearing is referring to the inmates' statements, but the transcript states that the Jackson v. -- he had opened the -- he had started his examination, and he was not, he was not suppose -- no one was suppose to talk about the voluntary statements that Joey Clark and Beverly Patrick gave.

A Mr. Stroud, I, I believe you're correct, and upon rereading on Page 402, Line 12, begins my position is that the entire statement comes in. I believe that Ms. Leskanic's speaking, and references the defendant making -- they now know the defendant gave a statement. So, you're correct, that was in reference to Joey. I don't see a mention of Ms. Patrick, but---

Q All right.

A ---if you have a question about that.

Q Okay. Why was the State, and, and -- okay. The question about that is why was the State concerned that the jury heard, heard these interview statements?

A Could you rephrase that question?

Q All right. Why was the State concerned that the jury had heard these interview statements referring to the Beverly, the Beverly Patrick and Joey Clark voluntary statements?

MS. JAMESON: Objection. Calls for speculation.

MR. STROUD: Okay.

THE COURT: Okay.

MR. STROUD: Okay. All right.

THE COURT: Well, well, okay. First of all -- all right. Mr. Stroud, so you've asked the question about two other statements, and why there was concern that the jury had heard those statements?

MR. STROUD: Uh-huh. (Affirmative).

THE COURT: And I, I think that, that Mr. Harbin can answer that question if he knows.

MS. JAMESON: I, I believe the question was why was the State concerned---

THE COURT: Okay. Well, why---

MS. JAMESON: ---and that was the objection---

THE COURT: Okay.

MS. JAMESON: ---that it called for speculation. He's

not provided the State -- the prosecutor---

MR. STROUD: Okay.

THE COURT: Okay. If that was the question, sir, then I would sustain that objection.

Q Okay.

THE COURT: And we are now after five o'clock. And so we will reconvene in the morning at 9:30. Mr. Harbin is still under oath. He's not to discuss this matter with anyone during our break until the morning. That would include counsel for the Attorney General's Office, of course, and I'll see everybody back here then at 9:30 in the morning.

It's my understanding that arrangements have been made for the Applicant to remain here.

MR. STROUD: It was.

MS. JAMESON: Thank you, Your Honor.

THE COURT: Okay.

MR. STROUD: Thank you. Like I say, I promise to bring my transcript back that has---

THE COURT: Yes, sir, it, it gets to be very confusing. I know.

Thank you.

MR. STROUD: Yes, ma'am.

THE COURT: Oh, and let's -- counsel, I need to talk to Mr. Harbin, and, Judge Gravely, that he has a hearing with

in the morning to confirm that Judge Gravely will allow him to remain on -- with us.

MS. JAMESON: Thank you.

THE COURT: Okay.

(WHEREUPON, Court was in recess for the evening.)

Wednesday, June 20th, 2018

(WHEREUPON, seven photographs were marked as State's Exhibit Nos. 1 through 7 for identification purposes only at this time.)

THE COURT: Okay. Counsel, are we ready?

MR. STROUD: We're ready.

THE COURT: Okay. So, I believe Mr. Harbin was on the stand.

Mr. Harbin, sir, good morning. If you'll come back---

THE WITNESS: Good morning.

THE COURT: ---up please.

(WHEREUPON, the witness returns to the stand.)

THE COURT: And be reminded that you're still under oath.

THE WITNESS: Yes, ma'am.

THE COURT: I know you know that, and make yourself comfortable, sir.

CONTINUED DIRECT EXAMINATION

BY MR. STROUD:

Q Good morning.

A Morning.

Q Mr. Harbin, you told us yesterday that you intentionally had the inmates' written statements admitted into evidence.

Why did you choose not to allow the State to put the inmates on the stand under oath to testify and be subject to cross-examination?

A I was, frankly, scared that they would lie, and rehabilitate themselves to kind of correct their inconsistencies, and what I thought on its face on their statements were pretty obviously made up.

Q Okay. So, you -- explain then why you chose to ignore the Sixth Amendment Confrontational Clause.

A Well, on the one hand, you want the right to confront somebody. On the other hand, the, the, the other edge of that knife is, or, or sword or whatever the euphonism is, is that you allow them to change their story, that you allow them to explain what otherwise I can attack without the, the ability for them to rehabilitate themselves. So, you kind of box them in. You take a known quantity, and that known quantity, in my opinion, was very inconsistent, and not believable in and of itself.

Q Okay. Then, then how do you explain that it's the job of an attorney, on cross-examination, to be able to go beyond whether the, the inmates were telling the truth, cred -- and rehabilitate cause, at some point, you would get to recross?

A Right, or I could get to the same place by simply pointing those inconsistencies out in the statement.

Q Okay. Are you, are you aware of any exceptions that these inmates would have fall under when it comes to the confrontational clause?
A No, sir.
Q Would you please explain why, in addition, you would choose to ignore the Crawford holding?
A If you're referring to Crawford in the same---
Q The, the---
A ---sentence as the confrontation clause, the same---
Q Well, no, the holding. The, the Supreme Court holding -- the Supreme Court that went -- the case that went and differentiated between the Sixth Amendment Confrontational Clause, and the Crawford holding that there -- they talk about two different concepts.
A No, I, I understand that, but it still goes back to a decision as to whether or not you are going to take what I thought was going to be relied upon by the State as a strength in their case, and make it a weakness in their case.
Q Okay.
A And so that, again, in -- you know, obviously, a murder trial is the biggest deal that you can have.
Q Uh-huh. (Affirmative).
A And, and if you can control, in my opinion anyway, if you can control what evidence comes in from the State, then

you're---
Q Okay.
A ---you're doing a decent job.
Q All right. These inmates -- written inmate statements, did they can say (sic) hearsay and double hearsay?
A I'm trying to think back on what they said, but yeah.
Q We have them---
A They're, they're well---
Q --here if you refresh your---
A I mean hearsay exceptions---
Q ---refresh your memory?
A ---hearsay exceptions. I mean they're, they're essentially---
Q Right.
A ---saying that Joey confessed or that was the allegation, and I can't remember---
Q Okay.
A ---if one of them said hey, I heard somebody else say or maybe something -- one of them said that Skeet had repeated something.
Q All right. All right. Let me refresh your memory of this statement if you don't mind. That way you'll have a good clearer, picture -- remembory (phonetic) of whether they contained double hearsay or hearsay.
MR. COX: Which one?

A Do, do -- did you want to just ask me anything specific about---
Q Well---
A ---about these statements or---
Q Well, I'd like to---
A ---just make---
Q It was just -- just making sure that -- if you recollect. You weren't sure if they had hearsay -- the hearsay or so just letting you refresh your memory.
A Yeah, I'm, I'm, I'm sure that they had hearsay. Again, you know---
Q All right.
A ---if you -- I don't know if you're looking for my opinion as to whether they fall under a hearsay exception. But if the force of your question is whether or not I recognized there was hearsay in there---
Q Okay.
A ---I, I did.
Q All right. Yeah, like I say, you -- I just wanted to be fair and make sure---
A Yes, sir.
Q ---you, you were refreshed.
All right. Did you -- this strategy, did, did you discuss it in anyway with other attorneys that you, that you know in that -- it is a -- it, it -- your strategy, I

remember yesterday, you said even the assistant solicitor was surprised.

A (Witness nods affirmatively.)

I, I don't recall a specific conversation with attorneys, but there were, at the time, a couple of attorneys upstairs in my office that I, I know that I discussed the case with at length, and I'm sure that we probably discussed something around that, but---

Q Okay.

A ---I don't have a specific recollection of that.

Q All right. On Page 593 of the transcript --?

A Is this the little number or the big number?

Q In my case, it's the, the little -- let's see. I don't remember what -- yeah, I'm using the little number, and you probably would look at the big number, which is---

MS. JAMESON: 618 I believe.

THE WITNESS: 617?

MS. JAMESON: Eighteen.

MR. STROUD: Eight---

THE WITNESS: Okay.

Q All right. On that page, the Judge expressed his surprise that the inmates didn't testify.

What was your response to the Judge in, in response to his surprise?

A You're asking me to comment on the Judge's---

Q Well---
A ---comment?
Q Well, no, not on the Judge's comment, but because you had taken the strategy, and it, it seems to be something that does bring in the hearsay rules and all that. So---
MS. JAMESON: Your Honor, objection.
MR. STROUD: Okay.
MS. JAMESON: Arguing and testifying.
MR. STROUD: All right.
THE COURT: Okay. That is sustained.
Mr. Stroud, re -- rephrase the question, sir.
Q Okay. Let me look in the transcript. I'm not sure there was a response back in -- any response back and forth or not.
Bear with me one moment, Your Honor.
(Pause.)
Q Okay. Mr. Harbin?
A Yes, sir.
Q Would you explain if you were prepared for any comments about the propriety -- pri -- priority of the strategy that you used?
A If I was prepared to hear comments---
Q The---
A ---from the Judge about the propriety---
Q Just in---

A ---of my---
Q Just in general.
A I'm not sure I understand your question.
Q Okay. All right. You, you said yesterday you distinctly remember that Ms. Lestos -- Lesto---
A Leskanic.
MS. JAMESON: Leskanic.
Q Leskanic.
You, you said yesterday that, when you started using this tactic, that she was very surprised.
A Yes, sir.
Q Okay. Now we have an -- a second example of someone expressing surprise at this tactic.
So, my question to you is how did you prepare to respond to -- if anybody was surprised to, to you using this strategy?
A I don't know that I had any priority to care what other people thought. It was only whether or not I thought it could be effective. In other words, I'm not looking for approval for anybody.
Q Okay.
A So, I'm, I'm, I'm not sure that answers your question though.
Q Yeah, well, we'll go with that.
All right. You just said you're not looking for

approval, but one of the focuses of your job as the attorney is try to make sure it's beneficial we can say.

How was this beneficial?

A Well, so, if, if you -- this, this -- you know, you can't discuss this -- the statements and, and the hearsay issue that you bring up, proffered---

Q Uh-huh. (Affirmative).

A ---and double hearsay and all that stuff in a vacuum. It's part of this case as a whole.

Q Uh-huh. (Affirmative).

A And the arch of the defense in this case was that the police had four liars in the jail, right?

And this is me speaking, you know, editorially. They had four liars, under trustworthy criminals, that basically, you know, told the police what they wanted to hear so they could get something for themselves, and then the police got real lazy, and didn't follow-up---

Q Okay.

A ---with---

Q I believe that---

A ---things they could have done.

Q And could that---

MS. JAMESON: Hold on.

I'd ask that Mr. Harbin be able to fully respond.

MR. STROUD: Okay. All right.

And these are---

THE COURT: And I will grant that request just -- and, Mr. Stroud, again I know you -- you're trying to help Mr. Harbin I think answer, and you're trying to clarify your questions, but give him an opportunity to---

MR. STROUD: Okay.

THE COURT: ---to respond. We're trying to keep a clean record.

Okay?

MR. STROUD: Okay.

THE COURT: All right. Yes, sir, if you would please fully respond to the question.

THE WITNESS: Yes, ma'am.

So -- and I'm, and I'm happy to kind of adjust my, you know, the, the---

Q Uh-huh. (Affirmative).

A ---how I'm addressing your questions. I want to be clear. But the -- so, the kind -- as an editorial comment, the -- I wanted the jury to believe that they got bad info, and they relied on that bad info, and, therefore, did not follow-up on the things that they really should have followed up on. In other words, it was -- they predetermined that Joey was guilty, and everything was viewed through that lense.

And, those statements, the contents of those

statements, were gonna come in. And, and so -- you know, those, those people were there. They had transported---

Q Uh-huh. (Affirmative).

A --the guy from North Carolina.

Q Yeah.

A The other three were in the, in the courtroom. So, I had a choice as to whether and how, if I wanted to try cause the State still could of called them, but if I wanted to try to control the amount of information that came in as it related to those statements, and how it came in, and, and I made the decision, at the time, that I was---

Q Okay.

A ---comfortable defending against specifically the content of those statements.

Q Okay. All right. Now, as you just pointed out, they could of still had the inmates testify. And so -- and you, and you had previously testified that you were concerned that, if they did testify through the State, you would -- you were concerned about their ability to be rehabbed.

So, how, how were you able to rehab, through your method, of just by talking about the statements because once you brought the statements, the written statements in, isn't it difficult to rehab your---

MS. JAMESON: Objection.

MR. STROUD: Okay.

MS. JAMESON: Argument and testifying.

MR. STROUD: Okay. Okay. All right.

THE COURT: Okay. And I, I will sustain that objection.

Q Okay. All right. Let's just move on because I think we may be dug into this as much as I want to do it at the moment.

All right. Did Mr. Clark agree to entering these statements in evidence without the inmates taking the stand?

A I don't know that I asked Mr. Clark specifically as to whether he wanted me to do X or Y. You know, that was trial strategy, and, and, you know, as much as I value his input and want to, you know, have him believe in the confidence of the case and, and everything else, ultimately it still lies with me, and I have to make that decision.

Q Okay.

A I don't recall having that conversation with him.

Q Okay. Now, earlier on in the trial, I think it's Trial Transcript Page 3, you apparently -- you -- why did you view these inmates as confidential informants?

A So, if, if I -- and I'm not sure if I'm gonna---

MR. STROUD: This is 73.

MR. COX: You said three or 73?

MR. STROUD: 73. The little -- my little 73.

THE WITNESS: So, seven you said?

Three?

MS. JAMESON: 73.

THE COURT: 73.

THE WITNESS: Oh, 7-3. I'm sorry.

MR. STROUD: Be 98 or big 98.

A Okay. Let me try to find it.

98 is the small number or the big num---

Q The big, big number.

A The big number.

Okay. So, that is in reference to my concern that any of the folks that gave statements would have had any reason to cooperate with the police other than just being kind of good samaritans. So, not confidential informants in this case. Obviously they're not confidential because you have their names. I just wanted to know whether they had previously worked with the police or if they were actively working with police.

Q Okay.

A If they are, obviously, if you're kind of a ongoing snitch, you probably have a little less credibility than if you're just someone that's repeating something you heard in the jail.

Q Okay. Chase, I'm now gonna ask you some questions regarding the PC -- the PCR allegations that your closing argument reinforced the jury's impression that Mr. Clark had

confessed to the murder of Ms. Wingard, and this, in the PCR Application, would be around Page 3 and 14.

(Pause.)

Q Mr. Harbin, you ready?

A Yeah, I don't know if you want me to turn to a particular page---

Q Well, I don't---

A ---but I'm certainly ready to answer any question you have.

Q I'm just trying to give you a roadmap where we're heading, and where, where it came from.

A Sure.

THE COURT: Just -- so Mr. Harbin has a copy---

THE WITNESS: I do.

THE COURT: ---of the application?

THE WITNESS: Oh, no, ma'am.

Q This one -- I'll just lend it to you for a --.

A Do you need me to look at a particular -- you said three and 14 or --?

Q Yeah.

THE COURT: He's referring to the Application.

MR. STROUD: Yeah, the PCR Application.

THE COURT: Right. And I just thought that probably the witness -- he asked him if he had -- if he could refer to it, and he was not aware that in -- Mr. Harbin didn't

have a copy. I'm happy to give Mr. Harbin my copy to refresh or for him to answer -- to be able to answer the questions as posed.

MR. STROUD: And I've just been handed an---

THE COURT: Okay.

MR. STROUD: ---an additional copy.

THE COURT: All right.

MS. JAMESON: I would just ask that Mr. Stroud give page cites for any question. Not---

MR. STROUD: Okay.

MS. JAMESON: Not just the transcript.

THE COURT: I think he said Page 4 and Page 14.

MR. STROUD: That -- yeah, that's kind of where in the Application. Not, you know, just somewhere I began to define---

MS. JAMESON: I guess my objection is this is -- this is a document of argument. It's 38 pages pretty much of argument. And so, if, if he's gonna be questioning Mr. Harbin, I'd prefer -- about portions of the transcript, I'd prefer that we refer directly to the transcript---

MR. STROUD: Well---

MS. JAMESON: ---and those page cites.

MR. STROUD: Well -- and I'm gonna do that.

MS. JAMESON: Okay.

MR. STROUD: We can just scratch that out. I was just

offering him a roadmap of -- you know, I've changed from the inmates' statements, and letting him know where I'm headed now so we can---

MS. JAMESON: Okay.

MR. STROUD: I mean I don't even have to read that to him cause I---

MS. JAMESON: I'm just trying to keep a clear record.

MR. STROUD: Okay. Okay.

All right. Mr. Harbin, did Mr. Clark, at anytime, ever confess to killing Ms. Wingard?

A Not to my knowledge, no, sir.

Q Okay. Chase, during your closing argument on Page 16, Line 25 of, and Page 615, Lines 1 through 23 of the trial transcript, and, again, that would be -- all right. It would be big numbers 640 and 641.

A Okay.

Q Okay. Why did you state the following:

It's everything. The State has presented to you if viewed through the lense of well, Joey's guilty. So, this must -- so, this must mean this, right?

But let's give credit to the State. I get there's probable cause to believe that Joey committed the crime. I mean they presented to you evidence. I mean I'm not going to insult your intelligence, but there is evidence that suggests that he could of done it. But this isn't a

probable cause hearing, and arguably he could of been jealous.

This is your closing argument.

A Okay. I, I lost you when you did the arguably he could of been jealous.

Q Okay.

A But I was following you up until then.

Q Okay. And, and that was the end of the statement, and arguably he could of been jealous.

So, my question was why did you state that in the -- in your closing argument?

A I don't know if I can describe it better than I described it in the closing argument, but the, the point of it is to tell the jury, and to highlight to the jury that there are different levels of burdens of proof, and that, just because he was arrested, doesn't mean that he has to be convicted, and all of, all of the evidence that they were presented, what I was trying to do, was have them believe, as I did, that that was, you know, to a reasonable person, and I, you know, I had a buddy of mine that went to Law School at Notre Dame. He said his -- this is just stuck with me forever.

His law professor said that the jury is always looking for one person in the courtroom to be the truth teller. And, to be the truth teller, you have to admit when

something is obvious. And the State's not -- they weren't presenting an entirely fabricated case. There were pieces of evidence that they were cobbling together to try to convict Joey.

So, I acknowledged that there are pieces of evidence, and, and, and literally not to insult the jury's intelligence, but to explain to them why it's not enough to rise to the level of, of beyond a reasonable doubt. So, to tell them yes, there is evidence, and it's okay for you to admit that there's evidence. It's just also okay for you to find that there's not enough evidence.

Q Okay. What affect do you think these comments that -- had on the Judge's later reasonable doubt jury charge where he is clearly explained reasonable doubt?

MS. JAMESON: Ob---

MR. STROUD: Well, okay.

MS. JAMESON: Objection. Argument and testifying.

MR. STROUD: Okay. All right.

THE COURT: Sustained.

Q Okay. The State -- well, the jury, after the closing arguments are over with, the, the Judge would have covered, in detail, the reasonable doubt standard.

So, what -- how did it benefit for you to try to delve into that subject with statements like probable cause, and, and other items that might have confused and -- the jury

when the, when the Judge did actually say what the reasonable doubt standard is?

A If you're asking me why I used, in my closing argument, information about different burdens of proof --

Q Uh-huh. (Affirmative).

A -- it's because the, the Judge's instructions are designed to be down the line, and I don't want to talk down the line. I'm biased. I'm pro-Joey at this point, right. So, I am -- I'm highlighting things that help Joey. The Judge is not doing that. That's not his job. His job is to -- simply to define---

Q Okay.

A ---beyond a reasonable doubt, and, in certain circumstances, probable cause. But he's not going into that, and he's not arguing. That's what I'm trying to do, and, and, you know---

Q Okay.

A ---Joey's sitting in a jumpsuit. So, that, that -- it didn't work the way I wanted it to, but it was my best effort at the time.

Q Okay. All right. What effect do you think this had on what you, your, your -- what you just said?

What effect do you think it had on your client, Mr. Clark?

A I'm not sure I understand the question.

Q Okay. I guess what I'm saying is did you discuss with Mr. Clark that, in your closing argument, you were gonna delve into a contention that there is evidence to suggest that he was guilty especially when the only---

MS. JAMESON: Objection.

MR. STROUD: Okay.

MS. JAMESON: Argument and testifying.

MR. STROUD: All right.

THE COURT: Sustained.

Q Okay. All right. Let's just move on then.

Then, Mr. Harbin, on Page 621 of the trial transcript, and -- let's see.

MS. JAMESON: Page 646.

Q 646.

THE COURT: 4-6?

A He said 646 and 621.

Q Okay. You tell the jury the following:

The other piece of evidence that I think is, I would evaluate as potentially the strongest piece of evidence by the State, would be the statements by the jailhouse witnesses.

Why did you tell this to the -- in your closing argument?

A Because if their strongest pieces of evidence are still lies and demonstrably so, then they shouldn't convict Joey.

Q Okay. All right. Then on Pages 624, 625 of the trial transcript?

MS. JAMESON: 649 and 650.

Q 649 and 650.

A Got you.

Q Okay. You tell the jury the following:

The one I find most fascinating, interesting -- well, excuse me. Let me back up. I didn't read it correctly.

The one I find most interesting, fascinating actually, is Michael Stillwell's statement. You can read it when you get back there. Michael Stillwell says that Joey said he killed Winter in so many words, but then he offers a very specific set of facts. He said that Joey had been arguing with Winter for days.

Why would you say that to the jury?

A If you'd continue reading---

Q Okay.

A ---that closing, and, and that line of, of argument, I go on to say, if I said Michael Stillwell says that Joey said he killed Winter in so many words, but then he offers a very specific set of facts. He said that Joey had been arguing with Winter for days, and y'all -- the statement will tell. Don't believe me. But they are arguing in the kitchen or he picks up the knife in the kitchen, and he stabs her in the kitchen. And now we all know that didn't

happen for a number of reasons.

Number one. Do you really think that Detective Hanson actually missed the blood in the kitchen or missed a whole bunch of cleaning solvents and fluids and stuff to cover up where blood would be?

Number two. We had experts say that, that she was probably almost certainly stabbed at Mike's Creek.

So, basically what I'm saying is that that witness demonstrably lied.

Q Okay. I'm trying to think -- I'm -- as you were saying, I'm trying to read it here.

Okay. All right. But then, if you'll look at following on where -- if you look at Lines 20 through 23, in the same argument you're making, then you said, and then I went one step further. And I said would you go so far as to say that he was lying. That was very interesting, interesting, wasn't it?

He said no. He said no because of the totality of the circumstances.

So, you know, you, you -- it seems to contradict because, in that statement---

MS. JAMESON: Objection. Argument.

MR. STROUD: Okay. All right.

THE COURT: Sustained.

Q Okay.

A I'm, I'm happy to explain why---
Q Yeah.
A ---I said that.
Q Yeah.
A So, if an officer gets on the stand and can't understand why or doesn't admit that somebody he took a statement from is lying, then that officer loses credibility. And, in that moment, as I recollect, that officer lost credibility because he did not admit the obvious. And I reminded the jury of that at that moment.
Q Okay. All right. In the line -- in, in -- this was in your closing argument, and prior to -- all this was about Detective Burgess, right?
A Well, that last statement I believe was a different detective.
Q Okay.
A But a lot of them are about---
Q All right.
A ---Detective Burgess.
Q All right. But my question to you is the State never, on direct exam of these detectives and investigators, never brought any of this up. They only brought it up after you cross-examined---

MS. JAMESON: Objection.

MR. STROUD: Okay.

MS. JAMESON: Argument and testifying.

MR. STROUD: All right.

THE COURT: Sustained.

Q All right. Let's move on.

Chase?

A Yes, sir.

Q Did you discuss this closing argument trial strategy with Mr. Clark?

A If you're -- yes, I mean I, I would of discussed our trial, trial -- excuse me. Our trial strategy. I, I did not give him a copy of, you know, a verbatim, you know, kind of statement of my closing.

What I normally have is kind of some bullet points that I, you know, make a sentence out of a bullet point or a paragraph out of a bullet point because I don't read verbatim stuff. But, again, I think the answer is, is that I went over the trial strategy, but he would not have had an opportunity to kind of edit my closing argument---

Q Okay.

A ---if that's what you're asking me.

Q All right. Mr. Harbin, knowing that this was a circumstantial evidence case, why did you fail to request the Rule 19 directed verdict motion at anytime during the trial?

A So, my understanding of anytime, and this may be

incorrect. I've said this before. If I'm wrong, I'm, I'm, I'm happy to be told I'm wrong, and learn from that mistake.

Q And I appreciate that.

A But I've always been told that, if you, if you, as an officer of the Court, do not have a good faith belief that, that the judge should grant a motion, then you shouldn't make it. And, and I've seen attorneys for years stand up and make motions that everybody in the courthouse, including, you know, the bailiffs and, and the people in the gallery knew wasn't gonna be granted because, as far as I know, the standard by which the judge is suppose to consider that directed verdict is in the light most favorable to the State as they're basically any evidence to suggest that, that a jury could possibly convict. And I understand that it, it seems to kind of be proforma to do that.

Q Uh-huh. (Affirmative).

A Had no belief whatsoever that that judge was gonna grant that directed verdict. And, again, if, if I am suppose to do that as a matter of form, then I, then I -- if, if that is true, then, then I would of been wrong.

Q Okay. All right. Did you believe that the State's case in chief had no material constitutional errors?

A I can't think of one right now, but if, if you want to ask me about something specific---

Q Okay.

A ---I'm happy to --.
Q Just that the, the purpose of the Rule 9, Rule 19 is also to show that the State has proven each and every element of the crime.
A Right, again, I---
Q Okay.
A ---I believed that there was ample evidence to get it to the jury. I mean the---
Q Okay.
A ---the bar to get something to a jury is extremely low.
Q Okay. All right. Please explain how offering no objections during Mr. Clark's murder trial was a valid and reasonable trial strategy.
A I, I did not realize, until this hearing, that, that there were no objections offered, and I, I would concede that, on its face, would, would appear to be rare. We had a lot of pretrial discussions, and we worked out a lot of stuff behind the scenes. There were concessions made on both sides, I believe, and, and I believe that they were fair.

As an overarching point, I will tell you that, in my experience watching trials and in prosecuting and defending trials, the most attention you will ever get paid to you by a juror is when they hear the word objection, and they have that kind of little DVR where they go back, and they listen

in their head to the last 20 seconds or so.

So, if, if whatever is objectionable is not, you know, terribly substantive, and I think I can overcome it or I can explain it in cross-examination or whatever, then I will very often let that go.

Q Okay. Mr. Harbin, in a direct appeal, what affect does having no objections during the trial have on -- have regarding the submission of properly preserved issues for appellate review?

A If it, if it would have been substantive, then it would prevent the appeal from doing what you're doing here at a PCR to bring that issue to light.

Q Okay.

A So, it's, it's -- I think your point is that it's a decision with consequence.

Q Okay. Mr. Harbin, why did you fail to object that the inmates' statements contained inadmissible hearsay and double hearsay?

MS. JAMESON: Objection. Asked and answered. We've been over that---

MR. STROUD: Okay.

MS. JAMESON: ---in detail.

MR. STROUD: Okay.

Mr. Harbin?

THE COURT: Sustained.

Q Mr. Harbin, why -- okay. Mr. Harbin, why did you fail to object to the State's, to the State's improper closing argument when, in the trial transcript on Page 599, Lines 19 through 22 -- okay.

MS. JAMESON: 624 and 625.

Q Okay. Big numbers 624 and 625.

A I'm with you.

Q Okay. Let me just read -- start over again. I'm kind of lost.

All right. Mr. Harbin, why did you fail to object to the State's improper closing argument when the trial transcript, on Page 59 -- 599, Lines 19 through 22, the assistant solicitor stated the following to the jury:

When Joey Clark was in jail, he confessed to fellow inmates that he killed Winter Wingard. He confessed to people in the cell block with him that he killed her. I stabbed her. She was butchered.

A I, I, I don't see an objection to be made there. It's, you know, it's, it's clearly kind of an editorial comment, but that's the entire---

Q Okay.

A That's the -- as far as I'm aware, that's the entire purpose of having a prosecutor is for them to summarize the case at the end of it.

Q Okay.

A And paint it in their best light.
Q Okay.
A That's -- I don't find an objection in that statement.
Q Okay. On Pages 601, Lines 5 through 9 -- 601. Lines 5 through 9.
MS. JAMESON: 626.
Q All right. It will be 626. Big number.
A I'm with you.
Q Okay. Okay. I said 601. Yeah, I'm -- all right.
Okay. On Page 601, Lines 5 through 9, in the trial transcript, the following was stated to the jurors by the assistant solicitor:
So, investigators worked and worked and worked to find the truth. They didn't know who it was. They didn't even know who she was. This was an investigation to do their job, and they did it very well, and to find the truth.
Mr. Harbin, why did you fail to object when the assistant solicitor improperly bolstered and impermissibly vouched for the credibility---
MS. JAMESON: Objection. Argument.
MR. STROUD: Okay.
THE COURT: Sustained.
MR. STROUD: Your Honor, during the trial, it -- it's clear that the job of the defense attorney is to object during the prosecutor's -- when the prosecutor makes a --