

In The
Supreme Court of the United States

EDWARD THOMAS, Warden,
Central Prison, Raleigh, North Carolina,
Petitioner,

v.

WILLIAM LEROY BARNES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

M. Gordon Widenhouse, Jr.
Counsel of Record
RUDOLF WIDENHOUSE
Post Office Box 2663
Chapel Hill, North Carolina 27515
(919) 967-4900
mgwidenhouse@rudolfwidenhouse.com

Counsel for Respondent

George B. Currin
ATTORNEY AT LAW
Post Office Box 8594
Asheville, North Carolina 28814
(828) 424-7018
georgecurrin@aol.com

Counsel for Respondent

Dated: July 20, 2020

CAPITAL CASE**QUESTION PRESENTED**

Several deliberating jurors in William Barnes's capital sentencing hearing were concerned they would "burn in hell" if they returned a sentence of death. One juror was so concerned she sought her pastor's advice after she attended a prayer meeting service during an overnight recess. She did so despite having been instructed almost forty times not to speak to anyone other than her fellow jurors. The pastor assured her no juror would face negative spiritual consequences from voting for a death sentence and gave her several biblical passages to support his advice and opinion, which she marked in her Bible. The next day, relieved of her reservations about returning a death sentence, and armed with biblical and spiritual assurance she could use to sway other jurors, she took her Bible into the jury room, told the other jurors what her pastor said, and read the verses to them. Shortly thereafter, the jury returned a sentence of death.

The question presented is:

Did the Fourth Circuit properly apply *Brecht v. Abrahamson* and *Kotteakos v. United States* in holding this evidence showed a substantial and injurious effect on William Barnes's capital sentencing hearing from this improper contact between a third-party and a deliberating juror who then shared their communication with the other jurors?

PARTIES TO THE PROCEEDING

Petitioner Edward Thomas was the Respondent and Appellee below.

William Leroy Barnes was the Petitioner and Appellant below.

DIRECTLY RELATED CASES

William Barnes v. Edward Thomas, 1:08-cv-00271, United States District Court for the Middle District of North Carolina at Greensboro. Judgements on appeal entered September 12, 2019.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
DIRECTLY RELATED CASES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
A. Proceedings in state trial, appellate, and post-conviction courts.....	2
B. Initial proceedings in federal court	4
C. Proceedings on remand in federal court.....	4
D. Proceedings in the Fourth Circuit	7
REASONS WHY CERTIORARI SHOULD BE DENIED	7
REVIEW BY CERTIORARI IS UNWARRANTED BECAUSE THE FOURTH CIRCUIT PROPERLY APPLIED <i>BRECHT V.</i> <i>ABRAHAMSON</i> AND <i>KOTTEAKOS V. UNITED STATES</i> TO THE EVIDENCE	7
A. The Fourth Circuit properly stated the applicable rule of law and then applied it to the evidence Barnes presented.....	8
B. Petitioner offers no compelling reason to review the Fourth Circuit’s application of the applicable law to the evidence presented	11
CONCLUSION.....	14

APPENDIX:

Transcript of Evidentiary Hearing before The Honorable Joi Elizabeth Peake on February 8, 2016	1a
--	----

Defendant's Exhibit:

1. Excerpts of Transcripts of State v. Leroy Barnes various dates	84a
--	-----

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>CASES</u>	
<i>Barnes v. Joyner</i> , 751 F.3d 229 (4th Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 2643 (2015)	4
<i>Barnes v. Thomas</i> , 938 F.3d 526 (4th Cir. 2019)	7, 10
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)	<i>passim</i>
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	8
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946)	<i>passim</i>
<i>Mattox v. United States</i> , 146 U.S. 140 (1892)	7
<i>O’Neal v. McAnninch</i> , 513 U.S. 432 (1995)	10
<i>Parker v. Gladden</i> , 385 U.S. 363 (1966)	7, 13
<i>Remmer v. United States</i> , 347 U.S. 227 (1954)	8
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	8
<i>State v. Barnes</i> , 345 N.C. 184, 481 S.E.2d 44 (1997), <i>cert. denied</i> , 523 U.S. 1024 (1998)	3
<i>State v. Barnes</i> , 362 N.C. 239, 660 S.E.2d 53 (2008)	4

<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965)	8
---	---

STATUTES

28 U.S.C. § 2254.....	4
N.C. Gen. Stat. § 15A-2000(b)	6

RULES

Sup. Ct. R. 10	1
Sup. Ct. R. 10(a).....	1
Sup. Ct. R. 10(c)	8

INTRODUCTION

This case is unworthy of this Court’s exercise of its certiorari jurisdiction. The Fourth Circuit properly identified the applicable rule of law from this Court’s decisions and conscientiously applied it to the evidence in the record. Contrary to petitioner’s assertion, the Fourth Circuit did not “misappl[y]” the standard in *Brecht v. Abrahamson* and *Kotteakos v. United States*. Pet. at 1.¹ Petitioner concedes that “the Fourth Circuit properly identified *Kotteakos* as supplying the substantial and injurious effect standard for assessing” prejudice in a federal habeas corpus proceeding.² Pet. at 14. Petitioner merely disagrees with the result, which is not a legitimate reason to grant a writ of certiorari. See Supreme Court Rule 10 (“certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law”).

Petitioner’s own framing of the Question Presented reveals why this case is not worthy of review. He states, “there was no evidence that a juror’s contact with a third party had a substantial and injurious effect on the jury’s verdict.” Pet. at 1. Petitioner’s complaint is merely an “asserted error” that is essentially a claim of “erroneous factual findings.” See Supreme Court Rule 10 (“certiorari is rarely granted when the asserted error consists of erroneous factual findings”). The petition should be denied.

¹ The Petition for a Writ of Certiorari is referenced Pet. at ___. The Appendix to the Petition is referenced Pet. App. at ___. The Appendix to this Brief in Opposition is referenced Resp. App. at ___.

² In addition, petitioner has not presented a split within the circuits on this issue, and Barnes is also aware of none. See Supreme Court Rule 10(a).

STATEMENT OF THE CASE

A. Proceedings in state trial, appellate, and post-conviction courts.

William Leroy Barnes, Frank Junior Chambers, and Robert Lewis Blakney were charged with two counts of first degree murder and other crimes. Their jury was composed of very religious people. Resp. App. at 85a-98a; *see* Pet. App. at 33a, n.6. Eleven of the twelve deliberating jurors discussed their church affiliations during the jury selection process. Resp. App. at 85a-98a. This jury convicted the defendants. The same jury then heard evidence about whether it should impose a sentence of life in prison or death.

In the closing arguments at the sentencing hearing, the prosecutor seized on the jurors' religious convictions in asking for a death sentence. He predicted defense counsel would argue that the Bible says "Thou shalt not kill," and he assured them they would have nothing to feel guilty about for imposing a death sentence. He asserted it would be "an abomination" for defense counsel to use religion to make the jurors feel guilty about returning a death sentence. Resp. App. at 147a-149a.

Co-defendant Chambers' attorney then responded and cautioned the jurors of the eternal judgment they might face if they imposed a death sentence. He argued, in part, "All of us would stand in judgment one day." He stated "a true believer" would not "want to explain to God, yes, I did violate one of your commandments. . . . I know it says, Thou shalt not kill, but I did it because the laws of man said I could. You can never justify violating a law of God by saying the laws of man allow it." A juror who voted for a sentence of death would have "[t]o explain when your soul is at

stake.” He concluded, “Who wants to be placed in that position? I hope none of us. And may God have mercy on all of us.” Resp. App. at 151a-155a; Pet. App. at 3a.

This argument upset the jurors. Despite nine specific admonitions from the trial court that no juror was to discuss the case with anyone outside the jury deliberation room -- admonitions that were augmented by thirty-three reminders from the trial court to follow its instructions, Resp. App. at 99a-112a, 113a-146a -- one of the jurors consulted her pastor during the evening recess of the sentencing deliberations. Resp. App. at 49a-50a. She received from him advice and counsel that supported the prosecutor’s contentions and rebutted the defense closing argument. Resp. App. at 51a-52a. Upon returning to jury deliberations the next day, she repeated his advice to her fellow jurors. Resp. App. 54a-55a. The jury then recommended a death sentence for Barnes and Chambers, and a life sentence for Blakney.³ Pet. App. at 3a.

Barnes appealed. The Supreme Court of North Carolina affirmed. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024 (1998).

Barnes timely pursued his available state post-conviction remedies. The state post-conviction court eventually conducted a hearing on some, but not all, of the issues Barnes raised. However, the state court did not conduct a hearing on the claim of juror misconduct. It denied relief on all the claims. Pet. App. at 4a. Barnes sought

³ After the jury returned its sentencing recommendation, the trial court denied Barnes’s request to ask the jurors if one of them talked to a pastor and relayed the conversation to the other jurors. Pet. App. at 3a.

a writ of certiorari in the Supreme Court of North Carolina, which was denied. *State v. Barnes*, 362 N.C. 239, 660 S.E.2d 53 (2008).

B. Initial proceedings in federal court.

Barnes timely filed a petition for a writ of habeas corpus, which was denied without any evidentiary hearing. Pet. App. at 4a. *See* 28 U.S.C. § 2254. The Fourth Circuit reversed and remanded to the district court for a hearing on whether the jury misconduct was prejudicial; this Court denied review. *Barnes v. Joyner*, 751 F.3d 229, 251-52 (4th Cir. 2014) (holding district court erred because state post-conviction court unreasonably applied clearly established federal law by denying juror misconduct claim without applying presumption of prejudice and conducting evidentiary hearing), *cert. denied*, 135 S. Ct. 2643 (2015).

C. Proceedings on remand in federal court.

At the ensuing evidentiary hearing, Hollie Jordan testified she served on the jury in Barnes’s case. Resp. App. at 46a. At that time, she regularly attended church. She went to church “every time the doors were open,” including Sunday morning, Sunday night, and Wednesday night prayer meeting. Resp. App. at 47a. Her “churchgoing” was “very important” and “played a big role in [her] life.” Resp. App. at 48a. She knew Pastor Tom Lomax “very well.” Jordan considered him to be her “spiritual guide or leader” and sought his counsel about important things in her life. Resp. App. at 48a-49a.

The closing argument by Chambers’ attorney not only troubled and “stood out” to Jordan, but especially bothered at least one other juror. Jordan recalled the

attorney “said that if they [the defendants] got the death sentence that we [the jury] would burn in hell.” Resp. App. at 49a; Pet. App. at 4a. Jordan was “worried” and “had concerns” about whether she and the other jurors were “going to die because we’re killing them.” Resp. App. at 52a. Based on these concerns, Jordan sought her pastor’s counsel.⁴ Resp. App. at 52a.

This improper communication took place during the evening recess between the first and second days of the sentencing deliberations.⁵ Resp. App. at 50a, 59a-60a. That evening, Jordan went to the weekly Wednesday prayer meeting at her church. After everyone else left, she asked Pastor Lomax if she could talk to him. Resp. App. at 50a. Jordan told him she was serving on Barnes’s jury and talked to him about the crime scene photographs, including how “horrific” they were. Resp. App. at 50a-51a. Then she specifically related the closing argument to her pastor and asked him “if we gave them the death sentence would we burn in hell.” Resp. App. at 49a. Pastor Lomax responded, “No.” Resp. App. at 49a. He gave Jordan several “scriptures in the Bible” that “explained everything.” Resp. App. at 51a. They talked for “roughly an hour or two,” with part of the discussions about Barnes’s case and part about family and other things. Resp. App. at 51a-52a. Pastor Lomax told Jordan “we have to live by the laws of the land” and assured her the jurors would not “burn

⁴ Unfortunately, Pastor Lomax passed away before the Fourth Circuit ordered the evidentiary hearing to which Barnes had been entitled in the state post-conviction proceedings and which he had consistently requested.

⁵ The timing of this external influence on the deliberating jury can hardly be over-emphasized, as it occurred at a most critical juncture: the moment the jurors were making their ultimate decision to impose a death sentence on Barnes.

in hell.” Resp. App. at 51a. They prayed together. Resp. App. at 54a. Jordan then felt better. Resp. App. at 52a.

The next morning, relieved by Pastor Lomax of her own worry and concern about returning a death sentence, Jordan brought her Bible into the jury room. Resp. App. at 54a, 60a, 74a. During the continued deliberations, Jordan read to her fellow jurors the multiple Bible verses that Pastor Lomax had suggested to her. Resp. App. at 54a, 61a, 72a. One of the verses was “an eye for an eye and a tooth for a tooth.” Resp. App. at 61a. According to juror Ardith Peacock, Jordan read these Bible verses aloud to the other jurors to “rebut Chambers’ attorney’s [closing] argument.” And juror Leah Weddington said Jordan shared the information in an attempt “to convince someone to--it was okay to give him the death penalty.”⁶ Resp. App. at 72a, 75a.

Jordan spent approximately fifteen to thirty minutes relaying to the other jurors what her pastor told her. Resp. App. at 55a. She explicitly told them he had assured her that the defense attorney’s closing argument about facing God’s judgment if the jury returned a death sentence was not true. She told them “we wouldn’t burn in hell.” Resp. App. at 54a.

Despite this compelling evidence, the district court denied relief. Pet. App. 25a-37a. Barnes timely appealed.

⁶ In North Carolina, if one juror votes to impose a life sentence, then a life sentence must be imposed. *See* N.C. Gen. Stat. § 15A-2000(b).

D. Proceedings in the Fourth Circuit.

The Fourth Circuit reversed, holding Barnes “met his evidentiary burden as to both constitutional error and actual prejudice.” *Barnes v. Thomas*, 938 F.3d 526, 536 (4th Cir. 2019). Pet. App. at 8a. Faithfully applying this Court’s decisions in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *Kotteakos v. United States*, 328 U.S. 750 (1946), the Fourth Circuit stated: “After reviewing the record, which now includes the evidentiary hearing to which [Barnes] was legally entitled, we hold that Juror Jordan’s external communication was not harmless.” *Id.* at 534. Pet. App. at 6a. In making this decision, the Fourth Circuit evaluated the facts under “[t]he substantial and injurious effect standard used to determine harmlessness on habeas” that “comes from the Supreme Court’s decision in *Kotteakos*,” expressly noting that *Brecht* held “the *Kotteakos* standard applies to harmless error review on habeas appeal.” *Id.* at 534 & n.3. Pet. App. at 6a.

REASONS WHY CERTIORARI SHOULD BE DENIED

REVIEW BY CERTIORARI IS UNWARRANTED BECAUSE THE FOURTH CIRCUIT PROPERLY APPLIED *BRECHT V. ABRAHAMSON* AND *KOTTEAKOS V. UNITED STATES* TO THE EVIDENCE.

In this matter, a deliberating juror consulted her pastor during an overnight recess of the sentencing proceeding and discussed competing closing arguments made by the prosecutor and counsel for a co-defendant. This third-party communication constituted an impermissible external influence on the deliberating jury. *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966); *Mattox v. United States*, 146 U.S. 140, 150 (1892). Information infecting a jury from any source other than properly presented

evidence or instructions from the trial court, especially during jury deliberations at the sentencing phase of a capital case, is prohibited. *Remmer v. United States*, 347 U.S. 227, 229 (1954). This principle reflects sound jurisprudence. “The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury.” *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (citation omitted). Hence, “any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.” *Remmer*, 347 U.S. at 229.

A. The Fourth Circuit properly stated the applicable rule of law and then applied it to the evidence Barnes presented.

The Fourth Circuit reviewed *de novo* the evidence about the juror’s “external communication” in this case, under the standard espoused in *Brecht* and *Kotteakos*, and concluded “it was not harmless.”⁷ Appendix 6a-8a. This straightforward, fact-based application of “a properly stated rule of law” is unworthy of this Court’s review. *See* Supreme Court Rule 10(c) (“A petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

Simply put, this case is about the facts. The Fourth Circuit looked at the evidence and concluded the improper communication between Jordan and her pastor,

⁷ *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (where state courts do not reach merits of federal constitutional claim, habeas court considers the issue *de novo*); *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (where state courts do not consider prejudice from federal constitutional error, habeas court evaluates prejudice *de novo*).

and Jordan’s sharing his spiritual counsel with the other jurors, had a substantial and injurious effect on the jury’s decision to impose the death sentence on Barnes. Any fair reading of the facts shows that it did, which means Barnes was actually prejudiced. *Brecht*, 507 U.S. at 637.

As this Court explained in *Brecht*, “the *Kotteakos* harmless-error standard applies in determining whether [federal] habeas relief must be granted because of constitutional error of the trial type.” *Brecht*, 507 U.S. at 638. Under *Kotteakos*, an error is not harmless where there is “actual prejudice,” which means the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Kotteakos*, 328 U.S. at 776.

In explaining actual prejudice, *Kotteakos* stated:

[T]he question is, not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had *or reasonably may be taken to have had* upon the jury’s decision. The crucial thing is *the impact of the thing done wrong on the minds of other men, not on one’s own*, in the total setting.

This must take account of what the error meant to them, not singled out and standing alone but in relation to all else that happened. And one must judge others’ reactions not by his own, but with allowance of how others might react .

...

[W]hether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is “technical” or is such that “*its natural effect is to prejudice a litigant’s substantial rights.*”

Id. at 764-65 (citations omitted) (emphasis added). This language reveals that actual prejudice can be shown by circumstantial evidence indicating the “natural effect” of the error was to prejudice a defendant’s substantial rights, meaning the error was so

fundamental to a fair proceeding that it “reasonably may be taken to have had [an effect] upon the jury’s decision.” *Id.* at 764.

The *Kotteakos* standard, which was adopted in *Brecht*, is not an insurmountable hurdle. See *O’Neal v. McAnninch*, 513 U.S. 432, 436-37 (1995) (petitioner need not prove the outcome would have been different absent the error). Improper third-party communications with a sitting juror, which are relayed to the other jurors, is harmless only if the reviewing court has a “fair assurance” or “[sure] conviction” that the error “did not influence the jury, or had but very slight effect.” Otherwise, the error requires reversal. *Kotteakos*, 328 U.S. at 764- 65 (“If, when all is said and done, the *conviction is sure* that the *error did not influence the jury*, or had but very slight effect, the verdict and the judgment should stand.”) (emphasis added).

As the Fourth Circuit correctly concluded, Barnes’s evidence showed the juror misconduct had a substantial and injurious effect on the jury’s decision to sentence him to death. *Barnes*, 938 F.3d at 528-29. Pet. App. at 3a. Surely, where a deliberating juror contacts her pastor and gets his advice about the spiritual propriety of returning a death sentence, and then this juror tells her fellow religious jurors her pastor indicated it is “okay” to sentence a defendant to death, this external information “reasonably may be taken to have had [an effect] upon the jury’s decision.” *Kotteakos*, 328 U.S. at 764.

Petitioner criticizes the Fourth Circuit, ostensibly because Barnes “could not show that [the juror’s] conversation with her pastor actually prejudiced the result at trial.” Pet. at 12. Petitioner’s complaint seems to be nothing more than disagreement

with the result: the Fourth Circuit granting relief to Barnes. Pet. at 17-18. It is not a basis for this Court to issue a writ of certiorari.

B. Petitioner offers no compelling reason to review the Fourth Circuit's application of the applicable law to the evidence presented.

Petitioner posits two factual reasons for review. First, he argues Pastor Lomax did not actually tell Jordan how to vote. Second, he claims the discussions in the jury room were insufficiently lengthy to have had any effect on the verdict. Pet. at 15-18. Both arguments lose sight of the specific nature of the juror misconduct in this case.

Pastor Lomax tacitly told Jordan how to vote. She was sincerely worried that imposing a death sentence would cause her to “burn in hell.” Other jurors were also very concerned. Her pastor assured her that imposing a death sentence would not have this impact on her or any other juror. He told her the Bible allows punishment by an eye for an eye, a tooth for a tooth, and a life for a life. By giving her this biblical analysis, he sanctioned imposing a death sentence on Barnes.

Furthermore, the length of the discussions among the jurors about this spiritual advice was substantial. The discussions took place on the second, final day of sentencing deliberations. In the fifteen to thirty minutes the jury discussed the pastor's advice, Jordan was able to reassure every juror, including one who was struggling with whether to vote for a death sentence, that imposing such a sentence was “okay.” Resp. App. at 72a, 75a. The time it took to provide this spiritual counsel does not alone determine whether it was prejudicial; what matters is what was said and what it accomplished. The jury recommended a sentence of death the same day.

Jordan, in direct conflict with her oath as a juror and the repeated instructions of the trial judge, infected the sentencing deliberations by bringing to the other jurors her pastor's specific assurance that they could vote for a death sentence, despite their initial reservations. This improper external influence on a capital sentencing jury had a substantial and injurious influence on the sentencing deliberations and prejudiced Barnes, under *Brecht* and *Kotteakos*.

This substantial and injurious influence is reflected by Jordan seeking the spiritual counsel of Pastor Lomax despite nine specific admonitions from the trial court that she was not to discuss the case with anyone outside the jury deliberation room. Resp. App. at 99a-112a. These specific directions were augmented by thirty-three reminders from the trial court to follow its instructions. Resp. App. 113a-146a. That Jordan would violate these numerous, explicit instructions persuasively demonstrates how deeply the closing arguments worried her and her fellow jurors.

Significantly, Jordan did not seek merely to assuage her fears about the effect of a death sentence on her own spiritual wellbeing. Rather, she took Pastor Lomax's assurances to the other jurors because "she was trying to convince someone to -- it was okay to give him the death penalty." Pet. App. at 5a. Instead of asking the trial court about the closing arguments, Jordan took it upon herself to speak privately with her pastor to arm herself with expert biblical information she could use to sway other jurors (at least one of whom appeared unwilling to vote for a death sentence) to impose the death penalty. Resp. App. at 42-44, 51-55, 74-75. If only Jordan was struggling with the closing argument by Chambers' lawyer, there would have been

no reason for her to relay her pastor's advice to the other jurors. She abandoned her role as an impartial juror and assumed the role of an advocate for the state.⁸

By her conduct, Jordan tainted the deliberations of the remaining jurors on the ultimate issue to be decided by them: whether Barnes should live or die. The sole question before the jury at this point was the appropriate sentence. As Jordan's testimony made clear, all of the jury's concerns were assuaged by her improper communication with Pastor Lomax and his biblical view that imposing a death sentence in this case was spiritually permissible. This sort of third-party interference with a deliberating jury is prejudicial. *See Parker*, 385 U.S. at 365 (a "bailiff—as officer of the court as well as the State—beyond question carries great weight with a jury which he has been shepherding for eight days and nights").


Here, the Fourth Circuit ably identified and applied the decisions of this Court. Petitioner's claim that "there was no evidence" of "a substantial and injurious effect" on the jury's sentencing decisions is simply wrong. Given the evidence presented, the Fourth Circuit correctly concluded it did not have a "fair assurance" that Jordan's conversation with her pastor and her subsequent discussions of that conversation with her fellow jurors "did not influence the jury, or had but very slight effect." *See Kotteakos*, 328 U.S. at 764-65. Thus, Barnes was actually prejudiced.

⁸ Similarly, Pastor Lomax essentially became an extra prosecutor, giving an argument Barnes had no chance to rebut, or an expert witness, giving expert spiritual testimony Barnes had no chance to confront.

In conclusion, the Fourth Circuit appropriately applied a properly stated rule of law to the facts. Its opinion also does not conflict with the decision of another circuit on this question. Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated herein, William Leroy Barnes respectfully requests that the Petition for a Writ of Certiorari be denied.



M. Gordon Widenhouse, Jr.

Counsel of Record

RUDOLF WIDENHOUSE

Post Office Box 2663

Chapel Hill, North Carolina 27515

(919) 967-4900

mgwidenhouse@rudolfwidenhouse.com

Counsel for Respondent

George B. Currin

ATTORNEY AT LAW

Post Office Box 8594

Asheville, North Carolina 28814

(828) 424-7018

georgecurrin@aol.com

Counsel for Respondent

APPENDIX

TABLE OF CONTENTS

	<u>Page</u>
Transcript of Evidentiary Hearing before The Honorable Joi Elizabeth Peake on February 8, 2016	1a
 <u>Defendant's Exhibit:</u>	
1. Excerpts of Transcripts of <i>State v. Leroy Barnes</i> various dates.....	84a

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WILLIAM LEROY BARNES,	*	Case No. 1:08CV271
	*	
Petitioner,	*	
	*	
vs.	*	Winston-Salem, North Carolina
	*	February 8, 2016
CARLTON JOYNER,	*	10:50 a.m.
	*	
Respondent.	*	

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE JOI ELIZABETH PEAKE
UNITED STATES MAGISTRATE

APPEARANCES:

For the Petitioner: M. GORDON WIDENHOUSE, JR., ESQUIRE
Rudolf Widenhouse & Fialko
312 W. Franklin Street
Chapel Hill, North Carolina 27516

GEORGE B. CURRIN, ESQUIRE
Post Office Box 86
Raleigh, North Carolina 27602

For the Respondent: JONATHAN P. BABB, ESQUIRE
NC Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Also Present: Danielle Marquis Elder, Esquire
NC Department of Justice

Court Reporter: Lori Russell, RMR, CRR
P.O. Box 20593
Winston-Salem, North Carolina 27120

Proceedings recorded by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

I N D E X**PETITIONER'S WITNESSES:****PAGE**

JANINE FODOR

Direct Examination by Mr. Widenhouse

22

Cross-Examination by Mr. Babb

44

HOLLIE JORDAN

Direct Examination by Mr. Widenhouse

46

ARDITH PEACOCK

Direct Examination by Mr. Currin

58

LEAH WEDDINGTON

Direct Examination by Mr. Currin

73

E X H I B I T S**PETITIONER'S EXHIBITS:****IDENT ADMIT**1 Defendant's 1 - Notebook of Transcript
Excerpts

32

P R O C E E D I N G S

THE COURT: All right. I'm going to ask the clerk to call the case on the calendar this morning so we can put all of this on the record.

THE CLERK: United States of America versus William Leroy Barnes, 08CV217.

THE COURT: And I believe it's Barnes versus Joyner.

THE CLERK: Yes, ma'am.

THE COURT: The civil habeas case.

All right. This matter is before the Court for an evidentiary hearing on remand from the Court of Appeals for the Fourth Circuit. The Court issued a writ for defendant -- excuse me, for Mr. Barnes' appearance on December 7th, 2015. Apparently, due to some miscommunication between the clerk's office and the state, that writ has not been executed. So that's where we are this morning.

I will tell you that apparently there was some misunderstanding in the clerk's office as to whether counsel was handling that, but my concern is with the clerk's office and I'm not holding counsel responsible for that at all. So that's not an issue as to any of the folks here.

What I'm going to do is ask you to go ahead and announce your representations. This is where we are today. I understand there are witnesses here. We're going to take up how that's to proceed and whether we need to reschedule this

1 and what that might mean.

2 Yes, sir.

3 MR. WIDENHOUSE: May it please the Court, I'm Gordon
4 Widenhouse. I represent William Barnes and with me is George
5 Currin, cocounsel.

6 THE COURT: All right. Good morning.

7 MR. CURRIN: Good morning, Your Honor.

8 THE COURT: Yes, sir.

9 MR. BABB: Good morning, Your Honor. I'm Jonathan
10 Babb with the Attorney General's office and with me is Danielle
11 Elder with the Attorney General's office. While she's not
12 counsel in this case, she was counsel in the Hurst case. I
13 ask, with your permission, she be allowed to sit at the table.

14 THE COURT: Certainly. That's fine.

15 MR. BABB: Thank you, Your Honor.

16 THE COURT: All right. So, Mr. Widenhouse, we are
17 where we are. Would your request be then to continue this and
18 to reissue the writ or what would your request be this morning?

19 MR. WIDENHOUSE: Well, I don't think I can waive my
20 client's appearance, although I could do that, but I'm not sure
21 it's effective.

22 THE COURT: All right.

23 MR. WIDENHOUSE: You have to tell me.

24 THE COURT: Well, I don't want to ask you to do that;
25 and if you're not sure that you can do that this morning, then

1 I think the thing we probably will have to do is reschedule it
2 so that we can have him here and present unless -- unless
3 you're telling me otherwise.

4 MR. WIDENHOUSE: Well, I don't think I can waive his
5 appearance without his permission and I didn't know to ask him
6 when I visited him last week.

7 I would let the Court know that one of my witnesses is
8 Janine Fodor, who is an attorney from somewhere in Upstate New
9 York, two hours from Buffalo. So if we're going to continue
10 it, I'd like a little leeway to continue it at a time when I
11 can get her back down here. And certainly I would apologize to
12 my three witnesses who were subpoenaed.

13 THE COURT: Absolutely. And that really is -- the
14 concern of the Court is for the witnesses who have been
15 subpoenaed here, needed to be here, and are going to be
16 inconvenienced by this. So I will take care of that to the
17 extent I need to do that.

18 But as far as proceeding today, what I can do is -- and I'm
19 going to ask counsel for both sides how best you want to
20 proceed. What I would like to do is get just some general
21 suggestions for how long or when would be convenient to reset
22 this. I realize that might require some conversations with the
23 folks that you have as witnesses here. If I need to have those
24 conversations directly with them, I can do that; but if you all
25 can have those conversations with them -- I can set it out a

1 week. I can set it out 30 days. Really my concern is for the convenience of the witnesses at this point.

3 And so, Mr. Babb, I'll hear from you in terms of the State's position on that. Do you have anything? I can take a quick recess so that you can do that. But as far as the State's position generally, what would that be?

7 MR. BABB: I was not intending to call any witnesses given the witness list that Mr. Widenhouse said he was going to call. In terms of when you want to reschedule, either of the two suggestions the Court just made I believe would be fine. I don't have my phone with me to check my calendar, Your Honor, but I believe either one would be fine. I don't think it would go as far as April 11th, but I have another hearing that far out, but either next month or 30 days -- excuse me, 30 days or next week I think would work. I just need to check that, but I believe that would be fine.

17 THE COURT: All right. Would you have any objection to Mr. Widenhouse speaking with the folks who are here in order to determine what might be convenient for them?

20 MR. BABB: No, ma'am, I do not. The only caveat is unless there's something I'm forgetting that I have scheduled for 30 days from today or next week just because I can't check electronically due to the security measures.

24 THE COURT: All right. If I gave you a 15-minute recess, would that give you time to double-check to confirm

1 that?

2 MR. BABB: Actually, I apologize, Your Honor. I'd
3 have to walk to the car where I left my cell phone because I
4 don't have a cell phone permit to come into the building. I
5 apologize.

6 THE COURT: All right. If you had access to a phone
7 to call out, would that be sufficient?

8 MR. BABB: Yes, ma'am.

9 THE COURT: All right. I can ask the clerk to get you
10 to a conference room where you can make a call. What I want to
11 do is make sure I won't have to continue it again --

12 MR. BABB: Yes, ma'am.

13 THE COURT: -- once we determine what the date might
14 be.

15 MR. BABB: I'm sorry to be so much trouble. I'm
16 almost positive neither one is not, but I want to make double
17 sure before I represent anything to you.

18 THE COURT: All right. So, Mr. Widenhouse, would
19 there be any reason why you couldn't talk to the folks who are
20 here to determine what might be a date that they would be able
21 to come back again? Again, with the Court's apologies and I'm
22 sure counsel's apologies as well to the extent that they have
23 had to do that and we will -- we'll take care of that, to the
24 extent we need to, to determine where that miscommunication
25 occurred.

1 But as far as determining when it could be reset for, my --
2 what I would be looking for -- my suggestion would be sometime,
3 whether it's a week or 30 days, whatever it might be, if it
4 needs to be longer than that, sometime during March if you have
5 some suggestions from the folks when they're available or not
6 available. What I'm going to do is intend to give you a
7 15-minute recess so that you can make that determination.

8 If there's -- any of the folks would feel more comfortable
9 talking to the Court directly rather than through you, that's
10 certainly fine, but if you want to talk to them first -- or you
11 can do that while you're here in the courtroom. Then I can
12 make a determination when I can reset it for. That's what I'm
13 looking for, suggestions at this point.

14 MR. WIDENHOUSE: And you don't have particular days of
15 the week or --

16 THE COURT: I do not have particular -- I do not have
17 particular days of the week. What I can do is I'll touch base
18 with the clerk to give her particular conflict days if there's
19 particular days you're looking at, but I want to give you as
20 much leeway as I can to try to determine when would be dates
21 that you have that the folks would be able to be available with
22 the least inconvenience to them.

23 MR. WIDENHOUSE: Okay.

24 THE COURT: So my -- my guess is that moving into
25 March is actually going to be easier to avoid a date when I

1 have a conflicted hearing, but I'm going to let the clerk --
2 make sure she's got the calendar -- the Court's calendar and
3 then I'll let you talk to the folks who are here and do -- try
4 to do that informally, and then I'll take the bench again and
5 announce when it is we're resetting the hearing. I'll reissue
6 the writ and I will call Central Prison myself if I need to to
7 make sure they have it this time.

8 All right. What I'm going to do is take a 15-minute recess
9 then and let you all make whatever determination or
10 conversations you need to have; and then when you're ready, the
11 clerk will come let me know and I'll take the bench again.

12 All right. Thank you.

13 (A recess was taken from 11 a.m. until 11:20 a.m.; all
14 counsel present.)

15 THE COURT: All right. I'll hear from you as to where
16 we are. I'm going to add another piece of information. The
17 clerk's office is continuing to work with the state and it
18 turns out we should be able to reconvene as of two o'clock this
19 afternoon with Mr. Barnes present so that we can go ahead and
20 take care of this today. I will hear from you if you have any
21 objections to that, but that would be the Court's intent if we
22 can do that.

23 MR. WIDENHOUSE: I do because Ms. Fodor has got a
24 plane back to New York at three o'clock.

25 THE COURT: Well, I think if we're talking about all

1 of the folks that we need to otherwise reschedule here, if we
2 could, I can take her first. We could also move her flight --
3 her return flight, if that's the only issue, so we don't have
4 to bring her back here again for another hearing. I can --

5 MR. WIDENHOUSE: Well, she's a lawyer. Can she just
6 answer your questions?

7 THE COURT: Yes, ma'am.

8 WOMAN IN AUDIENCE: I -- I live in a very remote area
9 of New York. I have the last flight back tonight and it leaves
10 Greensboro at like 5:45 or something. So I think if I -- and
11 I've got a rental car. I think if I leave here at 3:30 I could
12 probably make it.

13 THE COURT: All right. Well, it sounds like then if
14 we start right at 2:00 that there should be -- there should be
15 time, Mr. Widenhouse.

16 MR. WIDENHOUSE: I guess I can try to get her on and
17 off in 30 minutes.

18 THE COURT: Well, it sounds like she will have an hour
19 and a half, until 3:30. It sounds like she would have an hour
20 and a half before she would need to leave.

21 WOMAN IN AUDIENCE: Can I leave the courthouse by
22 3:00? I mean, I've got to go out to my car. It's going to be
23 awfully tight.

24 THE COURT: So what I'm trying to do is balance a lot
25 of different folks and a lot of different issues here. There's

1 certainly the possibility this hearing could have gone on into
2 the afternoon regardless, so that was a possibility. I
3 certainly will do everything I can to try to take Ms. Fodor
4 first, if that's how you want to proceed, Mr. Widenhouse, and
5 to move the proceedings along so that she can try to catch her
6 flight; but it seems to me that that is the most effective way
7 to try to address the situation that we have. In the worst
8 case, even if she did have to reschedule, that still seems to
9 me to be less inconvenient to her to come back again and
10 certainly also to the other folks that we have here.

11 Ms. Fodor, you understand the Court's position at this
12 point?

13 WOMAN IN AUDIENCE: I do. I have kind of absolute
14 commitments tomorrow, Your Honor, that are just -- missing this
15 flight tonight is a huge problem for me. I --

16 THE COURT: Well, so, Mr. Widenhouse -- and I
17 appreciate -- I understand, Ms. Fodor, but at this point -- the
18 hearing was for today, understanding it was originally set for
19 10:00, but it could have gone on into the afternoon.

20 My inclination is to go ahead and try to get back here at
21 two o'clock so that we can proceed with Mr. Barnes here with
22 the evidence you have. If you want to call Ms. Fodor first,
23 certainly you can do that. If you're telling me that -- why
24 don't you tell me what your concern is with that then
25 otherwise.

1 MR. WIDENHOUSE: Well, it's taking witnesses out of
2 order and disrupting my game plan. I'm not sure she would be
3 able to make her flight anyway. That's her concern. I
4 understand the hearing was scheduled for 10:00 and could last
5 until the end of the week, you know.

6 THE COURT: Right.

7 MR. WIDENHOUSE: But, you know, if it started at
8 10:00, I have a pretty good guess as to where we would be by
9 two o'clock or three o'clock. And so I also understand, you
10 know, we serve at the pleasure of the Court, so we're here.
11 People are subpoenaed and --

12 THE COURT: Well, what's your alternative proposal?

13 MR. WIDENHOUSE: That's -- the end of March, but I
14 would need to take a video deposition of Ms. Jordan.

15 THE COURT: So is that your preference?

16 MR. WIDENHOUSE: Yes.

17 THE COURT: But you wouldn't have her here in person.

18 MR. WIDENHOUSE: Ms. Jordan?

19 THE COURT: Right.

20 MR. WIDENHOUSE: No, because she is going in for back
21 surgery, so I would have to take a video deposition of her.
22 Then I think I could present my case in the way I would want to
23 present it.

24 THE COURT: If we go ahead and proceed with all of the
25 other witnesses, the jurors who you have here, so we can take

1 care of them today; and then if you need to reconvene the
2 hearing to have Ms. Fodor here, then we could do that if we
3 needed to. Is there any reason we couldn't proceed that way?

4 MR. WIDENHOUSE: No, that could work and we could --
5 we could take a video deposition of Ms. Fodor.

6 THE COURT: All right.

7 MR. WIDENHOUSE: Or do her testimony remotely at a
8 convenient time.

9 THE COURT: My preference is certainly for the other
10 folks who are here to go ahead and take care of them and if we
11 can do that this afternoon at two o'clock -- Mr. Babb, I
12 haven't heard from the State yet. What's your position on
13 that?

14 MR. BABB: I would object to video depositions. I
15 would want the witnesses to testify before the Court given the
16 objections that I anticipate making to a lot of the areas that
17 may be broaching up in the hearing. However the Court wants to
18 proceed in terms of scheduling a hearing I'm amenable to. I
19 just don't -- I would just oppose video depositions, Your
20 Honor.

21 THE COURT: So if we go ahead and proceed today with
22 all of the witnesses that we have here; and then if we needed
23 to reconvene for Ms. Fodor to come back down here, then we can
24 do that. But my certain -- my preference certainly would be to
25 go ahead and take care of her today, if we could, and I don't

1 know that taking -- it's not a jury presentation -- if taking
2 her out of order is really going to make any difference in
3 terms of whatever presentation that you might want to make to
4 the Court.

5 Do you understand my point on that, Mr. Widenhouse?

6 MR. WIDENHOUSE: I do.

7 THE COURT: And so understanding if you need
8 additional time if she's not going to be able to finish today,
9 if there's a problem with that, then you can reserve the right
10 to ask the hearing to be reconvened to have her brought back
11 and we'll do her live again at another occasion, though we'll
12 go ahead and proceed this afternoon with the witnesses we do
13 have. And to the extent we can go ahead and take care of her
14 today, that's my preference, but I'm going to leave it to you
15 for presenting the evidence.

16 MR. WIDENHOUSE: So you would be amenable to doing all
17 the witnesses this afternoon, except Ms. Fodor, and reconvening
18 at a later time to take her testimony live?

19 THE COURT: She would need to be live, right. We
20 could reconvene at a later time to take her testimony. I think
21 we could also consider -- because I would want to address the
22 extent to which the testimony that she's going to present is
23 something that we need to reconvene and you can address this or
24 tell me what it is that she's going to present that wouldn't be
25 hearsay that we would be able to have her testimony on. So I

1 can let you all address that as well.

2 Mr. Babb, do you have a position on that?

3 MR. BABB: I'd have to hear what he intends to present
4 through the witness first, Your Honor.

5 MR. WIDENHOUSE: Well, she was Mr. Barnes' lawyer on
6 direct appeal. She's got an intimate familiarity with the
7 transcripts and the proceedings at the trial level. She was
8 his first post-conviction lawyer and can explain, I think
9 without getting into any hearsay, the important parts of the
10 post-conviction process. One of the things that -- and I
11 don't --

12 THE COURT: I'll tell you what. I don't want to get
13 into having a hearing without Mr. Barnes here. That's the
14 point of waiting until this afternoon. So I will leave it with
15 you this way. We're going to reconvene at two o'clock so that
16 I can take care of all the witnesses who are here and they
17 don't have to come back again for another day for court. And
18 then as to Ms. Fodor, we can take that up separately. My
19 preference would be to go ahead and take care of her today, but
20 I'm going to leave that to you, Mr. Widenhouse.

21 My -- my suggestion to you would also be that we
22 consider -- before we talk about reconvening for Ms. Fodor, we
23 consider what testimony that she's going to present that she
24 needs to present here that wouldn't be subject to objection or
25 that would be necessary for the hearing based on the remand

1 that I've got before me. So I think there may be some issues
2 in terms of whether we need to reconvene to bring her back
3 here.

4 I'm also going to suggest to you whether you call her first
5 or call the other witnesses first would not necessarily be an
6 issue for the Court --

7 MR. WIDENHOUSE: I understand.

8 THE COURT: -- given that, you know, I'm going to be
9 able to weigh each of those things.

10 I also would entertain or ask whether you're intending to
11 ask the witnesses be excluded in any event while we proceed.
12 Is that a request then from the other side?

13 MR. BABB: That might be -- well, I don't know his
14 witnesses for sure.

15 Which four witnesses are you calling or intend to call?

16 MR. WIDENHOUSE: Right now I intend to call Hollie
17 Jordan and Leah Weddington and Ardith Peacock and Ms. Fodor.

18 MR. BABB: Since three of the witnesses are jurors, it
19 might be good to have them sequestered during the hearing.

20 THE COURT: So I'll ask the clerk to have that set up
21 for when we come back at two o'clock this afternoon as well.

22 So have I given you enough, Mr. Widenhouse, so you can make
23 some determination on how you want to proceed at two o'clock?
24 But I'm not going to hear anything substantively or make any
25 decisions until we're back and have Mr. Barnes here.

1 MR. WIDENHOUSE: Yes.

2 THE COURT: All right. I'm going to give you a minute
3 if you want to check with the folks out there and -- so they
4 understand we're going to go ahead and proceed this afternoon
5 at two o'clock. Any issues with anybody who is here?

6 Mr. Widenhouse, I'll let you --

7 MR. WIDENHOUSE: No.

8 THE COURT: All right. What I'm going to do is let
9 everybody go. So you're welcome to stay in the courthouse if
10 you want to do that, but you're free to go and just return back
11 here at two o'clock.

12 Yes, sir.

13 MR. WIDENHOUSE: Could I ask procedurally --

14 THE COURT: Yes.

15 MR. WIDENHOUSE: -- are you inclined to allow us to do
16 post-hearing briefing?

17 THE COURT: I will allow you to do post-hearing
18 briefing and so my inclination would be -- I don't necessarily
19 need to hear you argue -- you're welcome if there's something
20 you want to argue today even at the conclusion of the hearing,
21 but I don't necessarily need that. I will let you do
22 post-hearing briefing. I think that would probably be most
23 helpful and we can do that after you have a copy of the -- have
24 a chance to have a copy of the transcript.

25 MR. WIDENHOUSE: Thank you.

1 THE COURT: So to the extent that affects how you
2 choose to proceed -- I don't know that it will.

3 MR. WIDENHOUSE: I don't either.

4 THE COURT: So I'll let you make some determinations
5 as to what your intent on that would be, understanding what my
6 preference would be, but certainly trying to give you the
7 leeway that you need in order to present what it is that you
8 want to present.

9 MR. WIDENHOUSE: All right.

10 THE COURT: All right. We'll go ahead and recess this
11 case. We'll be back in at two o'clock this afternoon.

12 (The morning proceedings concluded at 11:28 a.m.)

13 (Court reconvened at 2:15 p.m. with all parties present.)

14 THE COURT: I'm going to ask the Clerk to call the
15 case on the calendar this afternoon.

16 THE CLERK: The Court calls Barnes versus Branker,
17 08CV271.

18 THE COURT: All right. This action is before the
19 Court on remand from the Court of Appeals for the Fourth
20 Circuit for an evidentiary hearing to determine whether the
21 state court's failure to apply the rule of presumption and its
22 failure to investigate Mr. Barnes' allegations in a hearing had
23 a substantial and injurious effect or influence on the jury's
24 verdict. Now, that would include a hearing as to the nature
25 and circumstances of any extraneous communication; and, in

1 addition, as noted by the Fourth Circuit, to be entitled to
2 habeas relief, Mr. Barnes will need to affirmatively prove
3 actual prejudice by demonstrating that the jury's verdict was
4 tainted by the extraneous communication.

5 So this matter has been referred to me to conduct a hearing
6 about proposed findings of fact. The Court issued a writ in
7 this case on December 7th for the hearing. The case was called
8 this morning, but Mr. Barnes was not present because the State
9 had not received the writ. He is here now and I indicated this
10 morning it was my preference to proceed with as much as we
11 could cover this afternoon so we would not need to call the
12 witnesses back for another day.

13 It is my understanding that only one witness may have a
14 potential conflict and that's Ms. Fodor. So I've indicated my
15 preference to present all of the witnesses today, but if that's
16 not possible, we can reconvene this hearing at another time in
17 order to call Ms. Fodor separately. If we would need to do
18 that, I would intend to reconvene as soon as possible and no
19 later than early March, but I would wait to address any issues
20 as to her testimony when she's ready to testify. So to be
21 clear, I'm not at this point addressing any substance as to
22 what Ms. Fodor might be intending to present.

23 I have also indicated that I will allow post-hearing
24 briefing after you have a copy of the transcript of the
25 hearing; and in addition, to the extent the record in this case

1 includes information, all that's part of the record; and so
2 I'll let you reserve the right to tell me as part of the
3 post-hearing briefing what in the record you think should be
4 considered.

5 So with that I'm going to ask you how you intend to proceed
6 at this point and include an overview of who you intend to call
7 as witnesses just to give me some idea of where we are at this
8 point this afternoon.

9 Yes, sir, Mr. Widenhouse.

10 MR. WIDENHOUSE: Thank you, Your Honor. Given the
11 Court's preference and after some extensive discussions over
12 lunch, we're going to call Ms. Fodor first --

13 THE COURT: All right.

14 MR. WIDENHOUSE: - knowing that she needs to be out of
15 here at 3:30.

16 THE COURT: All right.

17 MR. WIDENHOUSE: Hopefully we can accomplish that.
18 And then after that we would call several of the jurors who are
19 here and sequestered.

20 THE COURT: All right. And they are sequestered now;
21 is that correct?

22 MR. WIDENHOUSE: Yes.

23 THE COURT: So I have here the individuals that you
24 intend to call would be first Ms. Fodor. And who else do you
25 have then?

1 MR. WIDENHOUSE: We have Hollie Jordan.

2 THE COURT: Hollie Jordan. And she is sequestered
3 right now; is that correct?

4 MR. WIDENHOUSE: Correct.

5 THE COURT: Okay.

6 MR. WIDENHOUSE: Ardith Peacock.

7 THE COURT: All right.

8 MR. WIDENHOUSE: And Leah Weddington. There are a
9 couple of other possible witnesses I don't really anticipate
10 calling, but they're sequestered as well.

11 THE COURT: So you have the option that way.

12 MR. WIDENHOUSE: Right.

13 THE COURT: All right. And then it's Mr. Babb; is
14 that correct?

15 MR. BABB: Yes, ma'am, Your Honor.

16 THE COURT: And any witnesses that you intend to
17 present?

18 MR. BABB: No, ma'am.

19 THE COURT: Anything else as far as how we proceed
20 this afternoon?

21 MR. BABB: No, ma'am. I think the Court has addressed
22 my concerns. We can talk about Ms. Fodor's testimony as it
23 comes up.

24 THE COURT: All right. Mr. Widenhouse, anything we
25 need to take up before you call your first witness?

1 MR. WIDENHOUSE: I hope not.

2 THE COURT: All right. You may proceed then.

3 MR. WIDENHOUSE: We call Janine Fodor.

4 **JANINE FODOR, PETITIONER'S WITNESS, SWORN**

5 **DIRECT EXAMINATION**

6 **BY MR. WIDENHOUSE:**

7 THE COURT: Yes, sir.

8 Q. Would you state your full name for the record and tell the
9 Court where you live?

10 A. My name is Janine Crawley Fodor. I live in Allegany, New
11 York.

12 Q. And where do you work currently?

13 A. I have kind of two and a half jobs. I work part-time at a
14 law firm, Wagner & Hart law firm, as an attorney. I work as
15 in-house counsel for a group called the Iroquois Group and I am
16 an adjunct professor at St. Bonaventure University.

17 Q. And can you tell us about your postsecondary education?

18 A. Yes. I attended the University of Michigan as an
19 undergraduate. I completed a degree, a BA, in 1983. I got a
20 master's degree from Cambridge University in England in 1985
21 and I graduated from Yale Law School in 1990.

22 Q. And are you licensed to practice law?

23 A. Yes, I am.

24 Q. In which states are you licensed in?

25 A. Right now my active license is in New York. I had a

1 license in North Carolina, but it's inactive at the moment.

2 Q. All right. Can you tell the Court where you've worked
3 since you passed the bar and began practicing law?

4 A. Yes. When I completed law school, I worked for about a
5 year or 15 months at the Institute of Government at UNC. Then
6 I accepted a position at the Appellate Defender's office for
7 the State of North Carolina roughly the end of 1991 and I was
8 there until the end of '98 or early '99. I then went to a
9 small law firm in Raleigh, Unti Lumsden & Smith; and in July of
10 2001, my husband took a job at St. Bonaventure University in
11 Upstate New York; and so we left the area. I can go on, if you
12 like.

13 Q. No, that's fine. And just for the record, we've known each
14 other for a while?

15 A. Yes. You and I were at the Appellate Defender's office for
16 a couple years in the early '90s, and your wife also works
17 there. She and I are friends, so we stayed in contact over the
18 years.

19 Q. So if I slip up and call you Janine, you won't get too mad
20 at me.

21 A. No.

22 Q. How did you come to represent William Barnes?

23 A. In the mid-'90s, I was working as a state appellate
24 defender and I was assigned Mr. Barnes' case by the Appellate
25 Defender. He would assign us cases. I was assigned his case

1 on direct appeal and so I represented him on direct appeal '95
2 through -- I can't remember when the decision came down. In
3 '96 or early '97.

4 Q. And can you tell the Court what approach you take when
5 you're assigned to do an appeal? What would be the kinds of
6 things that you would do with regard to the case?

7 A. Well, the first thing you do is compile the records, all
8 the documents, the most important of which would be the trial
9 transcript; and then I would read the trial transcript; and I
10 would write down, you know, the errors -- the assignment of
11 errors we were going to include in the record based on my
12 review of the transcript and any other relevant documents that
13 were in the record. That's kind of Stage 1. And then Stage 2
14 would be to write a brief based on the assignment of errors
15 that were in the record.

16 Q. And do you recall reading the transcripts in this case?

17 A. I do. I recall that they were voluminous.

18 Q. And did anything in particular stand out to you when you
19 read the transcript?

20 A. Well, probably the most striking error that I noticed in
21 the transcript was that there was an allegation of juror
22 misconduct during the sentencing phase. Lawyers came to the
23 judge at the very end, I think the jury was out, came and
24 suggested that a juror had contacted a pastor or a clergyman
25 during the deliberations.

1 Q. And why did that catch your attention?

2 A. Well, jurors are not supposed to have the -- be influenced
3 by anything outside of what happens in the courtroom, the law
4 and the evidence as it's presented in a trial.

5 Q. And did discovering that -- that information in the
6 transcript cause you to do anything in particular with regard
7 to the remaining parts of the transcript?

8 A. Well, yeah. I think that you always read the transcript
9 with an eye to seeing whether or not there's information that's
10 going to support the prejudice of the -- of the possible error
11 that you see.

12 Q. And did you find parts of the transcripts that you thought
13 supported your position?

14 MR. BABB: Objection, Your Honor. The transcript
15 speaks for itself. Ms. Fodor has testified she came in the
16 case in post -- excuse me -- post-trial the allegation is of a
17 third-party contact that took place during sentencing
18 deliberations. Her analysis and opinion of the transcript is
19 not relevant. The transcript speaks for itself for the Court
20 to evaluate.

21 MR. WIDENHOUSE: Your Honor --

22 THE COURT: I'll let you tell me where you're going
23 with this, Mr. Widenhouse, but if you're just look for
24 arguments you want to present, certainly I'll let you present
25 those in the post-hearing briefing. I'm not sure that I'm

1 understanding where you're going with the testimony.

2 MR. WIDENHOUSE: Well, as I understand, the directive
3 from the Fourth Circuit is I've got to show at some point
4 prejudice from the external communications in this case and I
5 think Ms. Fodor's analysis of pieces of the transcript help me
6 to make that position at the end of this hearing.

7 THE COURT: Well, isn't that just attempting to use
8 her as a legal expert in some way, as opposed to providing
9 facts to the Court?

10 MR. WIDENHOUSE: I think I'm using her to highlight
11 what I think is pertinent information from the transcript that
12 provides context for the Court as it goes back and reviews
13 whether this external communication was prejudicial.

14 THE COURT: Can't you do that in the briefing? Why do
15 you need Ms. Fodor to do that?

16 MR. WIDENHOUSE: Because I think she provides context
17 that is beyond the written word that I might put down in a
18 brief.

19 THE COURT: And how does she provide context?

20 MR. WIDENHOUSE: Because she saw the significance of
21 these things when she was working on the appeal.

22 THE COURT: Well, I'm not sure if I understand -- if
23 she were the trial counsel, I think there's context there in
24 terms of what was happening at trial. I'm not sure if I
25 understand how she is providing factual context from reviewing

1 the transcript that would be any different than what you would
2 be providing me in briefing as to what would be important to
3 look at. Do you understand the question?

4 MR. WIDENHOUSE: I do and I've given you the best
5 answer I can give you.

6 THE COURT: All right. Mr. Babb, what's the State's
7 position?

8 MR. BABB: Your Honor, we agree. The witness
9 providing analysis is not relevant. That's for the briefing or
10 oral argument. The transcript speaks for itself. The entire
11 transcript is already before this Court. The Court will be
12 ultimately the one that reviews the transcript and the --
13 assesses the significance of each piece of it or any piece of
14 it. If a certain part needs to be highlighted, I'm sure that
15 we'll both highlight the transcript that we want to highlight
16 for you in our post-hearing brief. But from the testimony, as
17 you said, Your Honor, it's like an expert witness. That's
18 really not applicable here. And she came in, by Ms. Fodor's
19 own testimony, after the trial. It's not relevant. There's
20 no -- I don't think there's a proper purpose for it and it's
21 not necessary for this Court.

22 THE COURT: Anything else you wanted to add on that,
23 Mr. Widenhouse?

24 MR. WIDENHOUSE: Well, it's as relevant as it could
25 possibly be. It tends to make a material fact in issue more or

1 less likely than it would be without the evidence, so it's
2 certainly relevant for the Court.

3 THE COURT: How does her opinion make it more
4 relevant?

5 MR. WIDENHOUSE: I'm not asking her opinion. I'm
6 asking her to highlight portions of the trial transcript that I
7 want the Court to consider at the end of the hearing and I
8 think her identification of those portions of the transcript is
9 relevant to me showing the prejudice from the external
10 communication. I'm not going to ask her her opinion about
11 whether this error was prejudicial. I agree that would be
12 expert opinion and probably not germane or admissible. I think
13 having her identify what she saw as important and some short
14 explanation of why it's germane to what the Court is about in
15 this hearing.

16 MR. BABB: May I respond, Your Honor?

17 THE COURT: You may.

18 This is where I'm inclined to go with this. It sounds to
19 me like additional argument that counsel might make about the
20 transcript and the essential weight that -- or interpretation
21 that I might make of the transcript. I don't think that that
22 would be within the scope of witness testimony. On the other
23 hand, I don't know that it hurts anything; and I'm inclined not
24 to preclude whatever it is you might want to present,
25 understanding that if it's just argument as to what you think

1 is important then Mr. Babb is going to have the opportunity to
2 respond to all of that in -- certainly in briefing.

3 MR. WIDENHOUSE: I understand.

4 THE COURT: Mr. Babb.

5 MR. BABB: Your Honor, you've already ruled, but I
6 would like to say on the record counsel has already asked her
7 opinion: What jumped out at you? Why is that important? The
8 whole sequence of examination is opinion of what's important
9 and when you say "what do you want to highlight," you're
10 highlighting what is important, what should be determined of --
11 it's clearly asking for her opinion, Your Honor.

12 THE COURT: Well, it -- so what I would indicate,
13 Mr. Babb, I'm not going to accept it as opinion testimony, but
14 what I will do is accept it -- what I understand Mr. Widenhouse
15 offering is essentially another version of an argument he might
16 make with respect to what he wants to highlight and so I'm
17 going to let him present it, although I'm going to take it more
18 as attorney argument than as witness testimony.

19 Unless you can present, Mr. Widenhouse, some basis why you
20 think that this would be some factual testimony of a witness,
21 as opposed to argument of counsel.

22 MR. WIDENHOUSE: I'm comfortable with you letting me
23 present it under those conditions you just described.

24 MR. BABB: I'm not comfortable with the attorney
25 argument from the witness stand, but Your Honor has ruled.

1 We'll go from there.

2 THE COURT: All right. I just ask you to make it
3 limited to where we are and understanding the time frames we're
4 under as well. I don't know that there's much need to belabor
5 to the extent I'm going to let you file a post-hearing brief to
6 highlight any of those things you want to highlight. It's
7 certainly -- I don't see any reason why you couldn't consult
8 with Ms. Fodor about whatever it is you want to present in your
9 post-hearing briefing as well.

10 Is there any reason why you couldn't do that,
11 Mr. Widenhouse?

12 MR. WIDENHOUSE: No.

13 THE COURT: All right. All right. So I'll let you
14 present what it is that you want to present and then I'll make
15 a determination the extent to which I'm going to consider it.

16 So, Mr. Babb, for your purposes, I am not yet making a
17 determination whether it's admissible, but I'm going to let him
18 offer it, and then I will make a determination whether and to
19 what extent I consider it.

20 MR. BABB: Thank you, Your Honor. Does that mean I
21 have, like, a standing objection?

22 THE COURT: You can keep a standing objection to
23 Ms. Fodor on that basis. If there's some other basis that you
24 want to raise an objection to what Ms. Fodor is testifying,
25 then I need you to let me know that, but you can have a

1 standing objection to that and just on the basis of her
2 presenting testimony that's really argument of counsel.

3 MR. BABB: Thank you, Your Honor.

4 THE COURT: All right. Mr. Widenhouse.

5 MR. WIDENHOUSE: Thank you, Your Honor.

6 THE COURT: All right.

7 Q. (By Mr. Widenhouse) To try and move this along, did you
8 come to read the closing arguments in the case?

9 A. Yes, I did.

10 Q. In the context of having learned that a juror may have
11 talked to her pastor, did you find anything of interest in the
12 closing arguments?

13 A. Yes, I did.

14 Q. And what was that?

15 A. Well, there -- there were mentions of the Bible in both the
16 prosecutor's closing argument and in the closing argument of
17 one of the defense attorneys, Mr. Causey; and in particular,
18 Mr. Causey made a fairly extensive argument that God's law
19 would prohibit the jurors from deciding to impose the death
20 penalty.

21 Q. Mr. Causey, which defendant did he represent?

22 A. Mr. Chambers.

23 Q. So he didn't represent Mr. Barnes?

24 A. No, he was not one of Mr. Barnes' attorneys.

25 Q. When you were reading the transcripts, are the religious

1 affiliations of the jurors reflected in the transcript?

2 A. Yes, the jurors were questioned during the voir dire about
3 their religious affiliations.

4 MR. WIDENHOUSE: Your Honor, may I approach the
5 witness --

6 THE COURT: What do you have?

7 MR. WIDENHOUSE: -- to have her examine Defendant's
8 Exhibit 1.

9 THE COURT: Has that been marked?

10 MR. WIDENHOUSE: Yes.

11 THE COURT: All right. Do you have a copy for the
12 Court?

13 MR. WIDENHOUSE: I have a copy for you. I do, Your
14 Honor.

15 THE COURT: All right.

16 (Notebook handed to the Court.)

17 MR. WIDENHOUSE: And I've given copies to the State as
18 well.

19 THE COURT: And, Mr. Widenhouse, I'm happy to hear
20 argument from you as to highlighting the parts of the
21 transcript that you want to highlight to the Court. I'm -- I
22 am still not sure why we need to do this through a witness.

23 MR. WIDENHOUSE: Let me try two questions.

24 THE COURT: All right.

25 Q. Are you familiar with this notebook?

1 A. Yes, I am.

2 Q. And does it contain various parts of the transcript that
3 might be pertinent to the question about a juror having
4 communicated with her pastor during the deliberations?

5 A. Yes.

6 MR. WIDENHOUSE: Your Honor, with the Court's
7 directive, I will move the notebook into evidence and move on
8 to something else.

9 THE COURT: Is this just information that's already
10 part of the record?

11 MR. WIDENHOUSE: It's all transcripts from the trial,
12 yes.

13 THE COURT: All right. Any objection to that,
14 Mr. Babb?

15 MR. BABB: I don't see the need for having to move it
16 into evidence. It's already part of the record. The language
17 on this cover sheet, that's fine, but it's already before the
18 Court. I don't see a need to move it in.

19 THE COURT: So I'm going to accept it as a part of
20 counsel's argument in terms of the -- parts of the record that
21 you would highlight for the Court then.

22 MR. WIDENHOUSE: That's fine. Thank you, Your Honor.

23 MR. BABB: Thank you, Your Honor.

24 THE COURT: All right.

25 Q. Did you continue to represent Mr. Barnes after his appeal?

1 A. I did. I was actually appointed to -- as one of his state
2 post-conviction attorneys after I left the Appellate Defender's
3 office.

4 Q. And did the -- did any of the information in the trial
5 transcript provide a basis for further investigation in
6 post-conviction?

7 A. Yes. We investigated the potential extrinsic contact from
8 the jurors in the post-conviction investigation.

9 Q. And as post-conviction counsel, were you familiar with the
10 gist of how the post-conviction investigation was conducted?

11 A. Yes, I was familiar with it, yes.

12 Q. And can you tell the Court briefly about the jury
13 investigation in the case?

14 A. Yeah. Actually, the juror -- the jury investigation --
15 there was an investigation that was conducted before the
16 post-conviction stage, 1995, which was when the case was on
17 direct appeal. My recollection, and it's a vague recollection,
18 is that one of the trial attorneys called The Center for Death
19 Penalty Litigation because of that risk of extrinsic contact,
20 and an attorney for The Center for Death Penalty Litigation and
21 a student went out and conducted some juror interviews in 1995.

22 I, myself, went along on one of those trips with an
23 investigator from The Center for Death Penalty Litigation in
24 1995; and then in 2000 when the case was in post-conviction,
25 got an investigator appointed to the case and he went out and

1 reinterviewed some of the jurors; and then after that you took
2 over so -- but, yes, there was a jury investigation at the
3 post-conviction stage and also some work done while the direct
4 appeal was still pending.

5 Q. And without going into anything that any particular juror
6 might have said to you or anybody else, generally speaking,
7 what kinds of questions would the investigators or you have
8 posed to jurors in this case?

9 A. Well, a variety of questions.

10 MR. BABB: Your Honor, objection, unless they're the
11 questions she posed.

12 THE COURT: Do you want to clarify, Mr. Widenhouse?

13 MR. WIDENHOUSE: Yes.

14 Q. Why don't you tell us what questions you posed when you did
15 your interviews in this case.

16 A. It's been 20 years. I can't remember precisely, but I
17 asked how the jurors felt about the attorneys in the case. I
18 asked in this particular case -- very concerned that three
19 different defendants were tried together, so I asked jurors
20 about their ability to kind of parse the evidence and to only
21 consider the evidence against Mr. Barnes against Mr. Barnes and
22 not confuse the evidence that had been admitted against the
23 other defendants; and then, of course, we asked about whether
24 or not anybody remembered a juror contacting somebody or
25 bringing a Bible into the jury room, which had been the

1 allegations that had been brought forward by the attorneys
2 during the sentencing phase.

3 Q. And why was it important in your mind to ask those
4 questions?

5 A. About the jury contact?

6 Q. Yes.

7 A. Well, again, jurors are instructed and the law requires
8 that they make their decision based on what happens in the
9 courtroom, on the evidence that's presented and the
10 instructions that the judge gives them about applying the law
11 to the evidence; and for a juror to go out and communicate with
12 somebody extrinsic and bring in evidence -- information that
13 was not presented as evidence at the trial that might influence
14 a juror's verdict, that's -- it's misconduct and it can -- it
15 can taint the case. It can taint the outcome of the case.

16 Q. Do you recall who you talked to that was a juror in this
17 case?

18 A. I talked to Hollie Jordan. I think we talked to somebody
19 else, but I don't remember that juror's name.

20 Q. All right. And what did Hollie Jordan tell you about the
21 Bible reading and talking to -- about a juror having talked to
22 her pastor?

23 MR. BABB: Objection.

24 THE COURT: It's hearsay. What's your response to
25 that?

1 MR. WIDENHOUSE: I'd like to have it on the record as
2 an offer of proof in case I need it, understanding that if it's
3 hearsay it's stricken at the end.

4 THE COURT: And why would it not be hearsay?

5 MR. WIDENHOUSE: Because it might be offered for
6 something other than the truth of the matter asserted in
7 clarifying potential testimony from Hollie Jordan and I'm not
8 going to have Ms. Fodor here when Hollie Jordan finishes.

9 THE COURT: I'm still trying to understand how it
10 would not be hearsay.

11 MR. WIDENHOUSE: Because it would not be offered for
12 the truth of the matter asserted if it's coming in to clarify
13 something in Hollie Jordan's testimony.

14 THE COURT: How is it not hearsay if it's coming in to
15 clarify? Are you intending to use it to impeach?

16 MR. WIDENHOUSE: No.

17 THE COURT: Then -- I'm going to let you make an
18 argument to me, if you have an argument you want to make, but
19 I'm not sure I'm following why or what potential exception it
20 might fall into.

21 MR. WIDENHOUSE: Your Honor, I'm trying to make an
22 offer of proof in case I need it because the witness may not be
23 here later; and if the Court's ruling is I can't make that
24 offer of proof at this point, I understand.

25 THE COURT: All right. Mr. Babb, any objection to him

1 making an offer of proof, understanding that I've sustained
2 your objection? But here's my concern. I don't want to have
3 to reconvene this if we don't have to; and so if he wants to
4 make an offer of proof, understanding I have otherwise
5 sustained the objection, is there any basis why I shouldn't let
6 him do that?

7 MR. BABB: Your Honor, I don't believe so. If I could
8 hear the question again that opposing counsel asked and if --
9 in terms of the hearsay objection, should you sustain that,
10 then I would not object to an offer of proof for the same
11 reason the Court just identified. If we jumped in that answer
12 over to 606 territory, then I would oppose an offer of proof,
13 but we haven't got there yet. I just...

14 THE COURT: All right. So if you want to proceed on
15 that basis to make your offer of proof, then you need to
16 restate your question or repeat your question.

17 MR. WIDENHOUSE: All right.

18 Q. Did you speak to Hollie Jordan in this case?

19 A. Yes.

20 Q. And did you talk to her about the information you had
21 regarding a juror having talked to a pastor during the
22 deliberations?

23 A. Yes.

24 Q. And what did she tell you about that?

25 A. She said that she was the juror. She said that there was

1 discussion in the jury room about whether or not the Bible
2 permitted --

3 MR. BABB: Objection, 606.

4 THE COURT: I think that's a separate concern.

5 MR. WIDENHOUSE: It's a separate concern, but doesn't
6 violate 606 because I haven't inquired as to any juror's belief
7 or impression or mental process. We're only talking -- she's
8 only mentioned that it was discussed in the jury room.

9 THE COURT: All right. As to that -- and I understand
10 we're going to have some argument on that. Do you want to
11 raise that now, Mr. Babb, because -- and here is where I'm
12 going with that. If I'm just letting this in as an offer of
13 proof, I'm going to let you preserve your objections on that
14 ground as well; and then we can take up, if we need to, the
15 specifics of any objection you want to make as to 606.

16 MR. BABB: I'm afraid I --

17 THE COURT: All right.

18 MR. BABB: Yes, I'm afraid so, Your Honor, because the
19 nature of what was asked about was the Bible, which is -- the
20 Fourth Circuit has characterized as internal and not external
21 in the *Fullwood* case. So if we were talking purely about
22 whether -- you've already sustained the objection to hearsay.
23 If there's a question, if the answer is "I told the other
24 jurors I talked to my pastor," well, there still may be an
25 objection from the Respondent because that's going through her;

1 and if you're talking about her reading Bible verses, which has
2 been identified, like I say, in the *Fullwood* case as being
3 internal and not external, but if it's -- but I would concede
4 that if the argument is just a juror saying that "I spoke with
5 someone and I told the other jurors I did that," I will concede
6 my objection is less strong on that point. It's just when we
7 start mixing the Bible in because we don't know where her
8 internal process takes over as opposed to what the allegations
9 are of external contact.

10 THE COURT: All right. I -- it sounds like you've got
11 a lot of different issues going on there, fair enough?

12 MR. BABB: Yes, ma'am.

13 THE COURT: All right. It also seems to me that there
14 are some areas that are clearly off limits, some issues that
15 are specifically within what the Fourth Circuit has sent it
16 back to me to make a determination on. Whether you agree that
17 should be within 606 or not, it's what it's here for.
18 Potentially some gray areas.

19 MR. BABB: Yes, ma'am.

20 THE COURT: Along the same lines where I don't want to
21 have to reconvene this, what I would intend to do is, to the
22 extent we're in gray areas, leave it open for you all to brief
23 with me what should be allowed and what I should consider, what
24 I can consider and what I can't consider, but not go so far as
25 to preclude testimony that is actually part of the reason why

1 it was sent back here for us to determine. Do you understand?

2 MR. BABB: Yes, Your Honor, and -- and I agree with
3 that approach insofar as I will -- there will be times that I
4 may be making objections where I oppose an offer of proof
5 because of the protection of the jury process, but realizing
6 there is, like I say, testimony that unless it's said is not
7 necessarily part of that process. So, yes, ma'am, I will -- I
8 understand what the Court is directing and I will try to oppose
9 offer of proofs only when I need to. Is that fair enough?

10 THE COURT: All right. So at this point then I'm
11 going to let Mr. Widenhouse continue with two objections --
12 continuing objections as to Ms. Fodor, the first objection
13 being that this is really more summary evidence or argument
14 that I would hear from counsel and I'm just going to let him
15 present that through her as someone with knowledge of the case.

16 The second continuing objection with respect to the Rule
17 606 issue, to the extent it's subject to still further
18 discussion or objection among counsel, I'm going to recognize
19 it as a continuing objection and I'll let you address that
20 further in the post-hearing briefing in terms of what is
21 subject to being considered and what should not be considered
22 under Rule 606.

23 If we reach a separate point where you object to the offer
24 of proof, then I'll hear from you on that, although I really do
25 want to be as careful as we can to get the testimony that we

1 need so that we don't have to ask these folks to come back
2 again for another hearing.

3 MR. BABB: Yes, ma'am. And also is there a continuing
4 objection on the hearsay grounds from what Ms. Jordan told her?

5 THE COURT: Yes, a continuing objection on the hearsay
6 grounds with respect to what Ms. Jordan told her, yes.

7 MR. BABB: Thank you, Your Honor.

8 THE COURT: Mr. Widenhouse, is it clear enough for you
9 at this point to the extent there are issues that remain
10 unresolved that will need to be addressed?

11 MR. WIDENHOUSE: To the extent anything is clear with
12 me at this point in the day, Your Honor, yes.

13 THE COURT: All right.

14 Q. (By Mr. Widenhouse) What did Ms. Jordan tell you -- what
15 did you ask Ms. Jordan about the -- a juror having contacted
16 her pastor or his pastor?

17 A. Actually, I believe by the time I talked to Ms. Jordan I
18 was aware that other jurors had suggested it was her and so I
19 asked her whether she contacted her pastor or called any
20 clergyman and she indicated that she did.

21 Q. Did she tell you when that happened?

22 A. It was during the deliberations and during an evening
23 recess.

24 Q. Did she tell you what her pastor -- did she tell you who
25 her pastor was?

1 A. She did, but I can't remember.

2 Q. All right. Did she tell you what her pastor told her?

3 A. Her pastor, at her request, gave her Bible passages that he
4 thought showed that it was appropriate for a Christian to
5 impose a death penalty.

6 Q. So it would be fair to say that what Pastor Lomax -- what
7 Hollie Jordan told you Pastor Lomax told her was something that
8 she could use to support the death penalty in this case?

9 A. That's correct.

10 Q. Did you ask Ms. Jordan whether she relayed that information
11 to her fellow jurors during the deliberations?

12 A. Yes. And she indicated that she did.

13 Q. Did she tell you what she said in the jury room?

14 MR. BABB: Objection, Your Honor.

15 THE COURT: All right. Noting your continuing
16 objections. I think -- well, we can talk about this briefly,
17 Mr. Babb. I think that what she said in the jury room is at
18 least potentially within the scope of what the Fourth Circuit
19 has said we look at, but if you want to object to that or raise
20 some further issue with that or disagree with that, I'm going
21 to leave that open for you to do in the post-hearing briefing
22 once we have the transcript.

23 MR. BABB: Okay, Your Honor.

24 THE COURT: All right.

25 MR. BABB: Yes, ma'am.

1 A. She told me that she read those passages to the jurors, the
2 passages that her pastor had referred her to.

3 Q. Did she recall which passages he told her about?

4 A. My recollection is she did identify passages, but I can't
5 today remember what she said to me.

6 Q. Was it more than one passage?

7 A. I'm sorry, but I can't remember.

8 MR. WIDENHOUSE: All right. Your Honor, no further
9 questions.

10 THE COURT: All right. Any questions?

11 **CROSS-EXAMINATION**

12 **BY MR. BABB:**

13 Q. Ma'am, you say it's during deliberations. Was it during
14 guilt/innocence or sentencing?

15 A. Sentencing.

16 MR. BABB: Nothing else, Your Honor.

17 THE COURT: Anything else, Mr. Widenhouse?

18 MR. WIDENHOUSE: No, Your Honor.

19 THE COURT: All right. You can step down. Thank you.

20 (The witness left the stand.)

21 MR. WIDENHOUSE: I assume this one gets left with the
22 clerk that gets marked.

23 THE COURT: We can do that. It's marked and I'm going
24 to accept it as part of -- and you can leave it with the
25 clerk -- part of your information that you're submitting for

1 the Court's review, although to the extent -- it is just
2 reprints from the record; is that correct?

3 MR. WIDENHOUSE: That's correct.

4 THE COURT: So it's just highlighting particular parts
5 of the record, so it's not a separate piece of evidence,
6 correct?

7 MR. WIDENHOUSE: It's really an aid to the Court in
8 getting to the specific places without having to look
9 throughout a 10,000 page transcript.

10 THE COURT: So I'll accept it for that purpose, as a
11 demonstrative just for the Court's benefit as to items that are
12 already part of the record.

13 MR. WIDENHOUSE: Yes.

14 THE COURT: Are you asking that Ms. Fodor be released
15 then?

16 MR. WIDENHOUSE: Yes.

17 THE COURT: Any objection to that, Mr. Babb?

18 MR. BABB: No, Your Honor.

19 THE COURT: All right. You may leave. Thank you for
20 coming.

21 All right. Call your next witness, Mr. Widenhouse.

22 MR. WIDENHOUSE: We call Hollie Jordan.

23 THE COURT: Do you want to go get her then or do you
24 need the --

25 MR. WIDENHOUSE: I'll be glad to go get her.

1 THE COURT: All right.

2 (Mr. Widenhouse left the courtroom and subsequently
3 returned with the next witness.)

4 THE COURT: All right. If you could just be sworn,
5 please.

6 **HOLLIE JORDAN, PETITIONER'S WITNESS, SWORN**

7 **DIRECT EXAMINATION**

8 **BY MR. WIDENHOUSE:**

9 THE COURT: If you would just answer Mr. Widenhouse's
10 questions for us.

11 Q. Can you state your name and tell us where you live?

12 A. Hollie Ann Jordan. I'm staying right now at 2919 Heglar
13 Road in Concord.

14 Q. You and I have met before, haven't we?

15 A. Yes.

16 Q. And I think that was at your house?

17 A. Yes.

18 Q. And we chatted for a while?

19 A. Uh-huh.

20 Q. Do you recall the trial of William Barnes and Frank
21 Chambers and Kenneth Blakney?

22 A. Yes.

23 Q. And how were you involved in it?

24 A. I was a juror.

25 Q. All right. At the time of the trial, were you attending a

1 church?

2 A. Yes, sir.

3 Q. And what church was that?

4 A. Old Country Baptist Church.

5 Q. Old Country Baptist Church?

6 A. Yes, sir.

7 Q. And where was that? Where is that located?

8 A. Salisbury on Faith Road.

9 Q. All right. And at that time, how often did you attend
10 church?

11 A. Every time the doors were open. My husband --

12 Q. Can you tell us sort of how often that would be on a given
13 week?

14 A. Well, on Sunday morning, Sunday night, Wednesdays. My
15 husband and I got married there.

16 Q. So you're a regular churchgoer?

17 A. Yes, sir.

18 Q. And you went with your family?

19 A. Yes, we took our two kids.

20 Q. And attended prayer meetings I think you said during the
21 week, prayer meeting on Wednesday night?

22 A. Yes.

23 Q. All right. And how important in your mind was churchgoing?

24 A. Yes.

25 Q. How important was it?

1 A. Very important.

2 Q. Okay.

3 A. Played a big role in my life.

4 Q. All right. And do you remember who your pastor was at the
5 time?

6 A. Sure. Tom Lomax.

7 Q. And is he still alive?

8 A. No.

9 Q. Do you remember when he died?

10 A. No, I don't.

11 Q. How well would you say you knew him when you attended his
12 church?

13 A. Very well. He came to all our family functions and
14 gatherings.

15 Q. Did he marry you and your husband?

16 A. Yes.

17 Q. Did you like him?

18 A. Yes.

19 Q. Would you consider him your spiritual guide or leader at
20 the time?

21 A. Yes.

22 Q. All right. Did you trust him?

23 A. Yes.

24 Q. Would you from time to time seek his counsel or advice
25 about important things in your life?

1 A. Yes.

2 Q. Now, you told us you served as a juror in this trial. Do
3 you remember the closing arguments of the lawyers?

4 A. Yes, I do.

5 Q. Okay. And what, if anything, stood out to you in those
6 closing arguments?

7 MR. BABB: Objection, Your Honor. We're getting into
8 the effect of -- I apologize, Your Honor. That's getting into
9 the effect of anything a trial juror --

10 THE COURT: I'm going to note your objection on that
11 and allow him to proceed. You can address that in the
12 post-hearing briefing.

13 So you can answer the question.

14 THE WITNESS: Thank you.

15 Q. What stood out to you, if anything, in the closing
16 arguments?

17 A. Was Barnes', Blakney's, and Chambers' attorneys at the time
18 said that if they got the death sentence that we would burn in
19 hell. I didn't know the Bible all that well then, and I did go
20 to my pastor with that and asked him if we gave them the death
21 sentence would we burn in hell.

22 Q. And what did he tell you?

23 A. No.

24 Q. All right. And do you recall when you came to contact
25 Pastor Lomax?

1 A. It was during the deliberation.

2 Q. All right. And how did you -- how did you come in contact
3 with him?

4 A. It was after church one night when everybody had left. I
5 asked him if I could talk to him after church.

6 Q. Okay. So you were at a prayer meeting after part of the
7 deliberations and then took the opportunity to speak to him
8 there at the church?

9 A. Yes.

10 Q. Do you recall about how long you talked?

11 A. No, not really. A couple hours probably, an hour.

12 Q. And did you tell him you were on a jury?

13 A. Yes.

14 Q. And did you talk to him -- did you talk to him about --

15 A. I just told him -- the only thing I told him was how
16 horrific the pictures were.

17 Q. So you talked to him about the pictures that were
18 introduced and about the closing argument --

19 A. Right.

20 Q. -- of the lawyer?

21 MR. BABB: Objection, Your Honor, leading the witness.

22 THE COURT: Rephrase.

23 MR. WIDENHOUSE: I'm not even sure what I asked, so
24 maybe I'll automatically rephrase it.

25 Q. When you said you talked to him about the pictures in the

1 case, the photographs, do you remember which pictures they
2 were?

3 A. I just told him that the pictures were horrific. I didn't
4 specify which pictures.

5 Q. Okay. Would it have been the crime scene --

6 A. Yes, the crime scene.

7 Q. The photographs of the crime scene?

8 A. It was the photographs of those, yes.

9 Q. All right. Do you happen to remember where in the church
10 you were when you spoke to him?

11 A. We were outside the church.

12 Q. All right. And was there anybody with you besides you and
13 Pastor Lomax?

14 A. No, no.

15 Q. All right. And I think you said you talked to him for
16 about two hours?

17 A. It was, yeah, roughly an hour or two.

18 Q. All right. And of the -- however long you talked to him,
19 an hour or two, how much of that conversation was about the
20 Barnes/Chambers/Blakney trial?

21 A. Just the few minutes that I asked him would we burn in hell
22 and he said no, we had to live by the laws of the land. He
23 told me some scriptures in the Bible, you know, that explained
24 everything. And just that the photos were horrific. The rest
25 of the time it was about family and, you know, other things

1 like.

2 Q. All right. Do you remember which Bible verses he gave you?

3 A. I have no idea now. I'd have to find that Bible and I
4 don't know where it is.

5 Q. All right. Do you remember how many verses it might
6 have -- it was?

7 A. No, I don't.

8 Q. All right. Did you -- were you seeking his advice or
9 counsel about the case?

10 A. Just the closing argument as far as, like I said, if they
11 got the death sentence for what they did and we sentenced them
12 to death, were we going to die because we're killing them. Do
13 you know what I'm saying?

14 Q. Yes, I think so.

15 A. I was worried about it.

16 Q. So you had concerns about that and went to him?

17 A. Right.

18 Q. Did you feel better after you spoke with him?

19 A. Yes, I did.

20 Q. Were you worried about what to do in the case when you went
21 to talk to Pastor Lomax?

22 A. As far as giving him the death sentence, no. I just -- I
23 knew what I wanted to do. I mean, that was made up in my mind.
24 I just wanted to know if I was going to burn in hell for it.

25 Q. So the -- okay. So the --

1 A. It wouldn't have made any difference either way. If he had
2 said, "Yes, you're going to burn in hell," it wouldn't have
3 changed my mind about how I felt about what he would have
4 gotten.

5 MR. WIDENHOUSE: I think I'm going to strike that
6 under Rule 606.

7 THE COURT: Well, it's the same issue and I'll let you
8 all address that.

9 MR. WIDENHOUSE: Right.

10 THE COURT: That's fine. Just keep answering his
11 questions.

12 Q. Did Pastor Lomax lead you to believe the Bible supported
13 the death penalty?

14 A. No.

15 Q. Did he lead you to believe the Bible didn't support the
16 death penalty?

17 A. No. I mean, we have to live by the laws of the land.
18 That's all he said. So, no, he just told me I wouldn't burn in
19 hell for the decision that we were -- you know, I was about to
20 make.

21 Q. All right. Did -- did you feel better after you spoke to
22 him?

23 A. Yeah.

24 Q. Did he have a prayer for you at the end of the meeting with
25 him?

1 A. Yeah, we prayed.

2 Q. When you went to -- back to court the next day, did the
3 jury continue its deliberations? Were you all still talking
4 about the case when you went back to court?

5 A. If I'm not mistaken, that's the day that we went into
6 deliberations.

7 Q. All right. Okay. And did you talk to your fellow jurors
8 about what Pastor Lomax told you?

9 A. Yeah, that we wouldn't burn in hell.

10 Q. Did you read the Bible verses to them that he suggested to
11 you?

12 A. Yes.

13 Q. Do you think you read all of the verses that he told you
14 about?

15 A. I don't know. I don't remember that it's been so long.

16 Q. Do you think other jurors were paying attention to you when
17 you read the Bible verses?

18 MR. BABB: Objection, Your Honor. That's inside the
19 jury room.

20 A. I don't know.

21 THE COURT: I'm going to allow it as part of the
22 continuing objection.

23 All right. You can answer that.

24 A. I don't know.

25 Q. Do you know how much time you spent telling the jurors

1 about what Pastor Lomax had told you?

2 A. I'm going to say maybe 15 to 30 minutes. I wouldn't say
3 any longer than that.

4 Q. As you sit here today, are you confident you've done your
5 best to tell us the truth?

6 A. The best I remember considering how long it's been.

7 Q. I understand.

8 MR. WIDENHOUSE: Can I have a moment, Your Honor?

9 THE COURT: Yes, sir.

10 (Pause in the proceedings.)

11 Q. Just to make sure I'm clear, do you remember telling me you
12 didn't want to go to hell when all this was happening?

13 MR. BABB: Objection. That's hearsay, what she said
14 to him out of court.

15 MR. WIDENHOUSE: I think I'm clarifying her answer.

16 THE COURT: Are you impeaching?

17 MR. WIDENHOUSE: I think I'm leading.

18 Q. Do you remember -- what was your concern that caused you to
19 go talk to Pastor Lomax after prayer meeting that night?

20 MR. BABB: Objection, Your Honor. That's a concern
21 based on the argument, which would be her internal process.

22 THE COURT: I'm going to let her answer this as part
23 of the continuing objection, noting your continuing objection
24 on that.

25 A. The only thing was as far as burning in hell. That's the

1 only reason I went and talked to him.

2 Q. That concerned you?

3 A. (Nods head.) I would have still made the same decision,
4 though.

5 THE COURT: All right. Anything further,
6 Mr. Widenhouse?

7 MR. WIDENHOUSE: I'm going to move to strike that last
8 comment, but I understand where we are.

9 THE COURT: All right.

10 MR. WIDENHOUSE: No further questions.

11 THE COURT: All right. Mr. Babb, any questions?

12 MR. BABB: May I have one moment?

13 THE COURT: Yes.

14 (Pause in the proceedings.)

15 MR. BABB: No questions.

16 THE COURT: All right. You can step down, ma'am.

17 MR. BABB: Your Honor, may I approach?

18 MR. WIDENHOUSE: I'll help.

19 THE COURT: All right. Yes.

20 (The witness left the stand.)

21 MR. WIDENHOUSE: Your Honor, can Ms. Jordan be
22 released?

23 THE COURT: Mr. Babb, any objection to that?

24 MR. BABB: No, ma'am, no objection.

25 THE COURT: Ms. Jordan, you can be released then.

1 MR. BABB: Your Honor, may I be heard before the next
2 witness?

3 THE COURT: Yes, sir.

4 MR. BABB: Based on Your Honor's earlier ruling, I
5 understand it was a continuing objection.

6 THE COURT: Right.

7 MR. BABB: But I would move to strike all of
8 Ms. Fodor's testimony, any of the clarification. It didn't
9 seem to clarify anything of this witness and move to strike it.

10 THE COURT: So based on the hearsay objection?

11 MR. BABB: Yes, and because some of the argument was
12 that -- I believe, if I understood argument of counsel, that it
13 was going to clarify her conversation with Ms. -- Ms. Fodor's
14 conversation with Ms. Jordan was going to clarify some of
15 Ms. Jordan's testimony. I think it was pretty clear and it
16 didn't add to clarify anything and I move to strike.

17 THE COURT: At this point I think I had sustained your
18 objection --

19 MR. BABB: You did.

20 THE COURT: -- to the extent it was hearsay and was
21 letting him offer it to the extent he wanted to make an offer
22 of proof on that. I don't know there's anything else I needed
23 to address still. Are you asking for something else on that?

24 MR. BABB: When you put it that way, Your Honor, no.

25 THE COURT: Mr. Widenhouse, does that accurately

1 summarize where we were on that?

2 MR. WIDENHOUSE: Yes, Your Honor.

3 THE COURT: All right. So I had sustained the
4 objection to Ms. Fodor to the extent it was hearsay and I let
5 you make your offer of proof on that. To the extent you want
6 to address that further, you can do that as part of any
7 briefing -- or post-hearing briefing and I'll leave it at that
8 for today.

9 MR. WIDENHOUSE: That's fine. Thank you, Your Honor.

10 THE COURT: Mr. Babb, anything else we needed to
11 address on that?

12 MR. BABB: No, ma'am. Thank you, Your Honor.

13 THE COURT: All right. Do you have your next witness
14 then, Mr. Widenhouse?

15 MR. WIDENHOUSE: Mr. Currin is going to --

16 MR. CURRIN: Are you going to get her?

17 Yes, Your Honor, we're going to be calling Ardith Peacock.

18 THE COURT: All right. And, Mr. Currin, are you going
19 to be handling the examination of this witness?

20 MR. CURRIN: I am, Your Honor, with the Court's
21 permission.

22 THE COURT: All right. Yes, sir.

23 (Mr. Widenhouse left the courtroom and subsequently
24 returned with the next witness.)

25 **ARDITH PEACOCK, PETITIONER'S WITNESS, SWORN**

DIRECT EXAMINATION

BY MR. CURRIN:

THE COURT: If you could just answer Mr. Widenhouse's questions -- or Mr. Currin's questions.

MR. CURRIN: Thank you, Your Honor.

Q. Good afternoon, Ms. Peacock. Could you state your full name for the record, please?

A. Ardith Funderburk Peacock.

Q. Okay. And where do you reside? Where do you live?

A. Do you want the full address or just in Salisbury?

Q. Give us your address, please.

A. 315 Mae Road, Salisbury 28146.

Q. What is your occupation?

A. I'm a registered nurse.

Q. Okay. Now, Ms. Peacock, do you recall serving on a jury in the capital murder case involving William Barnes in 1994 in Rowan County?

A. Yes.

Q. So directing your attention to that time period back in 1994, do you recall whether -- do you recall one of your fellow jurors bringing a Bible into the jury room at any point in time?

A. Yes.

Q. Okay. And was that during the sentencing deliberations or during the --

1 A. The sentencing deliberations.

2 Q. Okay. And do you recall if that -- when that was, what day
3 it was during the deliberations?

4 A. When we started the deliberations, it was, like, in the
5 afternoon. I can't tell you what day of the week or whatever.
6 It was in the afternoon. And then when we were able to finally
7 go home, we come back the next day to finish up deliberations.
8 That's when the Bible came into play, that very next day.

9 Q. So the second day of sentencing deliberations is when you
10 believe the --

11 A. Yes.

12 Q. -- the Bible was brought in? And had there been a Bible in
13 the jury room the day before?

14 A. No, not that I recall.

15 Q. And so you specifically recall one of your fellow jurors
16 bringing in the Bible?

17 A. Yes.

18 Q. Okay. And do you know who that juror was?

19 A. Yes.

20 Q. And what was her name?

21 A. Hollie Jordan.

22 Q. Okay. Now, do you recall whether Ms. Jordan read aloud
23 from the Bible to the other jurors -- to you and the other
24 jurors?

25 A. She did.

1 Q. And do you recall whether there were multiple passages
2 or --

3 A. There were several passages. I can't name verbatim what
4 passages they were, but I do remember the eye for an eye and
5 tooth for a tooth --

6 Q. Okay.

7 A. -- the passage that dealt with that.

8 Q. And she was reading those passages aloud to the other
9 jurors?

10 A. Yes.

11 Q. And you were able to hear her?

12 A. Yes.

13 Q. And was it clear to you these were Old Testament passages
14 or were they New Testament? Do you know -- do you recall
15 whether they were Old Testament passages or not?

16 A. To say whether they were specifically Old or they were a
17 mixture, I can't tell you for sure.

18 Q. Let me ask you this. Was it clear to you at the time she
19 was reading these Bible passages to the other jurors that they
20 were pro-death penalty passages?

21 MR. BABB: Objection, Your Honor. That certainly goes
22 to mental process and trying to see the effect on the jurors.

23 THE COURT: I'm going to let you clarify that because
24 I'm not sure if -- if --

25 MR. CURRIN: I can rephrase it.

1 THE COURT: -- you characterized it right.

2 Q. Did Ms. Jordan -- either before, during or after reading
3 these Biblical passages to the jury, did she state or make it
4 known to the other jurors that these Biblical passages
5 supported imposition of the death penalty?

6 MR. BABB: Objection, Your Honor. That's advocacy by
7 a juror.

8 THE COURT: I'm going to note that's part of your
9 continuing objection.

10 MR. BABB: Your Honor, do I have a continuing
11 objection with this witness too under 606(b)?

12 THE COURT: I'll note that now. Yes, if there's
13 something else you need to add, but also now, based on that
14 objection, I'll note a continuing objection going forward on
15 the 606 issue.

16 MR. BABB: Thank you, Your Honor.

17 Q. Do you need me to re-ask the question or do you remember
18 what the question is?

19 A. Re-ask the question.

20 Q. I'll try.

21 A. Well, yes.

22 Q. What I'm really getting -- trying to get at and get you to
23 tell the Court is -- is when Ms. Jordan -- Hollie Jordan was
24 reading these Biblical passages to the jury, was it -- did she
25 indicate in some way to the jury while she was doing it --

1 either before, during or after did she state that these
2 passages support the death penalty in the case?

3 A. Did she state that?

4 MR. BABB: Your Honor, objection. I apologize. Even
5 in an offer of proof here, we're asking one juror what another
6 juror advocated inside the jury room deliberations and I think
7 that that completely goes against Rule 606 and -- I mean, I
8 know it's an offer of proof or subject to my continuing
9 objection, Your Honor, but respectfully, I think that's not
10 proper inquiry about what jurors were arguing about or what a
11 juror thought another juror was arguing.

12 THE COURT: Well, certainly that's true ordinarily.
13 We're in the exceptions now; and so if we're in the exceptions
14 as to whether extraneous prejudicial information was improperly
15 brought to a juror's attention, I don't know how you get that
16 without finding out what the juror who brought the extraneous
17 information in said. That seems to be what it's here for,
18 right?

19 MR. BABB: Yes, ma'am, Your Honor. May I respond to
20 that?

21 THE COURT: Yes, sir.

22 MR. BABB: The -- I agree, except -- two points in
23 response to that. One, the question was about Ms. Jordan
24 reading a Bible and a Bible is not extraneous under the
25 *Fullwood* decision under the Fourth Circuit.

1 Number two, I didn't object to did she read a Bible verse,
2 did -- "Do you recall which verses?" But the question now has
3 shifted to not did she read a verse, but was she advocating --
4 was a juror advocating for a result, and that is getting away
5 from what the extraneous information was and getting over into
6 the mental processes of Ms. Jordan and what this witness
7 thought Ms. Jordan's mental processes were.

8 So I think we're far afield from just saying what was said.
9 You can talk about what the outside influence is, but you can't
10 get into the effect of the outside influence. And if you're
11 arguing -- I believe -- if the question was "Wasn't this juror
12 advocating to you for the death penalty?" that's getting into
13 the deliberative process and the mental process of the jurors,
14 and I think that goes beyond where -- that goes beyond any of
15 the exceptions listed in 606.

16 THE COURT: I think I understand and I'll let
17 Mr. Currin respond.

18 The two issues that I'm sort of trying to address here -- I
19 understand your point about the Bible reading itself not being
20 extraneous. On the other hand, there is some issue here,
21 whether we can separate those things out, to the extent the
22 extraneous information was the Bible verse that the pastor gave
23 to Ms. Jordan and that's what we're trying to get to. So I
24 think there's an issue there that I would need you to address
25 for me and I'll let you do that.

1 The second piece or part of that is going to be -- I don't
2 think he asked what she was advocating. He was asking what
3 statements she made related to the Bible verses I think so --
4 in order to not characterize themselves or ask the juror to
5 characterize what the Bible verses were as much as to try and
6 get at what Ms. Jordan conveyed from what her pastor may have
7 told her.

8 That's more I'm trying to figure out where the line is. I
9 intend to let you address that with some authority for me in
10 the post-hearing briefing as to where exactly the line should
11 be on that, my point being right now that I don't know that
12 we're so far across the line that it doesn't make sense to
13 allow some inquiry on this to ensure at least for offer of
14 proof purposes.

15 MR. BABB: May I briefly respond to that, Your Honor?

16 THE COURT: Yes, sir. And I did indicate for you to
17 be able to respond to that.

18 MR. BABB: I agree with Your Honor about the
19 difficulty or the issue before the Court was the Bible coming
20 from Ms. Jordan, was it coming from Pastor Lomax, that issue,
21 which is why I didn't object to her -- Ms. -- I'm sorry --
22 Ms. Peacock testifying about was the juror -- was the Bible
23 verse read, and questions were asked what Bible verses -- do
24 you recall which one? Old Testament? New Testament. I think
25 that -- the Court has indicated you want to hear that evidence

1 and your ruling is that comes in.

2 But so even though the Bible may be internal, I understand
3 there's a -- the question before the Court -- the question the
4 Court has is was it coming straight from the juror's conscience
5 or is it coming -- and I understand that, so I didn't object to
6 that part of the testimony.

7 But then when we get into a "Did Juror Jordan tell you that
8 these passages supported the death penalty" -- well, whether
9 you say "Did Juror Jordan argue for the death penalty?" or "Did
10 she say these passages that she read to you supported the death
11 penalty?" that is functionally the same question because
12 you're -- it's making an argument. "Hey, this is the result I
13 want you to give and I have these Bible verses to back me up."

14 Now, while Bible verses may be internal, the Court may
15 find -- we'll deal with that in our briefs. Putting that
16 aside, which is why I didn't object to it, we're now asking
17 about what Juror Jordan advocated to other jurors and I do
18 think that crosses the line and that's why I'm taking so much
19 time from the Court objecting.

20 THE COURT: All right. Mr. Currin, I'll let you
21 respond to that to the extent you want to clarify to make sure
22 that you're not asking something that is an advocacy question.
23 That would be the basis of Mr. Babb's objection on that.

24 MR. CURRIN: Yes, Your Honor. I don't think I asked
25 that question. I think what I said was did she state to

1 you any -- and I think what Mr. Babb may fail to realize is
2 that Ms. Jordan is really just a conduit for what Mr. Lomax
3 told her and so if she is repeating -- Pastor Lomax I mean.
4 Pastor Lomax tells Ms. Jordan, you know, "It's okay" --
5 whatever he said. "It's okay to vote" -- "Don't feel bad" --
6 whatever he said about it. And then she relays that to the
7 other jurors. Then we have a two-fold situation there. One is
8 the communication between Ms. Jordan and her pastor, and then
9 Ms. Jordan then relaying that information to the other jurors.
10 So it's not simply what her thought was or her -- what she was
11 advocating, but what she was repeating from Lomax to the other
12 jurors.

13 THE COURT: So it may help to just clarify your
14 question.

15 Mr. Babb, did you need to respond to anything further on
16 that?

17 MR. BABB: Yes, Your Honor. I actually do recognize
18 what the defense's argument is, but the problem is the
19 testimony was these verses were read. As the Court said,
20 there's some -- there's some question -- or how do you
21 unscramble that? Well, I don't think you can unscramble it.
22 But again, an offer of proof of what the verses are. But in
23 terms of asking what the argument is going to be, I'm still
24 going to have the same objection, Your Honor.

25 MR. CURRIN: Just for the record, this is not an offer

1 of proof. This is evidence that we're putting on.

2 THE COURT: I understand.

3 MR. CURRIN: It's not offer of proof. Yeah.

4 THE COURT: Well, I have allowed him to make a
5 continuing objection on the 606.

6 MR. CURRIN: Right.

7 THE COURT: So it is in that sense that I'm letting
8 you put this on subject to his continuing objection --

9 MR. CURRIN: Yes, ma'am.

10 THE COURT: -- and then I'll make a determination
11 whether it's admissible or not --

12 MR. CURRIN: Yes, ma'am.

13 THE COURT: -- and whether it crosses the line onto
14 606. So in that sense, I think it is an offer of proof to the
15 extent it is ultimately precluded by the Court, if that's the
16 determination that I make. What I want to do is make sure that
17 we cover everything that we need to cover today; and then once
18 you actually have the information, you can make your arguments
19 to me as to what things are within 606 and what are not within
20 606. At least in my mind for the hearing today, what is
21 arguably within the exception, which is where we are, would be
22 what I'm going to let you ask, subject still to his objection
23 so that we can take that up.

24 MR. CURRIN: Yes, ma'am. And I would just say one
25 other thing. We have -- as the Court has indicated, we have

1 the burden here of proving prejudice; and, of course, the
2 nature of what Ms. Jordan said as she relayed what Pastor Lomax
3 told her, to the extent she was relaying something, is
4 certainly relevant to that. And as far as, you know, what she
5 was advocating based on her improper communication with
6 Pastor Lomax is relevant because, obviously, there could be
7 situations where there might not be any prejudice, where he was
8 arguing for life, for example. So it's very important that we
9 get into, you know, this situation as to what -- what was
10 she -- I don't want to say advocating, but what was she stating
11 to the other jurors. Otherwise, we're sort of handcuffed. We
12 can't really prove what we have to prove.

13 THE COURT: All right. Mr. Babb.

14 MR. BABB: I'm sorry, Your Honor. I'll be brief. I
15 don't believe this witness has mentioned Pastor Lomax and so,
16 again, we're getting back to the jury verses -- I mean the
17 Bible verses. I understand them coming in or whether they were
18 read and if there's any testimony about where they came from;
19 but in terms of what a juror's interpretation was of what
20 Pastor Lomax said or what the juror's -- Ms. Jordan's
21 interpretation of whether they're pro-death penalty or
22 anti-death penalty, again, that crosses over the line, Your
23 Honor.

24 THE COURT: Mr. Currin, what I'm going to do is let
25 you clarify your question. Certainly I think that to the

1 extent you want to ask about what she stated that her pastor
2 said or anything else that the juror may have stated that
3 relates to this information that is at issue, the extraneous
4 communication or information, then I'm going to at least let
5 you make that offer; and then I'll let Mr. Babb address it
6 further, if we need to, in the post-hearing briefing.

7 MR. CURRIN: Thank you, Your Honor.

8 THE COURT: All right.

9 MR. CURRIN: I'm not sure exactly where I was, but
10 I --

11 THE COURT: Go ahead and pick back up where you can.

12 Q. (By Mr. Currin) Okay. Ms. Peacock, in addition to reading
13 the Bible verses, did Ms. Jordan state to the other jurors in
14 your presence where you could hear her that these Bible verses
15 supported imposition of the death penalty?

16 MR. BABB: I still have my objection, right, Your
17 Honor?

18 THE COURT: Yes, you still have your objection.

19 A. She did not state that they were for the death penalty. It
20 was basically -- it was based on the closing argument that we
21 had -- that one of the defense attorneys had.

22 Q. Was she -- she wasn't arguing that the Bible verses
23 supported a life sentence, was she?

24 MR. BABB: Same objection, Your Honor.

25 A. She didn't say either way.

1 Q. Okay. So Ms. Jordan -- what you're -- let me make sure I
2 understand. You're saying that Ms. Jordan was reading the
3 Bible verses to the jury based on the closing argument of one
4 of the lawyers. Is that what you just said?

5 A. Yes.

6 Q. Okay. All right. Do you want to explain? Can you explain
7 what you mean by that?

8 A. Well, during the closing arguments, the defense attorney
9 had said that his client would have to meet his judgment day
10 for what he did or did not do in this situation and then we
11 would in turn have to meet our judgment day for what we decide.

12 Q. And?

13 A. And then the next day is when she brought the Bible and
14 read those verses.

15 Q. So is it fair to say that she was reading those Bible
16 verses to rebut what that closing argument had said by one of
17 the defense attorneys? Is that what you're trying to say she
18 was doing, rebutting that?

19 A. It's saying, you know, we are doing our duty. Do you
20 understand what I'm saying?

21 Q. No, I'm not sure. I'm just trying to understand if you are
22 saying -- well, what are you saying? She wasn't trying to
23 support Chambers lawyer's closing argument, was she, with the
24 biblical passages, was she?

25 MR. BABB: Objection. That's a lot of questions.

1 THE COURT: Can you clarify?

2 Q. Would it be fair to say that she brought the Bible passages
3 in to rebut Chambers attorney's argument?

4 A. Yes.

5 Q. Okay. And that it would be okay to impose the death
6 penalty in the case, correct?

7 A. She didn't --

8 Q. That was --

9 A. She didn't say either way. I did not hear her say either
10 way.

11 Q. Okay. But you do recall, I believe you said, that one of
12 the passages she read was an eye for an eye?

13 A. Yes, I do remember that one.

14 Q. And there were other passages as well, correct?

15 A. Yes, but I do not recall.

16 Q. But there were multiple passages that she read?

17 A. Yes, there were several.

18 MR. CURRIN: I don't have any further questions, Your
19 Honor.

20 THE COURT: All right. Mr. Babb, do you have any
21 questions?

22 MR. BABB: May I have one minute, Your Honor?

23 THE COURT: Yes.

24 (Pause in the proceedings.)

25 MR. BABB: No questions, Your Honor.

1 THE COURT: All right. You can step down. Thank you.

2 (The witness left the stand.)

3 THE COURT: Are you asking Ms. Peacock be released
4 then?

5 MR. CURRIN: That's fine with us, Your Honor.

6 MR. BABB: No objection from us.

7 THE COURT: All right. Then you can be released,
8 Ms. Peacock.

9 And are you calling your next witness?

10 MR. CURRIN: We are going to be calling Leah
11 Weddington, Your Honor.

12 (Mr. Widenhouse left the courtroom and subsequently
13 returned with the next witness.)

14 THE COURT: If you could step forward and be sworn.

15 **LEAH WEDDINGTON, PETITIONER'S WITNESS, SWORN**

16 **DIRECT EXAMINATION**

17 **BY MR. CURRIN:**

18 THE COURT: If you could just answer Mr. Currin's
19 questions, please.

20 Q. Could you state your full name for the record, please?

21 A. Leah Esther Weddington.

22 Q. Where do you live?

23 A. 1617 Fourth Street, Salisbury.

24 Q. Now, Ms. Weddington, do you recall serving on a jury in a
25 capital murder case involving Mr. William Barnes and others in

1 1994 in Rowan County?

2 A. Yes, I do.

3 Q. And were you -- did you serve on that jury --

4 A. Yes, I did.

5 Q. -- in the Barnes case? Directing your attention to -- to
6 that time frame back in 1994, do you recall whether one of your
7 fellow jurors brought a Bible into the jury room at some point?

8 A. I do recall a Bible being brought in, yes.

9 Q. And do you recall when that was?

10 A. (Shakes head.)

11 Q. Whether it was in the sentencing deliberations or the --

12 A. Probably the sentencing, yes.

13 Q. And do you know the name -- do you know the name of this
14 juror?

15 A. No.

16 Q. Okay. But do you recall whether it was a female juror or
17 not or a male?

18 A. I think it was a female.

19 Q. Okay. And was this female juror -- was there anyone else
20 who brought a Bible into the jury room?

21 A. No, not that I recall.

22 Q. Was it only one person? Okay. And do you recall whether
23 she was reading the Bible verses out loud or not?

24 A. Yes.

25 Q. And was she?

1 A. Yes.

2 Q. She was. Okay. And do you recall what the Bible verses
3 were?

4 A. No.

5 Q. And would that have been -- well, strike that.

6 MR. CURRIN: May I have just one minute?

7 THE COURT: Yes, sir.

8 (Pause in the proceedings.)

9 Q. Do you remember whether the Bible verses were from the Old
10 Testament or the New Testament?

11 A. No.

12 Q. Was it clear to you that this particular female juror who
13 was reading the Bible verses -- well, strike that. Were
14 there -- I'm sorry.

15 MR. WIDENHOUSE: Just a second.

16 THE COURT: Yes, you can have a moment.

17 (Pause in the proceedings.)

18 Q. Do you have any knowledge about what might have prompted
19 the juror -- the female juror to bring the Bible into the jury
20 room?

21 A. I guess she was trying to convince someone to -- it was
22 okay to give him the death penalty.

23 MR. BABB: Objection, Your Honor. That's the
24 deliberative process under 606.

25 THE COURT: I understand the basis of your objection.

1 I'll let you address that.

2 MR. CURRIN: No further questions, Your Honor.

3 THE COURT: All right. Any questions?

4 MR. BABB: May I have a moment?

5 THE COURT: Yes, sir.

6 (Pause in the proceedings.)

7 MR. BABB: No questions, Your Honor.

8 THE COURT: All right. Thank you.

9 All right. You can step down.

10 THE WITNESS: Thank you.

11 (The witness left the stand.)

12 MR. WIDENHOUSE: Your Honor, can she be released from
13 her subpoena?

14 MR. BABB: No objection.

15 THE COURT: Yes, sir.

16 MR. CURRIN: Thank you, Ms. Weddington.

17 THE WITNESS: Thank you.

18 THE COURT: All right. Any other witnesses?

19 MR. WIDENHOUSE: No, Your Honor.

20 THE COURT: All right. Any witnesses that you want to
21 call then?

22 MR. BABB: No, ma'am.

23 THE COURT: All right. Obviously, the issue of the
24 extent to which some of those answers were admissible under 606
25 I have held open, but I've allowed them at least in the nature

1 of a proffer so that we didn't need to reconvene this, but I
2 will let you address that further as part of your post-hearing
3 briefing.

4 Is there anything else that you would need me to take up on
5 that issue today? Mr. Widenhouse?

6 MR. WIDENHOUSE: No, Your Honor.

7 THE COURT: Mr. Babb, anything else on that issue
8 today?

9 MR. BABB: Not unless the Court wants to direct us as
10 to the timing after we get the transcript and so forth.

11 THE COURT: Right. Well, that would be the next piece
12 of this, looking at the schedule for that. But just on the 606
13 issue, I want to make sure that it's clear enough that I've
14 allowed that testimony in, but subject to the objections that
15 the State raised, and there may -- actually, there was an
16 objection you raised as well, Mr. Widenhouse. So to the extent
17 that there are objections that remain to be resolved, I can do
18 that as part of the post-hearing briefing, but I've allowed you
19 to offer everything you wanted to offer in order to make sure
20 we had a full proffer so that there wouldn't be a need to
21 reconvene the hearing for any of those purposes.

22 Does that accurately summarize where we are on that,
23 Mr. Widenhouse?

24 MR. WIDENHOUSE: Yes, Your Honor.

25 THE COURT: Mr. Babb?

1 MR. BABB: Yes, ma'am.

2 THE COURT: All right. Now, then the next question
3 would be with respect to the schedule or the procedure. Along
4 the same lines, if there's anything you want to be heard on
5 today, then I'll certainly give you the opportunity to be heard
6 today; and then, as I've indicated, I'm going to let you
7 address post-hearing briefing that would include the 606 issue,
8 but then obviously, of course, the substantive issue that's
9 before the Court as well on the remand from the Fourth Circuit.
10 I would assume you'll need some period of time after you get
11 the transcript.

12 As far as the transcript goes, I'm assuming,
13 Mr. Widenhouse, you're going to go ahead and order that
14 transcript; is that correct?

15 MR. WIDENHOUSE: Yes, Your Honor.

16 THE COURT: All right. And so how much time would you
17 need after you get a copy of the transcript to file that brief
18 for Petitioner?

19 MR. WIDENHOUSE: I'd like 30 days.

20 THE COURT: All right. How much time would the State
21 need? And your response brief, I'm going to let you include in
22 your response brief your objections on the 606 piece so you
23 don't need to file two separate briefs on that. How much time
24 would you be asking for for the State?

25 MR. BABB: In response to Mr. Widenhouse?

1 THE COURT: Yes.

2 MR. BABB: The same time period.

3 THE COURT: All right. Then I'll give you 30 days
4 from the time you get the transcript, but that's -- should be
5 sufficient time, so I hope not to extend that further so that
6 you can be planning for that.

7 MR. WIDENHOUSE: I understand, Your Honor.

8 THE COURT: And then you can have 30 days, Mr. Babb.
9 As part of your response brief, you can also brief any of the
10 Rule 606 issues that you want to bring to the Court's
11 attention. You've reserved all of that.

12 As well as for both of you the issue -- to the extent that,
13 Mr. Widenhouse, you intend to rely on anything Ms. Fodor
14 provided, I have sustained the objection to the extent it was
15 hearsay; and so if there's anything you need to address on
16 that, then you can address that in your briefing. The State
17 can address that in response. Because Mr. Babb is going to be
18 able to raise the 606 issues in his response brief, then I'm
19 going to allow you a brief reply at least on those issues that
20 he's raised in the response brief and that would be 14 days
21 after the response.

22 MR. WIDENHOUSE: That's fine, Your Honor.

23 THE COURT: All right. As far as page limits, I'm not
24 going to put particular page limits on it, but I'll ask you to
25 be as brief and as focused as you can. Obviously, there's a

1 lot of litigation that's already happened in this and I've
2 reviewed all of that. I have the record. If you want to focus
3 on particular parts of the record that you want me to look at,
4 you can certainly do that, or any arguments that you want to
5 raise, you can do that. But it would help me the most if it
6 was as focused as possible without necessarily putting a
7 particular page limit on that.

8 MR. WIDENHOUSE: And just for mine and maybe
9 Mr. Babb's edification --

10 THE COURT: Yes.

11 MR. WIDENHOUSE: -- do you prefer to have excerpts
12 from the record attached to the memoranda as exhibits to save
13 you having to sort through?

14 THE COURT: If you -- if you have some excerpts that
15 you want to attach, then I'm not going to preclude you from
16 doing that if you think that would be helpful to the Court,
17 along the lines of what you handed up today, but you're not
18 required to do that.

19 If you want to cite to the record -- what is required is a
20 particular cite. So if you're going to make a general
21 statement or make some assertion as to what the evidence is or
22 was, then you need to have a citation to the record for that
23 and whatever is the easiest way for you to point the Court to
24 that.

25 As far as the substance, though, it will not help me to

1 just reattach the entire record. So if you have particular
2 parts that you want to include, then you can do that.
3 Otherwise, you can just cite to the record as it currently
4 exists.

5 And then the transcript itself will be filed. You'll be
6 able to point to the particular points of the transcript that
7 should be separately included on the docket.

8 MR. BABB: Your Honor, may I ask a question?

9 THE COURT: Yes, sir.

10 MR. BABB: And this is -- I'm just ignorant of this.
11 Since it's on remand --

12 THE COURT: Yes.

13 MR. BABB: -- do you have the joint appendix --
14 electronic copy of the Joint Appendix?

15 THE COURT: I actually have just the ECF and
16 electronic copy of what was filed in this court.

17 MR. BABB: Okay.

18 THE COURT: So I have everything that was filed in
19 this court and that's what you would need to cite to, not to
20 the Fourth Circuit's Joint Appendix, but to the docket numbers
21 that are on the ECF in this court.

22 MR. BABB: Thank you.

23 THE COURT: Sure.

24 MR. WIDENHOUSE: Your Honor, I need to put one thing
25 on the record.

1 THE COURT: Yes, sir.

2 MR. WIDENHOUSE: I realize you are limited by the
3 Fourth Circuit opinion. I object to us not being given the
4 *Remmer* presumption in this court. I know you can't give it to
5 us because the Fourth Circuit told you.

6 THE COURT: Right. You're preserving your objection
7 on that.

8 MR. WIDENHOUSE: I'm preserving my objection on that.

9 THE COURT: All right. And I noted that, but I don't
10 know that there's anything else I would need you to address on
11 that in your briefing for me since I am dealing with this on
12 the remand.

13 MR. WIDENHOUSE: I understand. I just wanted to get
14 it on the record.

15 THE COURT: And then, as I've indicated, it's before
16 me for recommendation, so what you can expect is I'll enter a
17 recommended decision. You would still have a chance to file
18 objections before that goes to the district judge, but all of
19 the fact finding would be based on the transcript and what has
20 been presented here at this point.

21 Anything further that we need to take up today,
22 Mr. Widenhouse?

23 MR. WIDENHOUSE: I don't think so.

24 THE COURT: Anything else, Mr. Babb?

25 MR. BABB: No, ma'am.

1 THE COURT: All right. That completes the hearing
2 then on remand from the Fourth Circuit.

3 What I'll do then is just set the briefing schedule and I'm
4 not going to enter a separate order on that. It's just going
5 to be reflected in the clerk's docket entry that would note
6 from the date that the transcript is filed on the docket then,
7 Mr. Widenhouse, you'll have 30 days to file your post-hearing
8 brief and Mr. Babb will have 30 days thereafter to file his
9 response and then you'll have 14 days to file any reply,
10 Mr. Widenhouse.

11 All right. Thank you. We'll go ahead and adjourn this and
12 reconvene at four o'clock.

13 (Proceedings concluded at 3:47 p.m.)
14

15 **C E R T I F I C A T E**

16 I, LORI RUSSELL, RMR, CRR, United States District Court
17 Reporter for the Middle District of North Carolina, DO HEREBY
18 CERTIFY:

19 That the foregoing is a true and correct transcript of the
20 proceedings had in the within-entitled action; that I reported
21 the same in stenotype to the best of my ability and thereafter
22 reduced same to typewriting through the use of Computer-Aided
23 Transcription.

24 

25 Lori Russell, RMR, CRR
Official Court Reporter

Date: 3/7/16

Index to Various Excerpts from Trial Transcripts in *State v. Leroy Barnes*

1. Jurors provide their church affiliations to the Court and counsel. (Vol. I, Tpp. 205, 207; Vol. 2, Tpp. 34, 181; Vol. 3, Tpp. 95-96, 161; Vol. 4, Tpp. 74, 141-42; Vol. 5, Tpp. 114, 171, 187, 273)
2. Court repeatedly instructs jurors not to discuss the case or make any independent investigation. (Vol. I, Tpp. 70-71, 139-140; Vol. II, Tp. 354; Vol. III, Tpp. 254-55, 844; Vol. VII, Tpp. 87, 253; Vol. VIII, Tpp. 69-70; Vol. X, Tpp. 164-65)
3. Court repeatedly reminds jurors to follow prior instructions. (Vol. I, Tpp. 71, 115, 182, 188, 229; Vol. II, Tpp. 8, 59, 104, 280; Vol. III, Tpp. 188, 516, 586, 660, 739, 799; Vol. V, Tpp. 65, 164; Vol. VI, Tpp. 73, 178, 230; Vol. VII, Tpp. 40-41, 135, 175, 299, 362, 388, 428; Vol. VIII, Tpp. 99; Vol. IX, Tpp. 340, 401, 462, 590; Vol. X, Tp. 71)
4. Prosecution makes argument concerning "Thou shall not kill." (Vol. VII. Tpp. 359-62)
5. Defense makes argument concerning "Thou shall not kill." (Vol. VII. Tpp. 393-95, 401-402)
6. Trial counsel informs Court of juror contact with pastor and readings from Bible. (Vol. X, Tpp. 255-56)

1 MR. BOST: No.

2 MR. HARP: Mrs. Reece?

3 MRS. REECE: Yes, sir. I belong to Rowan
4 County Counsel against Adolescent Pregnancy and
5 I'm a member of First United Church of Christ in
6 Landis.

7 MR. HARP: Mrs. Bumgarner?

8 MRS. BUMGARNER: No.

9 MR. HARP: Mr. Deal?

10 MR. DEAL: I'm a member of Spencer
11 Presbyterian Church. That's here.

12 MR. HARP: Yes, sir, Mr. Wilkie?

13 MR. WILKIE: In your question, you want
14 it from all of us as far as church?

15 MR. HARP: I will do that in just a
16 minute, yes, sir.

17 MR. WILKIE: I didn't think you included
18 that in your question.

19 MR. HARP: Mr. Kenerly asked you some
20 questions about your prior connection with The
21 Court such as the Court system, legal system such
22 as jury duty or a witness in a civil or criminal
23 case. Have any of you ever been a victim of a
24 crime? Any type of crime at all? Okay, do you
25 have any relatives who have ever been the victim

1 MR. HARP: Okay, thank you. Mr. Harden?
2 MR. HARDEN: No, sir.
3 MR. HARP: Mr. Upright.
4 MR. UPRIGHT: Grace Lutheran Church.
5 MR. HARP: All right, thank you. Mr.
6 Schroyer?
7 MR. SCHROYER: United Church of Christ,
8 sir.
9 MR. HARP: Okay, thank you. Mr. Wilkie?
10 MR. WILKIE: Faith United Church of
11 Christ.
12 MR. HARP: Okay.
13 MR. CAUSEY: Is that the stone church
14 over near Granite Quarry, is it over in the
15 Granite Quarry area?
16 MR. WILKIE: Out from Granite Quarry.
17 Community of Faith.
18 MR. HARP: There are two stone churches
19 there, are there? Are there two stone churches in
20 that area.
21 MR. WILKIE: Well, there is a stone
22 church I think in Granite Quarry and one in Faith.
23 MR. HARP: Okay, you belong to the Faith
24 United Church of Christ?
25 MR. WILKIE: Yes, sir.

1 MR. LEA: And Mrs. Isenhour?

2 MRS. ISENHOUR: Methodist.

3 MR. LEA: And Mrs. Beasley?

4 MRS. BEASLEY: Baptist.

5 MR. LEA: And Mrs. Rice?

6 MRS. RICE: Baptist.

7 MR. LEA: And Mrs. Wilkes?

8 MRS. WILKES: Baptist.

9 MR. LEA: And you say you were Lutheran, is that
10 correct?

11 JUROR: Yes, sir.

12 MR. LEA: And Mrs. Adams?

13 MRS. ADAMS: Methodist.

14 MR. LEA: And Mrs. Hess?

15 MRS. HESS: Non-denominational.

16 MR. LEA: Now, Mr. Kenerly discussed with you
17 certain legal principals like the burden of proof and
18 presumption of innocence. As we have repeatedly said,
19 what the Judge says is what you take as the law and you
20 don't take what we lawyers say, Mr. Kenerly or any of us.
21 But using these general language like burden of proof,
22 and presumption of innocence, I want to ask if each of you
23 believes that in a serious crime like this there should be
24 a presumption of innocence? Do all of you agree with
25 that? That there should, the defendants should be

1 that I have not had a chance to ask questions about yet
2 and theses are all matters that I don't recall were
3 brought up by Mr. Kenerly. Mr. Miller, are you a member
4 of any church denomination?

5 MR. MILLER: Not at the present time, no.

6 MR. CRANFORD: Have you been in the past?

7 MR. MILLER: Yes, probably about twenty-two years
8 ago.

9 MR. CRANFORD: What denomination?

10 MR. MILLER: Lutheran.

11 MR. CRANFORD: And Mrs. Owen, are you a member of
12 any denomination?

13 MRS. OWEN: The church I go to is all
14 denominations.

15 MR. CRANFORD: Okay, Mrs. Cleveland?

16 MRS. CLEVELAND: United Methodist.

17 MR. CRANFORD: Okay, Mrs. Stevens?

18 MRS. STEVENS: No.

19 MR. CRANFORD: Okay, Mrs. Anthony?

20 MRS. ANTHONY: United Methodist.

21 MR. CRANFORD: Mr. Hess?

22 MR. HESS: Baptist.

23 MR. CRANFORD: Okay, Ms. Poteat?

24 MS. POTEAT: Methodist.

25 MR. CRANFORD: I beg your pardon?

1 Similar to that that might affect legislation or-- yes,
2 sir?

3 JUROR: I might still be a member of the N R A.

4 MR. LEA: You might still be? You have been a
5 member at least and you are not certain about your
6 membership right now?

7 JUROR: That's correct. I wasn't going to renew
8 it.

9 MR. LEA: But your dues may still be paid up?

10 JUROR: Yes, sir.

11 MR. LEA: Thank you, Mr. Walker, and I would also
12 like to ask each of you about your church affiliation.

13 . Ms. Wilkie, do you have a church affiliation?

14 MR. WILKIE: Methodist.

15 MR. LEA: And Mrs. Weddington?

16 MRS. WEDDINGTON: Catholic.

17 MR. LEA: Mr. Walker.

18 MR. WALKER: Lutheran.

19 MR. LEA: Did you say Lutheran?

20 MR. WALKER: Yes, sir.

21 MR. LEA: And Mrs. Funderburk?

22 MRS. FUNDERBURK: United Methodist.

23 MR. LEA: And Mr. Archie?

24 MR. ARCHIE: Well-- Christian. I don't go that
25 often. I go to a Baptist, Freewill Baptist.

1 MR. LEA: You have an affiliation. You go to the
2 Baptist Church?

3 MR. ARCHIE: I'm a member of a United Church of
4 Christ.

5 MR. LEA: Okay, but you mostly go to a Baptist
6 Church if you go?

7 MR. ARCHIE: No.

8 MR. LEA: I misunderstood.

9 MR. ARCHIE: Most of the time I go to United
10 Church of Christ.

11 MR. LEA: Okay. And Mrs. Weddington?

12 MRS. WEDDINGTON: United Methodist.

13 MR. LEA: And Mrs. Allen?

14 MRS. ALLEN: Baptist.

15 MR. LEA: And Mrs. Lyles?

16 MRS. LYLES: Baptist.

17 MR. LEA: And Mrs. Keller?

18 MRS. KELLER: Baptist.

19 MR. LEA: I never have been a real good note
20 keeper, but as to the questions that Mr. Kenerly asked you
21 about whether you had heard about this and I think most of
22 you on the panel have heard of the case before being
23 called to serve on this jury, and some of you-- but my
24 notes are not so good said they'd had private discussions
25 with people. Some people said they had just read the

1 Institute of Architects and the State Charter,
2 that type of thing.

3 MR. CRANFORD: Are any of you members of
4 any kinds of organizations that try to influence
5 legislation? Some examples would be the American
6 Civil Liberties Union, National Rifle Association,
7 something along those lines. Mrs. Dartt, do you
8 have a church affiliation?

9 MRS. DARTT: Presbyterian.

10 MR. CRANFORD: How about you, Mr.
11 Stover?

12 MR. STOVER: Baptist.

13 MR. CRANFORD: Mrs. Jordan?

14 MRS. JORDAN: Baptist.

15 MR. CRANFORD: Mr. Kluttz?

16 MR. KLUTTZ: Lutheran.

17 MR. CRANFORD: Would you happen to know
18 if that is the same Lutheran Church Mr. Kenerly
19 goes to?

20 MR. KLUTTZ: No, it's not.

21 MR. CRANFORD: Do any of you-- I know no
22 Methodists are in the group. Have any of you on
23 occasion ever attended Park Avenue Methodist
24 Church here in Salisbury? All right, Mrs. Dartt,
25 I know that you said you had read about this in

1 MR. BAME: Lutheran.

2 MR. LEA: Mr. Reid?

3 MR. REID: Baptist.

4 MR. LEA: And Mrs. Draper?

5 MRS. DRAPER: Methodist.

6 MR. LEA: Mr. Barnes will excuse Mr. Bame. Thank
7 you, Mr. Bame, for coming here. You may go back there,
8 Mr. Bame.

9 THE COURT: Satisfied with the remaining?

10 MR. LEA: I'm sorry, Your Honor. Yes, sir, I'm
11 satisfied with the rest of them.

12 MR. CRANFORD: Mr. Reid and Mrs. Draper, I know
13 you have already, you have been sitting here for a good
14 long while and answering questions from two other lawyers,
15 but I have been sitting here trying to pay attention so I
16 think my questions will be a lot more brief and I will try
17 not to touch any areas that have already been touched. If
18 I do, it may be because I did not hear something since I'm
19 sitting over here at the far end of the room. My name is
20 Randy Cranford. As you probably heard earlier, sitting
21 beside of me is Mr. John Hauser. We're both practicing
22 lawyers in Thomasville, North Carolina, in the next
23 county. Seated behind us is our client, Robert, Bobby,
24 Blakney. One reason I point that out to you is again, you
25 see six different lawyers sitting over here on this side

1 MR. PARRIS: No, sir.

2 MR. HARP: And Collins and Aikman, is that
3 textiles?

4 MR. PARRIS: I'm not sure. It's automotive.
5 We're an automotive division, make car parts for the new
6 cars. I don't know if you call it textiles.

7 MR. HARP: Do you make-- in your division you're
8 involved with making car parts for cars?

9 MR. PARRIS: Yes, sir.

10 MR. HARP: How long have you been working there?

11 MR. PARRIS: Right around five years.

12 MR. HARP: Have either one of you ever served in
13 the military?

14 (Negative response).

15 MR. HARP: Belong to any club or organization,
16 any civic club in the area? Lions Club, Civitan, anything
17 of that nature? Any national organization? National
18 rifle association, A C L U, organizations of that kind?

19 (Negative response).

20 MR. HARP: Are you a member of any church, Mr.
21 Plyler?

22 MR. PLYLER: Methodist.

23 MR. HARP: Do you attend regularly?

24 MR. PLYLER: Yes, sir.

25 MR. HARP: Mr. Parris, are you a member of any

1 church?

2 MR. PARRIS: Not at this time.

3 MR. HARP: Okay, are either of you individually--
4 have either of you ever been the victim of a crime?
5 (Negative response).

6 MR. HARP: Any relative of yours ever been the
7 victim of a crime or close friend?

8 JUROR: Not as I know of.

9 MR. HARP: You understand that the evidence which
10 will be presented in the case will show that the victims
11 who were killed were a white couple and obviously the
12 defendants are black. Does that create a problem for
13 either one of you in judging that circumstance?
14 (Negative response).

15 MR. HARP: Yes, sir?

16 JUROR: I was the victim of a crime one time. I
17 got held up where I worked at.

18 MR. HARP: Was that while you are working for
19 your father?

20 JUROR: No, it was a part time job and I was
21 going to school at the time but I just remembered that.
22 Somebody came in April and held me up at the job.

23 MR. HARP: Anything about that experience?

24 JUROR: Not-- just it happened in Rowan County at
25 the A B C store where I worked in the Spencer area.

1 MRS. SHELTON: No, sir.

2 MR. CRANFORD: I have got no further questions,
3 Your Honor.

4 MR. HARP: Mrs. Shelton, are you a member of a
5 church?

6 MRS. SHELTON: Do what?

7 MR. HARP: Are you a member of a church?

8 MRS. SHELTON: First Methodist.

9 MR. HARP: When you say you had been employed by
10 fast food, McDonald's, Hardees and places like that, is
11 that what you were talking about?

12 MRS. SHELTON: Burger King and Arbee's.

13 MR. HARP: Okay, is it-- does the fact that the
14 victims in this case are white and the defendants are
15 black, will that cause you any problems?

16 MRS. SHELTON: No, sir.

17 MR. HARP: You don't feel like there is any undue
18 pressure on you to decide one way or the other because of
19 that?

20 MRS. SHELTON: They could be purple. It wouldn't
21 matter.

22 MR. HARP: Okay, defendant Chambers passes Mrs.
23 Shelton.

24 THE COURT: All right, members of the jury,
25 those of you in the Courtroom, if you have been in the box

1 find that I'm not going to ask them as lengthy as
2 they were asked earlier in the week. Again,
3 because you have been able to hear and understand
4 a lot of the questions and as Mr. Kenerly said
5 awhile ago, any questions that you have heard
6 asked before that you have had a specific reaction
7 to at any point in time, if you would raise your
8 hand and I will ask you about it. I'd like to
9 start briefly with a couple of questions that I
10 will be asking to you individually. Mr. Shover,
11 are you affiliated with any church?

12 MR. SHOVER: No, I'm not a member.

13 MR. CRANFORD: How about you Mr. James?

14 MR. JAMES: Yes, sir, Baptist.

15 MR. CRANFORD: Mr. Keuhl?

16 MR. KUEHL: No, sir.

17 MR. CRANFORD: Mr. Fulham?

18 MR. FULHAM: Yes.

19 MR. CRANFORD: What church is that?

20 MR. FULHAM: Baptist.

21 MR. CRANFORD: Okay, now, I'm not sure--

22 again I am way over here on this side. Is your

23 last name Pullum, a P or F?

24 MR. FULHAM: F.

25 MR. CRANFORD: Do any of you belong to

1 MR. HARP: Have you ever been a member of
2 a church?

3 MR. SHOVER: Yes, in the past, been in
4 the Methodist Church.

5 MR. HARP: Okay, and Mr. Kuehl, the same
6 question. Have you ever been a member of a church
7 in the past?

8 MR. KUEHL: No.

9 MR. HARP: I want to be clear that-- I do
10 not think that has anything to do with your
11 personal value systems. We ask that because we
12 always ask the question do you for any religious
13 principle-- religious principles-- oppose or favor
14 the death penalty is the main reason we ask that.
15 The question I would like to ask you based on the
16 value system you have, do you have any preference
17 in favor of the death penalty?

18 MR. KUEHL: No.

19 MR. HARP: Do you have any preference
20 opposed to the death penalty?

21 MR. KUEHL: No.

22 MR. HARP: Mr. Shover, the same
23 question. Do you have any preference based on
24 your value systems in favor of the death penalty?

25 MR. SHOVER: No, sir.

1 MR. HARP: Is that fact standing alone--
2 would not be enough to cause you to impose the
3 death penalty?

4 MR. PEELER: No.

5 MR. HARP: Mrs. Moore, if someone were
6 convicted of first degree murder, would you feel
7 compelled for automatic imposition of the death
8 penalty?

9 MRS. MOORE: No.

10 MR. HARP: Would not? You would consider
11 all the factors that were presented in Court?

12 MRS. MOORE: Yes, sir.

13 MR. HARP: Base your decision on that?

14 MRS. MOORE: Yes, sir.

15 MR. HARP: Are you a member of a church?

16 MRS. MOORE: No.

17 MR. HARP: Mr. Peeler, you have a
18 business and is your business in the city or-- you
19 have a place of business in the city?

20 MR. PEELER: Yes, sir.

21 MR. HARP: Who else works for you? How
22 many?

23 MR. PEELER: Five people.

24 MR. HARP: Okay, do you operate your
25 business during normal business hours?

1 Q. You didn't examine it to see whether it had been
2 forced or not, whether there was a forced entry?

3 A. No, sir. We went there -- as we went in and didn't
4 have any, see any obvious signs of forced entry.

5 Q. You didn't notice -- in other words, nothing caught
6 your attention that would clue you to think that the door
7 had been forced open?

8 A. No, sir.

9 Q. Thank you, sir.

10 MR. KENERLY: Nothing further for Officer Lane.

11 (Witness leaves the stand.)

12 THE COURT: All right. Members of the jury, I want
13 to caution you once again, don't discuss this case among
14 yourselves or with anyone else, allow anyone to talk with
15 you at all about the case. Don't speak with any of the
16 participants in the trial about anything; don't talk with
17 any of the bailiffs or any of the witnesses or any of the
18 family members or me about any matter. If you have any
19 questions, anything you need to tend to, just let me know
20 during open court. Don't form any opinion as to the guilt
21 or innocence of either of these defendants until you have
22 heard all of the evidence and I have instructed you on the
23 law which you are to follow. Don't read, watch or listen
24 to any broadcast or publication concerning the trial. Don't
25 visit the scene or attempt to make any investigation on

1 your own. We're going to take our morning break. Be back
2 in place in fifteen minutes, please.

3 (Jury leaves the courtroom.)

4 (Morning recess taken by the Court.)

5 (Jury enters the courtroom.)

6 JUROR: Are we allowed to keep notes?

7 THE COURT: Yes. Let me see all of you at the
8 bench.

9 (Conference held at the bench.)

10 THE COURT: All right, Mrs. Shelton. The YMCA
11 called. Your son hit his head coming out of the pool. It
12 doesn't appear to be anything of great concern. I mean, it
13 doesn't appear to be urgent or anything of that nature. He
14 just bumped his head coming out of the pool, but they
15 wanted you to come and take a look at him, so we're going
16 to take a recess until 1:30 so you can go check on your
17 son. There appears to be no problem, ma'am. You go on and
18 check on him and we'll be back at 1:30. Just check on your
19 child. Follow my prior instructions. Be back at 1:30 this
20 afternoon, please. Thank you. All of us are going to take
21 a recess until 1:30. Be back at 1:30 this afternoon.
22 Everyone else remain seated while the jury leaves.

23 (Jury leaves the courtroom.)

24 THE COURT: Do we need to take up anything in the
25 absence of the jury?

1 A. Shows an exit wound to the right forehead. It's a view
2 of the right side of the head.

3 MR. KENERLY: Your Honor, the State would move to
4 publish to the jury State's Exhibit Number 63, 64, 65, 66,
5 67, and 68.

6 MR. FRITTS: Objection under Rule 403, Your Honor.

7 MR. CRANFORD: Objection.

8 Mr. HARP: Objection.

9 THE COURT: Overruled.

10 (Exhibits passed to the Jury.)

11 THE COURT: Okay, we're going to stop for the
12 day.

13 MR. LEA: Your Honor, may I ask a question?

14 THE COURT: Wait a minute.

15 MR. LEA: It's a jury instruction, Your Honor.

16 (Conference held at the bench.)

17 THE COURT: Mr. Parrish, your car was towed, so
18 I think your wife is going to be here to give you a ride to
19 pick it up. If she is not, a county employee will take
20 you. We'll find out for you at any rate. We expect your
21 wife to be here and there won't be any charge. I want to
22 caution each of you, don't park in the County parking lot.
23 They will tow you and then we have a problem making
24 arrangements for you, so, please avoid parking in the
25 County parking lot. Once again, don't discuss the case

1 among yourselves or with anyone else, allow anyone to talk
2 with you at all about the case. I want to emphasize to you
3 again not to talk with any of the lawyers or any of the
4 witnesses, any family members or anybody about the case.
5 Don't be in the presence of anybody and discuss the case.
6 We don't want you to appear to be unfriendly, but because
7 of the nature of the case, none of us can have any
8 interaction at all except on the record. So don't talk
9 with the bailiff, don't talk with anybody. If you have
10 anything to say, let me know in open court and I'll
11 recognize you. Don't read, watch or listen to any
12 broadcast or publications concerning the trial. Don't form
13 any opinion as to the guilt or innocence of the defendants
14 until you have heard fully and completely from all the
15 evidence. I'll instruct you on the law which you're to
16 follow. Keep in mind that these cases are to be judged
17 separately as to each individual case. Don't visit the
18 scene where it is alleged to have occurred or attempt to
19 make any investigation on your own. You're free to leave
20 for the day and be back tomorrow morning at 9:30, please.
21 Everyone else remain seated while the jury leaves.

22 (Jury leaves the courtroom.)

23 THE COURT: Any evidence that has been introduced
24 needs to be left with the clerk, please.

25 MR. KENERLY: Your Honor, I believe that would

1 come back Monday morning at 9:30. I want to caution each
2 of you once again not to discuss the case among yourselves
3 or with anyone else or allow anyone to talk with you at all
4 about it; don't talk to any of these folks involved in the
5 trial about anything, any family member or anybody, the
6 bailiffs, me, nobody. If anybody tries to discuss it in
7 your presence, let me know, please. Don't form any opinion
8 as to the guilt or innocence of either of these defendants
9 until you've heard all of the evidence and I have
10 instructed you on the law which you're to follow. Make
11 sure you don't read, watch or listen to any broadcast or
12 publications concerning the trial; don't visit the scene or
13 make any investigation on your own. Have a nice week-end
14 and we'll see you Monday at 9:30.

15 (Jury leaves the courtroom.)

16 THE COURT: I will put on the record that I have
17 reviewed the DA's notes as to James Chambers and as to
18 Maurice Alexander; that they do not constitute a statement
19 and that I'm going to have them sealed and put in the file;
20 also reviewed the notes as to Valerie Mason and it does
21 not constitute a statement and I'll have a copy of them
22 made, sealed and put in the file. I have reviewed the
23 notes of Teresa Scott. They do not constitute a statement,
24 but we will have a copy of them sealed and placed in the
25 file. Maybe that will give us some clarification about why

1 Mr. Feamster, in connection my question earlier and the
2 district attorney's question. That night, you just knew that a
3 Blakney had got in your cab. You did not -- I think you stated
4 later you didn't know the name or anything like that, just last
5 name?

6 A Yes.

7 MR. CRANFORD: Okay, that's all.

8 THE COURT: Anything further?

9 MR. KENERLY: I don't have any other questions. I'd
10 ask he be excused.

11 THE COURT: All right, stand down.

12 MR. KENERLY: Your Honor, I'd move to admit a
13 photograph that's previously been marked as State's Exhibit
14 134. Also move to admit the log that's been marked as State's
15 Exhibit 135 and the photocopy of a page marked as 135-A. We'd
16 move to pass State's Exhibit 134 and 135-A among the jury.

17 THE COURT: All right. I suggest that we do that
18 first thing in the morning so they can go home. Let me caution
19 you once again not to discuss this case among yourselves or
20 with anyone else, allow anyone to talk with you about the case.
21 Don't talk with anybody participating in the trial about
22 anything. If anybody approaches you or says anything to you in
23 your presence, if you'll come and let me know, please. Don't
24 form any opinion as to the guilt or innocence of the
25 defendants, either of them, until you've heard all the evidence

1 and I've instructed you of the law which you are to follow.

2 Don't read, watch or listen to any broadcast or
3 publication concerning the trial. Don't visit the scene or
4 attempt to make any investigation on your own. All right,
5 you're free to leave until tomorrow morning at 9:30.

6 (Jury exits the courtroom.)

7 THE COURT: All right, did you want to put something
8 on the record?

9 MR. FRITTS: Your Honor, I would. Let's wait until
10 the jurors are gone. Judge, one thing I want to put on the
11 record that at a bench conference at the end of Mr. Greg
12 Pulliam's testimony, I asked to approach and we -- I requested
13 any and all statements that he had made to law enforcement or
14 to district attorneys.

15 THE COURT: Have all those been turned over?

16 MS. SYMONS: Yes, Your Honor, there were two
17 interviews. They were both turned over previous to his
18 testimony.

19 MR. FRITTS: And one other matter, Your Honor please,
20 this morning at the break, at the eleven o'clock break, when I
21 was walking through the common area outside the courtroom, I
22 noticed that one of the gentleman I would assume to be a
23 reporter, was making a telephone call using the pay phone out
24 there. And that's an area where jurors are congregating. I
25 walked some 30 feet away from him, walking back to the law

1 THE COURT: All right.

2 (State's Exhibit Number 92, 93, 153, 154, 155 and 156
3 Received Into Evidence and passed to the jury.)

4 THE COURT: Is that it?

5 MR. KENERLY: Yes, sir.

6 THE COURT: All right, members of the jury, for a
7 variety of reasons, we're not going to be holding court
8 tomorrow. So I'm going to release you for the weekend. If
9 you'll be back Monday morning please at 9:30. And I just want
10 to caution you once against not to discuss this case among
11 yourselves or with anyone else or allow anyone to talk with you
12 at all about the case. Don't talk with anybody involved in the
13 case about anything.

14 If anybody tries to talk to you about it, let me
15 know. Don't form any opinion as to the guilt or innocence of
16 either of the defendants until you have heard all the evidence
17 and I have instructed you on the law which you are to follow.
18 Don't read, watch or listen to any broadcast publications
19 concerning the trial. Don't visit the scene or attempt to make
20 any investigation on your own. You're free to leave until 9:30
21 Monday morning.

22 (Jury exits the courtroom.)

23 THE COURT: Anything we need to take up?

24 MR. FRITTS: Your Honor, just briefly two matters.
25 Whenever the Detective Barber was testifying concerning the

1 do that. Make sure you follow my prior instructions
2 now. Don't discuss the case among yourselves with
3 anybody else. Don't allow anybody to talk with you at
4 all about the case. Don't form any opinion as to the
5 guilt or innocence of these defendants until you have
6 heard all the arguments. I have instructed you on the
7 law which you are to follow. We have been over this I
8 don't know how many times. Don't read, watch or listen
9 to any broadcast or publications concerning this
10 trial. Don't revisit the scene, try to make any
11 investigation on your own. Keep open, fair, impartial
12 minds about this entire matter until I have instructed
13 you on the law, which you are to follow. Of course,
14 couldn't have any contact with anybody. From what I
15 have seen you have done a good job of segregating
16 yourself from anybody that is here. If you will
17 continue to do that, remember don't deliberate the case
18 at all until all of you are back in the jury room as a
19 body, until I have told you what the law is and give
20 you instructions. Be back at 9:30 in the morning.
21 You're free to leave for the day,.

22 The COURT: Anybody have anything we need to
23 take up? Take a recess until 9:30 a.m. All right, let
24 me see you up here.
25 (Conference held at the bench.)

1 can find, not just the ones I have talked about, what
2 the 12 of you talk about in your deliberations. Thank
3 you.

4 THE COURT: All right, members of the jury,
5 we're going to adjourn for the day. Return tomorrow
6 morning at 9:30. Follow all my prior instructions.
7 Please make sure you don't discuss the case among
8 yourselves or with anyone else. Don't read, watch,
9 listen to any broadcast or publications concerning this
10 trial. Be back at 9:30 in the morning, please. You
11 are free to leave for the day.

12 (Overnight recess taken by the Court.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Rule. This, the 25th day of February, 1994. Teresa S.
2 Weddington, Foreperson of the jury. This is your verdict?

3 JURORS: Yes.

4 THE CLERK: So say you all?

5 JURORS: Yes.

6 THE COURT: You can have a seat.

7 (Jurors seated.)

8 THE COURT: All right, members of the jury, we're
9 going to adjourn then until Monday morning. If you would
10 follow all my prior instructions to you, please. The
11 alternates also, you know you need to be back on Monday
12 morning. I want to caution you once again do not discuss
13 this matter among yourselves or allow anyone to talk with
14 you at all about the case. Don't form any opinion
15 whatsoever as to what the appropriate punishment in this
16 case should be until you've heard all of the evidence and
17 I have instructed you on the law which you are to follow.
18 Don't have any contact with anybody involved in the case.
19 Make sure you avoid contact with any of the attorneys, the
20 witnesses, any members of the family of anyone involved in
21 the case. Especially don't read, watch or listen to any
22 broadcast or publications concerning the trial. It is
23 especially important that you take all your information
24 solely from the various witnesses as they appear before
25 you. You are free to leave for the day. Be back at 9:30

1 on Monday. Hope you have a pleasant weekend. Thank you.
2 (Jurors leaves the courtroom.)

3 THE COURT: I'm going to stay here just a few
4 minutes to give the jury a chance to clear the premises.

5 MR. HARP: Your Honor, for the record Mr.
6 Chambers would ask at this time for a Motion to Dismiss and
7 renew the Motion to Dismiss as against the weight of
8 evidence.

9 THE COURT: Motion is denied.

10 MR. FRITTS: Your Honor, Mr. Barnes would also
11 make that motion and renew his motion to sever and make a
12 Motion for Appropriate Relief.

13 THE COURT: Denied.

14 MR. CRANFORD: Your Honor, we would also renew
15 that motion and make a Motion for Appropriate Relief and
16 also renew our Motion to Sever.

17 THE COURT: Motion is denied.

18 MR. LEA: Your Honor, may we approach the bench?

19 (Conference held at the bench.)

20 (Recess for the weekend.)
21
22
23
24
25

1 answer this issue. Now, in such case, you must determine
2 whether the aggravating circumstances found by you are of
3 such value, weight, importance, consequence, or significance
4 as to be sufficiently substantial to call for the imposition
5 of the death penalty. Now, substantial means having
6 substance or weight, importance, significance, or momentous.
7 Aggravating circumstances may exist in a particular case and
8 still not be sufficiently substantial to call for the death
9 penalty. Therefore, it is not enough for the State to prove
10 from the evidence, beyond a reasonable doubt, the existence
11 of one or more aggravating circumstances. It must also
12 prove, beyond a reasonable doubt, that such aggravating
13 circumstances are sufficiently substantial to call for the
14 death penalty. And before you may answer Issue 4 "Yes," you
15 must agree unanimously that they are. Now, if you answer
16 Issue 4 "No," you must recommend that the defendant Frank
17 Junior Chambers be sentenced to life imprisonment. If you
18 answer Issue 4 "Yes," it would be your duty to recommend that
19 the defendant Frank Junior Chambers be sentenced to death.

20 All right, Members of the Jury, we're going to go
21 ahead and take our lunch recess at this time. I want to
22 caution you once again to follow all of my prior
23 instructions. Particularly, don't talk among yourselves
24 about the case, and remember you are not to deliberate at all
25 until I finish the charge and you all go to your jury room

1 and begin your deliberations. So follow my prior
2 instructions, please, and be back at 1:45, quarter of 2. Be
3 back at 1:45 this afternoon.

4 (RECESS FOR LUNCH)

5 THE COURT: I charge that in Case No. 92-CRS-11150,
6 that for you to recommend that the defendant Frank Junior
7 Chambers be sentenced to death for the murder of B. P.
8 Tutterow, the State must prove to you four things beyond a
9 reasonable doubt. A reasonable doubt is a doubt based on
10 reason and common sense, arising out of some or all of the
11 evidence that's been presented, or lack or insufficiency of
12 the evidence, as the case may be. Proof beyond a reasonable
13 doubt is proof that fully satisfies or entirely convinces you
14 of each of the following things:

15 First, that the defendant himself killed or
16 attempted to kill B. P. Tutterow, or intended to kill B. P.
17 Tutterow, or intended that deadly force would be used in the
18 course of a felony, or was a major participant in the
19 underlying felony and exhibited reckless indifference to
20 human life.

21 Second, that one or more aggravating circumstances
22 existed.

23 Third, that the mitigating circumstances are
24 insufficient to outweigh any aggravating circumstances you
25 have found.

1 your own. We're going to take our morning break. Be back
2 in place in fifteen minutes, please.

3 (Jury leaves the courtroom.)

4 (Morning recess taken by the Court.)

5 (Jury enters the courtroom.)

6 JUROR: Are we allowed to keep notes?

7 THE COURT: Yes. Let me see all of you at the
8 bench.

9 (Conference held at the bench.)

10 THE COURT: All right, Mrs. Shelton. The YMCA
11 called. Your son hit his head coming out of the pool. It
12 doesn't appear to be anything of great concern. I mean, it
13 doesn't appear to be urgent or anything of that nature. He
14 just bumped his head coming out of the pool, but they
15 wanted you to come and take a look at him, so we're going
16 to take a recess until 1:30 so you can go check on your
17 son. There appears to be no problem, ma'am. You go on and
18 check on him and we'll be back at 1:30. Just check on your
19 child. Follow my prior instructions. Be back at 1:30 this
20 afternoon, please. Thank you. All of us are going to take
21 a recess until 1:30. Be back at 1:30 this afternoon.
22 Everyone else remain seated while the jury leaves.

23 (Jury leaves the courtroom.)

24 THE COURT: Do we need to take up anything in the
25 absence of the jury?

1 Q. Perhaps I'm getting ahead of myself, but were you
2 present when the bodies of B. P. and Ruby Tutterow were
3 sealed to be sent to the Medical Examiner's Office?

4 A. I was.

5 Q. And were they sent to the Medical Examiner's Office
6 dressed in the manner that you found them?

7 A. Yes, they were.

8 Q. When you found them were either of them wearing
9 eyeglasses?

10 A. They were not.

11 Q. Did either of them have any jewelry on their hands or
12 wrist or anywhere on their body?

13 A. They did not.

14 MR. KENERLY: Your Honor, we move to admit
15 photographs, State's Exhibit 37 through 40 and publish
16 those to the jury.

17 THE COURT: All right.

18 (Exhibits passed to the Jury.)

19 THE COURT: Is there anyone on the jury driving a
20 car registered to Pamela Sue Cook. All right, we're going
21 to take our -- we'll take care of that later on. We're
22 going to take our afternoon break at this time. If you
23 would follow my prior instructions to you please, and be
24 back in place in fifteen minutes. Everyone else remain
25 seated while the jury leaves.

1 THE COURT: Okay. Thank you.

2 (Witness leaves the stand and is excused.)

3 MR. KENERLY: Your Honor, before the next witness
4 is called, there is a matter we need to bring to the
5 Court's attention. Before I get into that, we move to
6 introduce State's Exhibit Number 85, the photograph
7 identified by Special Agents Bonds on redirect
8 examination.

9 THE COURT: All right.

10 MR. KENERLY: Move to pass that among the jury.

11 (Exhibits passed to the Jury.)

12 MR. KENERLY: After the jury has had an
13 opportunity to view that, before the next witness is
14 called, there is a matter we need to bring to the Court's
15 attention out of the presence of the jury.

16 THE COURT: Members of the jury, go to your jury
17 room for just a moment, please. We will bring you back in
18 a moment. Follow my prior instructions.

19 (Jury leaves the courtroom.)

20 THE COURT: All right, sir.

21 MR. KENERLY: Your Honor, the next witness the
22 State intends to call is Valerie Mason. Based upon her
23 previous interviews that have been conducted with her, we
24 would forecast that she is going to relate two things that
25 Robert Blakney said to her around in the vicinity of 11:00

1 an extra five minutes?

2 MR. KENERLY: Yes, sir, that would be helpful.

3 THE COURT: Bring the jury back in.

4 (Jury enters the courtroom.)

5 THE COURT: All right. We're going to take our
6 morning break at this time. Follow my prior instructions
7 to you, please. Be back in place in twenty minutes.
8 Everyone remain seated while the jury is leaving.

9 (Jury leaves the courtroom.)

10 (Morning recess taken by the Court.)

11 (Jury enters the courtroom.)

12 THE COURT: All right go ahead.

13 MR. KENERLY: Call Tonya Wilhelm, Your Honor.

14 TONYA WILHELM, being first duly sworn, was examined and
15 testifies as follows during DIRECT EXAMINATION BY MR.

16 KENERLY:

17 Q. Ms. Wilhelm, you'll need to sit near enough to the
18 microphone so we'll all be able to hear you. Will you
19 state your name, please?

20 A. Tonya Wilhelm.

21 Q. Ms. Wilhelm, by whom are you employed?

22 A. Salisbury Police Department.

23 Q. What is your job there?

24 A. I'm an ID Technician.

25 THE COURT: What ma'am?

1 THE COURT: All right, members of the jury, we're
2 going to take our lunch recess at this time. If you'd
3 follow my prior instructions to you and return this
4 afternoon at 2:00 o'clock. You're free to leave until 2:00
5 p.m. Everyone else remain while the jury is leaving.

6 (Jury leaves the courtroom.)

7 (Lunch recess taken by the Court.)

8 -----

9 AFTERNOON SESSION, February 8, 1994:

10 (Jury enters the courtroom.)

11 THE COURT: Call your next witness.

12 MR. KENERLY: The next witness is Antonio Mason
13 and he is being brought around. Your Honor, if I might
14 step out of the courtroom just a minute to see how we're
15 doing with him. Mr. Mason, if you would come around and
16 be sworn, please. Go right up here to the microphone.

17 ANTONIO MASON, being first duly sworn, was examined and
18 testified as follows during DIRECT EXAMINATION BY MR.

19 KENERLY:

20 Q. Now, Mr. Mason, you'll need to sit up close enough to
21 that microphone that it will pick up your voice and you'll
22 need to speak slowly enough that everybody can understand
23 you. Will you say what your name is, please, sir?

24 A. Antonio Clemson Mason.

25 Q. Mr. Mason, do you know Robert Blakney?

1 there anyone else in that room?

2 A. No.

3 Q. What room of the house was that?

4 A. The bedroom.

5 Q. All right. Was the door closed when you and he went
6 in?

7 A. Yeah.

8 Q. Now, when you went into the room, will you just
9 describe what happened when you and he were in there?

10 A. When we went in the bedroom, he gave me a ring.

11 Q. Did he say anything to you about the ring other than
12 just give it to you?

13 A. Well, he said that they had some jewelry and the guns.

14 MR. LEA: Objection to they.

15 THE COURT: Overruled.

16 Q. Go ahead.

17 THE COURT: Once again, members of the jury, keep
18 in mind the prior instructions which I've given to you.
19 This may not be considered as evidence against either
20 Chambers or Barnes. Go ahead.

21 Q. Go ahead, ma'am. He said that he had some jewelry
22 and some guns?

23 A. Yeah.

24 Q. All right.

25 A. And I told him, let me see it, and he showed me just

1 Carolina and regularly teach both areas to law enforcement
2 officers in the State of North Carolina. I also serve on
3 the specialized homicide investigation team specifically in
4 the area of blood stain pattern interpretation. I'm also
5 responsible for the training program for the SBI for their
6 agents in the area of blood stain pattern interpretation.

7 Q. Over what period of time have you been certified to
8 analyze and to instruct in this field?

9 A. Since -- I have been instructing in the field since
10 1988.

11 MR. KENERLY: Your Honor, we tender Agent Deaver
12 to the Court as an expert in the field of forensic serology
13 and specifically blood pattern analysis.

14 THE COURT: All right.

15 Q. Now, Special Agent Deaver --

16 THE COURT: Before we get started, it will
17 probably be a good time for us to take our morning break.
18 We're going to take our morning break, members of the jury.
19 Follow my prior instructions to you. Be back in place in
20 fifteen minutes, please. Everybody else remain seated.
21 (Jury leaves the courtroom.)

22 THE COURT: Don't talk to the Bailiff. I'll talk
23 to you if you would like look to.

24 JUROR: I give him a note about the doctor's
25 appointment the 17th of February.

1 those fingerprints right there that day at the crime scene?

2 A. Yes, ma'am, I did.

3 Q. What did you have to compare those latent lifts with,
4 sir?

5 A. I had three sets of inked impressions.

6 Q. Would those be known inked impressions, sir?

7 A. They were inked impressions that bore the names of
8 Robert L. Blakney, Frank J. Chambers and William L. Barnes.

9 MS. SYMONS: Court's indulgence, Your Honor?

10 THE COURT: I think it's time for us to take a
11 break. Members of the Jury, we're going to take our lunch
12 recess at this time. Follow my prior instructions to you.
13 Please be back at 2:00 o'clock this afternoon. You're free
14 to leave until then. Everyone else remain in your seat.
15 (Jury leaves the courtroom.)

16 MR. HARP: For the record, I'd like to make a
17 motion to sever based upon your ruling this morning on the
18 admission of their statement of co-defendants.

19 THE COURT: Motion is denied.

20 MR. HARP. Thank you.

21 MR. CRANFORD: For the record, we would join in on
22 that, Your Honor.

23 THE COURT: Denied. Let the record indicate some
24 comment was made about a newspaper this morning that the
25 juror had. The bailiff saw the paper. It was a U.S.A.

1 before we go into the next phase?

2 THE COURT: Are we waiting on a witness?

3 MR. KENERLY: No, but probably what we will go
4 into next would be the DNA examination, which is probably
5 going to be fairly lengthy and involved.

6 (Conference held at the bench.)

7 THE COURT: All right, members of the jury, we're
8 going to take our morning break at this time. Follow my
9 prior instructions to you. Please be back in place in ten
10 minutes. Everyone else remain seated while the jury is
11 leaving.

12 (Jury leaves the courtroom.)

13 (Morning recess taken by the Court.)

14 THE COURT: Now for the record, the jury has been
15 sent out for purposes of Voir Dire.

16 MR. KENERLY: Your Honor, this is actually a
17 separate issue from the Voir Dire matter we discussed at
18 the bench. This next witness is James Chambers and we
19 anticipate that as he testifies about a conversation that
20 he had with the Defendant Frank Junior Chambers on the
21 early evening of the 29th of October of 1992 that he will
22 testify words to the effect that Frank Junior Chambers said
23 he had just gotten out of jail; that he would not go back
24 to prison again and that he would kill anybody he if had to
25 to keep from going back to prison. We would anticipate

1 (Jury enters the courtroom.)

2 THE COURT: Members of the jury, this is going to
3 take a while longer. Rather than just have you wait back in
4 the jury room, I'm going to let you have an extended break. If
5 you would, please, just gather outside the entrance door here
6 in twenty-five minutes. And we'll send the bailiff out for you
7 when we're ready for you. If you will just be outside the door
8 in twenty-five minutes, please. Follow my prior instructions
9 to you.

10 (Jury exits the courtroom.)

11 THE COURT: Anything else?

12 MR. LEA: Not right now.

13 - - -

14 VOIR DIRE EXAMINATION BY MR. HARP:

15 Q The only thing that -- when you walked in the room and saw
16 these three photos, the only thing you saw on the wall were
17 those three photos?

18 A Yes, sir.

19 Q No other pictures around, nothing else, just those three
20 pictures of those three individuals?

21 A I don't know who it was.

22 Q Did you know Mr. Chambers before you say you picked him up
23 on that night? Did you know him before then?

24 A Yes, I've seen him before.

25 Q You had seen him?

1 Q And who had most of that money or held the largest amount
2 of money?

3 A I don't know.

4 MS. SYMONS: Thank you, sir.

5 THE WITNESS: But basically the only person that I
6 received any money from out of their hand myself, was Tim
7 Barnes.

8 MS. SYMONS: Thank you, sir. Court's indulgence. No
9 further questions.

10 THE COURT: All right. Members of the jury, we're
11 going to adjourn for the afternoon at this point. If you'll
12 follow my prior instructions to you. Please be back tomorrow
13 morning at 9:30.

14 THE WITNESS: Here is the evidence.

15 THE COURT: Just leave it up there. Everyone else
16 remain seated while the jury leaves.

17 (Jury exits the courtroom.)

18 THE COURT: Anything we need to take up this
19 afternoon? Is there anything we need to take up before we
20 leave?

21 MS. SYMONS: Yes, Your Honor, there's two matters to
22 alert the Court to. One is that Mr. Smith is here on a writ.
23 So we'll need to have him ordered back tomorrow. We can have
24 that paperwork for you before you go. The second is that the
25 State had earlier filed a 404-B motion. And today we filed on

1 MR. HARP: I would object to the introduction of
2 those.

3 THE COURT: Overruled. All right, let's pass them
4 after we take a break. Follow my prior instructions and be
5 back in place in fifteen minutes.

6 (State's Exhibit Numbers 142, 142-A, 142-B and 142-C are
7 Received Into Evidence.)

8 (Recess.)

9 MR. KENERLY: Your Honor, we'd move to pass State's
10 Exhibits 142-A and 142-B among the jurors.

11 (States Exhibit Numbers 142, 142-A, 142-B and 142-C are
12 passed to the jury.)

13 MR. KENERLY: Your Honor, is it all right if I step
14 out to make a copy of the statement of the next witness?

15 (Mr. Kenerly exits the courtroom and returns.)

16 MS. SYMONS: Your Honor, the State would ask William
17 Logan to the stand. And Sergeant Harrington, if you could
18 bring him in, please.

19 - - -

20 WILLIAM LOGAN, being first duly sworn, testified as follows
21 during DIRECT EXAMINATION by MS. SYMONS:

22 Q Sir, what is your name, please?

23 A William Thomas Logan, Junior.

24 Q Mr. Logan, how old are you?

25 A 40.

1 some rulings on some of the things that may come up later on
2 during the trial. So rather than take up your afternoon
3 waiting in a room while I'm listening to that, I am going to
4 let you go ahead and go home for the day. So if you'll follow
5 all my prior instructions to you, please. All of you still
6 have those in mind? I repeated it so much by now. So if
7 you'll be back tomorrow morning at 9:30, please.

8 (Jury exits the courtroom.)

9 THE COURT: All right, we're going to go into the
10 matter of form in which these statements given by Chambers and
11 Blakney should come in; is that right?

12 MS. SYMONS: Yes, Your Honor, that's a matter which
13 we have previously filed a memorandum of law. We have offered
14 to the Court a proposed redaction of each of their statements
15 so that the co-defendants are not specifically identified by
16 name. That's attached to the memorandum of law as to each.

17 THE COURT: All right. I have that in front of me.
18 Do you have copies of that, each of you?

19 MR. FRITTS: We do, Your Honor.

20 THE COURT: Have you had a chance to review them?

21 MR. FRITTS: Yes, we have, Your Honor. And Your
22 Honor, we have handed up a memorandum of law and have given a
23 copy to the State back when we were arguing about a prior
24 statement that was made.

25 THE COURT: Let's see, that was entitled memorandum

1 THE COURT: All right, members of the jury, we're
2 going to take our lunch break at this time. If you'll recall
3 my prior instructions to you, please, and be back this
4 afternoon at two o'clock. You may leave until 2:00.

5 (Jury exits the courtroom.)

6 THE COURT: All right, take a recess until two
7 o'clock.

8 (Recess.)

9 - - -

10 (2:00 p.m.)

11 MS. SYMONS: Your Honor, at this time, the State
12 would ask Detective J.D. Barber to the stand. If you'd come
13 forward, sir.

14 - - -

15 J. D. BARBER, being previously sworn, testified as follows
16 during DIRECT EXAMINATION by MS. SYMONS:

17 Q Sir, your name, please.

18 A J.D. Barber.

19 Q And you have previously been sworn in this matter; is that
20 correct?

21 A Yes, ma'am, I have.

22 Q How are you employed, sir?

23 A As a criminal investigator for the Salisbury Police
24 Department.

25 Q How long have you been working with the Salisbury Police

1 (Pause.)

2 MS. SYMONS: Thank you, sir, nothing further at this
3 time, Your Honor.

4 THE COURT: We're going to take our afternoon break,
5 members of the jury. If you'll follow my prior instructions.
6 Be back in your place in fifteen minutes.

7 (Recess.)

8 (Jury exits the courtroom.)

9 - - -

10 CROSS EXAMINATION BY MR. LEA:

11 Q Mr. Creasy.

12 A Sir.

13 Q Now, you worked with the -- in this department for
14 approximately eighteen years, you just switched over; is that
15 correct?

16 A That is correct, sir.

17 Q And did I understand you to say that while -- I understand
18 that the barium and antimony and lead that you're talking
19 about, that's what you look for?

20 A That's correct, sir.

21 Q Now, and did I understand you to say that it's formed --
22 what you're looking for are little minute balls, you might say,
23 of what amounts to melted barium, antimony and lead?

24 A Yes, sir, you're correct in that.

25 Q And did you say it was formed -- that what happens is that

1 right, Members of the Jury, we're going to take our morning
2 break at this time. Remember my prior instructions to you.
3 Please be back in fifteen minutes.

4 SHORT RECESS

5 MS. SYMONS: Rachael Eberhart.

6 RACHAEL EBERHART, BEING FIRST DULY SWORN, TESTIFIED AS
7 FOLLOWS DURING DIRECT EXAMINATION BY MS. SYMONS:

8 Q. State your name, please.

9 A. Rachael Eberhart.

10 Q. You'll have to speak just a little bit louder. Okay?

11 A. Rachael Eberhart.

12 Q. How old are you, Ms. Eberhart?

13 A. Twenty-five.

14 Q. And are you working?

15 A. Yes.

16 Q. What do you do?

17 A. I'm a certified nurse assistant at Salisbury Nursing and
18 Rehabilitation.

19 Q. How long have you worked as a certified nurse's
20 assistant? Can you remember?

21 A. About six years.

22 Q. Ma'am, do you know one of the defendants here, Mr. Frank
23 Chambers?

24 A. Yes.

25 Q. How do you know him?

1 a discharged weapon or the hands of a shooter would have had
2 to have been in close proximity to the jeans to transfer that
3 material there.

4 Q. Now the lifts that you made of gunshot residue came from
5 the inside of the trouser band. Is that correct?

6 A. Inside top edge, yes.

7 Q. Okay. Not the outside but the inside of that band?

8 A. The inside and along the top.

9 Q. Now--

10 THE COURT: Let's take a break here. We're going to
11 take our afternoon break, Members of the Jury. Be back in 15
12 minutes. Follow my prior instructions.

13 SHORT RECESS

14 MR. KENERLY: I believe Mr. Hauser is still absent,
15 Your Honor.

16 THE COURT: Who's that?

17 MR. KENERLY: Mr. Hauser.

18 THE COURT: Have the bailiff look for him.

19 DIRECT EXAMINATION OF AGENT BENDURE CONTINUES BY MR. KENERLY:

20 Q. Mr. Bendure, I'm going to hand you a manila envelope
21 containing a slide and two evidence containers that are
22 marked as State's Exhibit No. 166. Let me begin by asking
23 you what State's Exhibit No. 166 is.

24 A. State's Exhibit 166 is assorted items I've put together
25 and it contains a manila envelope with the yarn fragments

1 you would, follow my prior instructions and come back at
2 1:45. Everybody understand that means be back at 1:45 this
3 afternoon? All right. You're free to leave until that time.

4 RECESS FOR LUNCH

5 THE COURT: All right. Let's proceed.

6 MS. SYMONS: We do have a number of items testified
7 to which we wish to move into evidence. First is State's
8 Exhibit No. 18, a photograph of the hall closet as it
9 appeared in the home on this date, and there has been a
10 circle drawn on it to indicate where the cigar box with the
11 money was found. We'd ask that that picture be published to
12 the jury.

13 THE COURT: All right.

14 MS. SYMONS: Photograph No. 32 has previously been
15 admitted, but since it was admitted, a witness drew a circle
16 on it--Susan Morgan--to indicate where she found a cigarette
17 butt. I'd like this to be shown to the jury so they may see
18 that new addition to the photograph. State's Exhibit No. 90,
19 which is the white T-shirt of Robert Blakney, and 91, which
20 are Mr. Blakney's jeans. State's Exhibit No. 94, which are
21 the jeans of Frank Chambers, and 95, which is the blue shirt
22 worn by Frank Chambers. State's Exhibits No. 100 through and
23 including No. 106, which are the different bullet fragments
24 and particles collected at the scene testified to by John
25 Bendure. State's Exhibit No. 107 and 107-A, the cigarette

1 to admit the items that we've had testimony about. That's
2 No. 175 through and including No. 190.

3 MR. LEA: Objection to those.

4 MR. CRANFORD: We also object.

5 THE COURT: The publishing of the pictures?

6 MR. HARP: Yes, sir.

7 THE COURT: Overruled.

8 MS. SYMONS: Thank you, Your Honor.

9 THE COURT: Members of the Jury, we're going to
10 adjourn for the day. Follow my prior instructions and be
11 back tomorrow morning at 9:30, please.

12 (The jury exits the courtroom.)

13 THE COURT: How many other witnesses do you have?

14 MS. SYMONS: One.

15 THE COURT: Remind him to be here at 9:30, please.
16 I'm sorry. It's too late to try to work you in when these
17 folks have children and everything that they need to attend
18 to. Anything else you want to take up?

19 THE COURT: Recess until 9 o'clock.

20 OVERNIGHT RECESS

21 February 23, 1994:

22 MR. KENERLY: Your Honor, the State will call Tom
23 Trochum.

24 T. R. TROCHUM, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS
25 DURING DIRECT EXAMINATION BY MR. KENERLY:

1 THE COURT: Yes, sir.

2 MR. KENERLY: Your Honor, at this time there are, I
3 believe, a few items that have not been admitted into
4 evidence, and according to your notes, that would be State's
5 Exhibit No. 119 and State's Exhibit No. 120, State's Exhibit
6 119 being identified as the *post mortem* inked impressions of
7 the finger and palm prints of Ruby Tutterow. We'd move to
8 admit those.

9 THE COURT: All right. Admitted.

10 MR. KENERLY: And State's Exhibit No. 120, which has
11 been identified as the *post mortem* inked impressions of B. P.
12 Tutterow.

13 THE COURT: Admitted.

14 MR. KENERLY: We'd move to admit the ballistics
15 chart used by Agent Trochum, which has been marked for
16 identification as State's Exhibit No. 198.

17 THE COURT: Admitted.

18 MR. KENERLY: If I could have just a minute, Your
19 Honor. Your Honor, that is the evidence for the State.

20 THE COURT: All right. Members of the Jury, it will
21 be necessary for there to be some motions in your absence.
22 I'm going to go ahead and give you an extended break. If
23 you'll be back in half an hour, please. Don't come in the
24 courtroom for thirty minutes. Remember my prior instructions
25 to you, please.

1 other witnesses say as well.

2 The other thing that you can consider about
3 whether or not to believe a witness is whether or not
4 they've got prior convictions. Many witnesses said to
5 you, yes, I have been convicted of this, and yes I have
6 been convicted that. And I say to you just because a
7 person has been convicted of a larceny or assault,
8 armed robbery, whatever it was, doesn't mean they're
9 not telling the truth about what they saw. There will
10 be arguments to you that these people are drug dealers,
11 and drug users and convicted criminals. I say of
12 course they are. That's who the defendants hung out
13 with. We don't get to choose our witnesses. Our
14 witnesses are the people who were there and the people
15 who saw things. That's why they're of that quality.
16 That's who these three men went to hang with after they
17 killed the Tutterows. Don't reject their testimony for
18 that reason alone.

19 Ladies and gentlemen, what happened on the
20 very last night in the lives of B. P. And Ruby
21 Tutterow?

22 THE COURT: At this point it may be a good
23 idea, a good time to take a break. Appears you're
24 going to another phase of argument. We're going to
25 take a ten minute break. Follow my prior instructions

1 to you, and let's make it 15 minutes. Take a 15 minute
2 break. Follow any prior instructions. Be back in
3 place in 15 minutes. Make sure you don't have any
4 contact with anyone associated with this case during
5 the break. Follow all my prior instructions to you.
6 Please be back in place in 15 minutes.

7 (Morning recess taken by the Court.)

8 MS. SYMONS: On the very last night of their
9 lives Ruby and B. P. did what they always did. They
10 talked with their kids and went to church. They went
11 to church for an annual church meeting and church
12 sing. You heard the Reverend House testify B. P. is
13 active in a number of different men's organizations
14 within the church, has held a number of positions and
15 collects money on behalf of those organizations. Ruby
16 sings in the choir, and she collects money for Sunday
17 school. They were having a special annual meeting and
18 went to attend it that night. B. P. came in and made
19 the joke he usually jokes, said sorry I'm late.
20 Couldn't find a parking spot. This is a joke because
21 they lived across the street from the church. They
22 always walked; they walked right over. And towards the
23 end of meeting Ruby began to tease Reverend House. And
24 she said I'm really tired of these really long
25 meetings, and he became concerned. So he looked at his

1 that in couple of minutes when I hit that chair, you're
2 not going to hear another word from the State of North
3 Carolina. You recall this evidence and you recall your
4 oath, and you do your duty and you find these three
5 guilty of these crimes that they committed there, that
6 they're not sorry for and help lift the burden of grief
7 that's on the Tutterow family.

8 The COURT: All right, members of the jury,
9 we're going to take a 15 minute break. Follow any
10 prior instructions, please. Be back in place in 15
11 minutes, please.

12 MS. SYMONS: Your Honor, yesterday when I was
13 making an argument there was an objection posed by
14 counsel for Mr. Blakney. I misunderstood his
15 objection. I thought they were objecting to the fact
16 that the watch was never recovered. Therefore, I can't
17 argue it, so I kept going. Turns out I was mistaken.
18 Which I was arguing at that point that Bobby Blakney
19 offered a watch for sale. In fact, the evidence had
20 been that Frank Chambers offered the watch. I went
21 back to my notes. I was wrong. It was a misstate that
22 I made. I have offered to counsel to put on the record
23 in front of the jury that I made that misstatement and
24 that, in fact, is not what the evidence was to the
25 Court.

1 I appreciate your patience, your time. My
2 thoughts are with you. I ask you to come back after
3 you have been instructed by the Judge to return a
4 verdict of not guilty of first degree murder. Thank
5 you.

6 THE COURT: Members of the jury, we will
7 take an hour for lunch. Be long enough for all of
8 you? I don't want to push any of you. If it's not
9 long enough, let me know.

10 JUROR: I may need a little more time. I
11 have to go approximately about 18 or 20 miles.

12 THE COURT: Be back at 1:45. Follow my
13 prior instructions to you. Please be back at 1:45.

14 JUROR: Will we be here tomorrow?

15 THE COURT: We will be here tomorrow, yes.
16 Be back at 1:45, please. Follow my prior instructions
17 to you, please.

18 (Lunch recess taken by the Court from 1:45 to 2:00
19 p.m.)

20 MR. HARP: It has been said that the mill
21 wheels of justice grind exceedingly slow and
22 exceedingly fine. I think you agree that the emphasis
23 has been on slow in this case and many others. I don't
24 want to prolong this any more than necessary. I just
25 want to try to cover a few things with you briefly, go

1 MS. SYMONS: Yes, sir.

2 THE COURT: We'll take a 15 minute break.

3 Follow any prior instructions to you. Please be back
4 in place in 15 minutes.

5 MS. SYMONS: Thank you, Your Honor. Ladies
6 and gentlemen, I was just about to discuss some points
7 about the testimony of Dr. Warren. And as with any
8 witness, you can decide to believe some or none or part
9 or all of his testimony. But some of the things you
10 need to consider before we even go into the substance:
11 Was Dr. Warren an objective expert who came in and said
12 these are my findings without respect to whether they
13 help this side or hurt this side? This is what I said,
14 let me tell you about it, or was he biased? Did he try
15 and shade everything?

16 MR. CRANFORD: Objection.

17 MS. SYMONS: To explain and justify things
18 by Robert Blakney. Did he alter his diagnosis to fit?
19 These are things for you to consider when you decide
20 what weight to give his testimony. Let me tell you
21 right at the front, at the very beginning Mr. Blakney
22 is not intelligent. He is not a rocket scientist.
23 Neither is Mr. Barnes. Neither is Mr. Chambers. I'm
24 not going to suggest to you otherwise. Certainly these
25 men have low IQ's. You saw the school records of all

1 And when you do, I hope that you will be able to say
2 that while you can't do something every day to stop the
3 Frank Chambers, Timmy Barnes and Robert Blakneys of the
4 world, you had a chance in this case. And that you
5 looked at the facts and you looked at the law --.

6 MR. FRITTS: Objection.

7 THE COURT: Overruled.

8 MR. KENERLY: -- and you decided that the
9 proper legal punishment in this case is a death
10 sentence as to each defendant. And ladies and
11 gentlemen, the murders of Ruby and B. P. Tutterow and
12 your oath as jurors in this case require, I contend to
13 you, that you have the strength to return death as your
14 verdict and recommendation. Thank you.

15 THE COURT: All right. Members of the jury,
16 we're going to take an hour lunch recess at this time.
17 Follow my prior instructions to you, please, and can
18 everybody be back at 2:15? Will that give everybody
19 plenty of time? Be back at 2:15 this afternoon. Follow
20 my prior instructions. Be back then.

21 (Lunch recess taken by the Court.)

22

23

24

25

1 understanding and do one thing: Of those two options
2 you have, I'm asking you to spare a life.

3 THE COURT: All right. Lets take ten
4 minutes. Be back in place in ten minutes, please.
5 Follow my prior instructions to you.

6 MR. CAUSEY: Thank you, Judge. Ladies and
7 gentlemen, I think when Mr. Fritts stood up here and
8 talked about feeling, I knew what he meant. I find it
9 odd that I didn't know a single one of you six weeks
10 ago. I didn't know your names, didn't know anything
11 about you, didn't know where you worked. And now, the
12 way this system works, I'm standing in front of you
13 asking you to make the most important decision any of
14 you will ever make. And if you think back on your
15 past, if any of you ever made a decision bigger than
16 this one that you are about to make, and I doubt that
17 you ever will in the future. I'm asking you to make a
18 decision that involves life or death. Many of us eight
19 lawyers have all taken a role in placing this serious
20 burden upon your shoulders. And I think when this is
21 over and you have made your decision, whatever it may
22 be, and you have had time to reflect on it, not here in
23 the courtroom, but in the cool of the evening; I don't
24 think any of you will ever thank us for putting you in
25 this position and placing this burden on your

1 how to. He's not saying one or none. He's saying one,
2 three; I don't know. He's not limiting, he is not
3 lessening it. Is that the sign of someone deceitful?
4 Is that the sign of someone trying to cover up? Bobby
5 Blakney's evidence meshes with the physical evidence.
6 There is nothing to connect him with the shooting.
7 There is nothing to connect him with the guns because
8 he wasn't connected with them. Bobby Blakney was in
9 another room when this unfortunate thing happened. He
10 had nothing to do with the shooting, had no intent for
11 anyone to die. Those are the facts. Those are the
12 evidence. There are uncontradicted. Mr. Cranford
13 will talk to you about the law.

14 THE COURT: All right. Members of the jury,
15 were going to adjourn for the day at this point.
16 Follow any prior instructions to you. Please be back
17 tomorrow morning at 9:30. You are free to leave for
18 the day.

19 (Jury out.)

20 THE COURT: I want to go over a few things
21 before we leave for the day. If you will be patient,
22 please. As to Barnes, I want to go over one thing.
23 You want to do something on failure to testify; is that
24 right?

25 MR. FRITTS: Yes, sir. On the introductory

1 THE COURT: Overruled.

2 MR. KENERLY: I would move to pass State's
3 Exhibit Number 200, the certified copies of the conviction
4 and State's Exhibit Number 204 and 204A to the jury.

5 THE COURT: All right, sir.

6 (Exhibits passed to the jury.)

7 THE COURT: While they are looking at that, could
8 I see you up here?

9 (Conference held at the bench.)

10 THE COURT: Let me see you up here again, please.

11 (Conference held at the bench.)

12 THE COURT: Let me see all of you up here at the
13 bench.)

14 (Conference held at the bench.)

15 THE COURT: All right, members of the jury, we're
16 going to take our morning break at this time. Follow my
17 prior instructions to you. Please be back in 15 minutes.

18 (Morning recess taken by the Court.)

19 MR. KENERLY: May I proceed, Your Honor? At this
20 time, the State would move to introduce into evidence
21 certified copies of a warrant in 90 CrS 10595; also a Bill
22 of Indictment and Judgment and Commitment in the same case
23 charging Frank Junior Chambers with Common Law Robbery and
24 a Judgment and Commitment in that case. We move to
25 introduce those certified copies.

1 better, but if they've been on alcohol for a couple of
2 years or marijuana or cocaine when they take a test and
3 they're off of that for a period of six months or so, then
4 it's going to get -- their true IQ is going to come through
5 better.

6 Q. Do you recall when your tests was administered?

7 A. August 20th, 1993.

8 Q. All right, you can re-take the witness stand.

9 (Witness returns to the stand.)

10 THE COURT: All right, we're going to stop for
11 the day at that point. Follow my prior instructions. Be
12 back tomorrow morning at 9:30.

13 (Witness leaves the stand.)

14 (Jury leaves the courtroom.)

15 (Overnight recess taken by the Court.)
16
17
18
19
20
21
22
23
24
25

1 other things.

2 THE COURT: Sustained.

3 Q. Well, you know why you go to training school in a
4 general way, don't you?

5 MR. CRANFORD: Objection.

6 THE COURT: Sustained.

7 Q. Well, now Dr. Warren, you had some materials that you
8 have called Tri-County Mental Health, that's the first page
9 and they're marked Defendant's Exhibit Number 2, right?

10 A. Yes.

11 Q. And if you start with Defendant's 2G, well, wait, you
12 have 2G with you, right?

13 THE COURT: Members of the jury, we're going to
14 take our morning break at this time. If you would follow
15 my prior instructions to you. Please be back in place in
16 fifteen minutes.

17 (Jury leaves the courtroom.)

18 THE COURT: I'm going to require you to lay some
19 foundation as to whether he reviewed these materials and
20 that sort of thing before I will allow that. He has already
21 testified these were the material. Stand in recess for 15
22 minutes.

23 (Recess taken by the Court.)

24 (Jury enters the courtroom.)

25 MR. HARP: Mr. Causey would like to be excused.

1 Warren be excused.

2 THE COURT: He's free to leave.

3 (Witness is excused.)

4 THE COURT: We're going to take the lunch recess
5 at this time. Follow my prior instructions. Be back at
6 two o'clock in the afternoon. You're free to leave at this
7 time.

8 (Luncheon recess taken by the Court.)

9

10

11 AFTERNOON SESSION, March 2, 1994

12 (Jury enters the courtroom.)

13 MR. CRANFORD: That will conclude our evidence,
14 Your Honor.

15 MR. LEA: Your Honor, we will be next.

16 THE COURT: All right, call your first witness.

17 LARRY MURPHY, being first duly sworn, was examined and
18 testified as follows during DIRECT EXAMINATION BY MR. LEA:

19 Q. State your name for the Court.

20 A. Larry Murphy.

21 Q. Mr. Murphy, where are you employed?

22 A. At Central Prison in Raleigh, Food Service Supervisor.

23 Q. What is your title there?

24 A. Food Service Supervisor II.

25 Q. What are your duties as Food Service Supervisor Number

1 to go first thing Monday. Bring the jury in, please.

2 (Jury enters the courtroom.)

3 THE COURT: All right, Members of the Jury, you
4 have heard all of the evidence that is going to be
5 presented during the sentencing portion of this trial.
6 It's going to take the balance of the day for me to have
7 charge conference with the attorneys and to go over the
8 instructions that are going to be given to you at the close
9 of this case regarding the appropriate sentence to be
10 imposed and I can only anticipate that based on the prior
11 arguments of all the attorneys, that took about a day and
12 a half, I anticipate that's what it will take during the
13 sentencing phase and I don't think it's fair to all people
14 concerned to have part of them on Friday and part of them
15 on a Monday and Mrs. Adams has a wedding to go to, so for
16 those reasons, we're going to adjourn for the week. If
17 you'll be back at 9:30 on Monday, we'll get attended to
18 what we have to tend to and be ready to go first thing on
19 Monday morning. So, I hope you a nice week-end. Be back
20 at 9:30 on Monday, please, and be ready to conclude this
21 matter. Make sure you follow all my prior instructions to
22 you.

23 (Jury leaves the courtroom.)

24 MR. LEA: Your Honor, before we get to the
25 charge conference, we would make another Motion for

1 THE COURT: You're not requesting that I bring them
2 back and instruct them further?

3 MS. SYMONS: No, Your Honor.

4 THE COURT: Bring the jury back.

5 (The jury returns to the courtroom.)

6 THE COURT: We'll take the lunch recess at this
7 time. Follow all my prior instructions to you and
8 specifically I tell you, don't deliberate in this case or
9 discuss it among yourselves in any way until I have completed
10 instructing you on the law which you are to follow. Will
11 2:15 give everybody enough time? Anybody have a problem with
12 that? Follow all my prior instructions. Be back at 2:15
13 this afternoon.

14 (RECESS FOR LUNCH)

15 THE COURT: Well, as you all probably know, Mrs.
16 Adams broke her finger. We have called the hospital to see
17 how she's doing. I think she's going to be back first thing
18 in the morning, and indications are that she still wants to
19 serve so rather than seat an alternate, we're going to wait
20 until she gets back. If you will follow all my prior
21 instructions to you, please be back tomorrow morning at 9:30
22 and we'll resume at that time. Yes, sir?

23 JUROR: Do you want us to pass these in?

24 THE COURT: Is it agreeable to just let them leave
25 their instructions on the seat there? All right. Anybody

1 trust that he had exhibited in Chambers continued right
2 up to that point at ten o'clock at night, opening the
3 door to see what they wanted. And the violation of
4 that trust and the violation of their home and the way
5 this murder occurred is in itself enough, substantial
6 enough to require that you impose a death penalty in
7 this case.

8 So what are you going to hear from the
9 defendants? I don't, of course, know. I'm not a mind
10 reader. I'm going to suggest a couple of things. I
11 would suggest to you that you are going to hear from
12 one of six attorneys something in the form of a
13 religious argument. Somebody invariably says that the
14 Bible says now "Thou shalt not kill". Point of fact,
15 every modern interpretation, I think you in your life
16 experiences are aware that the Bible says now "Thou
17 shalt not murder", which is what these defendants who
18 are standing before you are convicted of doing. They
19 would ask you, because of your religious background, to
20 extend charity and forgiveness to these defendants and
21 not impose the maximum punishment. B. P. Tutterow
22 extended that same charity and forgiveness to these
23 defendants. It identified him in the mind of Frank
24 Chambers as a target and led to him being the victim of
25 this crime. Chambers has come to court, and you're

1 entitled take your recollection -- he has come to the
2 court with Bibles. He has come to court with religious
3 paraphernalia. Ladies and gentlemen, you will recall
4 that he talked to Reverend Betty Smith, who testified
5 in this case on the afternoon of the 29th of October
6 with a Bible in his pocket, and told her that he had
7 turned his life around and that he was going to get
8 right. And within five hours of that conversation, he
9 participated in the brutal murders of these people. I
10 think for them to now having ignored that religious
11 training and background and come to you and say well,
12 gee, we want to use religion to keep you from doing
13 your sworn duty is an abomination, and you shouldn't
14 allow them to get away with that.

15 The other approach is going to be to make you
16 feel guilty about doing your job. Let me point out to
17 you, you haven't done anything. You have nothing to
18 feel guilty about if you want to recall the
19 circumstances and these defendants. You have seen this
20 very long process from jury selection up to this
21 minute. At that point and for the last week now, what
22 this trial has been about is what is the proper
23 punishment for these defendants having been convicted
24 of two counts of first degree murder. The State is
25 asking that you impose a recommendation of death as to

1 both defendants. What about the death of Ruby and
2 B. P. Tutterow? What if you compare what happened to
3 them with what is going on with these defendants? Ruby
4 and B. P. Tutterow didn't have any jury to decide
5 whether they lived or died. They didn't have two
6 lawyers to speak for them. They didn't have a year and
7 a half to prepare for a trial. When it came down to
8 the crucial question of whether or not Ruby and B. P.
9 Tutterow would live or die, they had one thing to count
10 on, and that was the humanity of Barnes, Blakney and
11 Chambers. And when they called upon it to save them,
12 it wasn't there. And you have nothing to feel guilty
13 about for imposing the sentence that is required by the
14 law.

15 MR. FRITTS: Objection.

16 THE COURT: Well, sustained. Members of the
17 jury, that is for you to determine what is required in
18 the case.

19 MR. KENERLY: I said to you earlier that I
20 thought that you could legitimately view your jury
21 service as important, and I think that is what it is if
22 you have the strength to seize the opportunity that is
23 presented to you. When this is over with, you are
24 going to leave this courtroom, and you are going to
25 reflect on this case for a long time, I anticipate.

1 And when you do, I hope that you will be able to say
2 that while you can't do something every day to stop the
3 Frank Chambers, Timmy Barnes and Robert Blakneys of the
4 world, you had a chance in this case. And that you
5 looked at the facts and you looked at the law --.

6 MR. FRITTS: Objection.

7 THE COURT: Overruled.

8 MR. KENERLY: -- and you decided that the
9 proper legal punishment in this case is a death
10 sentence as to each defendant. And ladies and
11 gentlemen, the murders of Ruby and B. P. Tutterow and
12 your oath as jurors in this case require, I contend to
13 you, that you have the strength to return death as your
14 verdict and recommendation. Thank you.

15 THE COURT: All right. Members of the jury,
16 we're going to take an hour lunch recess at this time.
17 Follow my prior instructions to you, please, and can
18 everybody be back at 2:15? Will that give everybody
19 plenty of time? Be back at 2:15 this afternoon. Follow
20 my prior instructions. Be back then.

21 (Lunch recess taken by the Court.)

22

23

24

25

1 individually to lower yourselves to the level of the
2 three men that you have convicted of murder and to roll
3 them together --

4 MR. KENERLY: Objection, Your Honor.

5 THE COURT: Overruled.

6 MR. CAUSEY: -- And to look them in the eye,
7 and then impose the sentence upon them that you have
8 convicted them of and that is killing. Think of the
9 crime that you have convicted these three men of.
10 Think of the chart that Ms. Symons had, where she
11 listed the elements of first degree murder. It's
12 unlawful killing. It's premeditated. It's
13 deliberated. It's done with a cold heart and a cool
14 head, with malice in their hearts or ill will or hatred
15 for their victims. I don't have to stand here and talk
16 to you long to convince you that's a horrible thing.
17 None of us like it. And that's what you have convicted
18 them of. It is said that those men will have the blood
19 of their victims on their hands forever. They'll never
20 come clean. They'll never wash it off. It will be
21 there forever. Think again what the State of North
22 Carolina is asking you 12 to do. They want you to go
23 into a back room here, and they want you to
24 premeditate. They want you to deliberate. Take a
25 vote, if necessary. Discuss it. Take two votes. Do

1 it with a cool head. Cold-blooded. And they want you
2 to debate killing three men. That's what you are being
3 asked to do. In the photographs they've shown -- and
4 the mannequins that are in front of you aren't there to
5 make you love or like these three men. They are there
6 to build a fire in your heart. They want you to
7 develop ill will, hatred, malice for those three men.
8 You don't have to worry about malice. That's been
9 supplied for you by the State, and they are asking you
10 to go back and commit premeditation, deliberation, and
11 with malice in your heart order the killing of those
12 three men. The only difference between what you are
13 being asked to do and what they have been convicted of
14 is that theirs is an unlawful killing in not only the
15 laws of the men of North Carolina and the laws of North
16 Carolina, but also the law of God. As Mr. Kenerly
17 said, Thou shalt not kill. That's a law of God. They
18 violated that law. In doing so, they violated the laws
19 of man. What you are being asked to do is justify it
20 under the law. The law says you can order the killing
21 of three men and it not be a crime. You do not violate
22 the laws of North Carolina when you return a death
23 verdict. I'll not comment on the laws of God at this
24 time. Just as those three men will forever have the
25 blood of their victims on their hands, anyone who kills

1 will have the blood of their victims on their hands.

2 That's something that you need to think about. I'm not
3 saying that it will shame you. I'm not saying that it
4 will make you feel guilty, but it's a fact of life. As
5 soon as you walk out of here, you think of it. You'll
6 never forgive any of us. It needs to be brought to
7 your attention, and you need to think about that.
8 Because this decision is not just about these three
9 men. It's about you 12 individuals.

10 There's a man in Raleigh who has the horrible job
11 of being the States executioner. Somebody's got to do
12 it. Somebody has the job of killing people who sit on
13 North Carolinas death row, and this man does it. He
14 earns his paycheck by doing it. And he is down there
15 in Raleigh today, looking westward to the city of
16 Salisbury. He's looking to you 12 people to tell him
17 what he should do. Not what he should do, what he must
18 do. If you sign that form and say death, then he will
19 kill these three men. You need to understand that. If
20 you say death, Judge Helms will sign the death
21 warrants. Only at your order. And that man in Raleigh
22 will kill them only on your word just as if you sign
23 life in prison, instead of death. You will have to
24 send him home without satisfying his blood lust.

25 There can be no division between the

causing

1 lawyers. There will be a Book of Life opened to a page
2 with his name on it. On that day, he will be judged,
3 not by the law of man, but by a higher law, the laws of
4 God. And he will be judged for his eternal life, his
5 soul at that point. If you believe, you will know that
6 is what will happen to him. That is the appropriate
7 time and place and the appropriate person to decide
8 what will happen to the life of Frank Chambers. If — *begin*
9 you're a true believer and you believe that Frank
10 Chambers will have a second judgment day, then we know
11 that all of us will too. All of us will stand in
12 judgment one day. And what words is it that a true
13 believer wants to hear? Well done, my good and
14 faithful servant. You have done good things with your
15 life. You have done good deeds. Enter into the
16 Kingdom of Heaven. Isn't that what a true believer
17 wants to hear? Or does a true believer want to explain
18 to God, yes, I did violate one of your commandments.
19 Yes, I know they are not the ten suggestions. They are
20 the ten commandments. I know it says, Thou shalt not
21 kill, but I did it because the laws of man said I
22 could. You can never justify violating a law of God by
23 saying the laws of man allowed it. If there is a
24 higher God and a higher law, I would say not.
25 To be placed in the predicament that the State has

1 asked you to place yourself in, is just that. To
2 explain when your soul is at stake. Yes, I know the
3 three that I killed were three creatures of yours, God.
4 And that you made them in your likeness. I know you
5 love us all, but I killed them because the State of
6 North Carolina said I could. Who wants to be placed in
7 that position? I hope none of us. And may the God
8 have mercy on us all.

9 MR. HARP: I am the voice of reason. I'm the
10 voice of logic. I'm the voice of reasonable,
11 intelligent thoughts. You have decided that Frank
12 Junior Chambers is guilty of the murders of Ruby and
13 B.P. Tutterow. The evidence presented last week will
14 be necessary for you to decide whether he shall --
15 Frank Chambers is going to die or shall spend the rest
16 of his life in prison. You may think that he deserves
17 to die simply because you have found him guilty. Some
18 of you may have already decided that. You may have
19 already in your minds flipped to the last page of these
20 instructions and written death on the last page. But
21 his guilt alone is not sufficient reason for you to
22 make your final decision. The law requires more of you
23 than that. Not many years ago the death penalty was
24 automatically imposed as the appropriate punishment for
25 first degree murder. In 1976, the Supreme Court of the

1 custody of the State Department of Corrections for a term of
2 forty years to run at the expiration of the sentence imposed
3 in 11152. Case No. 92-CRS-11971, let the defendant be
4 imprisoned in the custody of the State Department of
5 Corrections for a term of forty years to run at the
6 expiration of the sentence imposed in 11970. In Case No. 92-
7 CRS-11972, let the defendant be imprisoned in the State
8 Department of Corrections for a term of forty years to run at
9 the expiration of the sentence imposed in 11971. Have a
10 seat.

11 Members of the Jury, that is going to conclude your
12 service on the jury. Any questions or comments any of you
13 care to make at this time?

14 COUNSEL: Your Honor, may we approach for just a
15 moment?

16 (Conference at the Bench)

17 THE COURT: If you would not mind stepping into your
18 jury room for just a minute--the alternates I notice are
19 here. If you would come back and step into the jury room for
20 just a minute also, please.

21 (The jurors exit the courtroom.)

22 THE COURT: I take it everyone wants to enter some
23 Notice of Appeal. Is that correct?

24 MR. HARP: The first thing we would like to get in
25 is that late yesterday afternoon we were informed, after

Be Lin
L Wed.

1 talking to alternate jurors, that on Tuesday, before
2 deliberations and before instructions were given by the
3 Court, one of the jurors carried a Bible back into the jury
4 room and read to the other jurors from that. That it was
5 also discovered by us that one of the jurors, one of the
6 other jurors, called a member of the clergy, perhaps a
7 relative of hers, to ask her about a particular question as
8 to the death penalty. We also informed you of it this
9 morning at ten o'clock and that we need to enter that on the
10 record for purposes of preserving that.

11 MR. FRITTS: Judge, for Mr. Barnes we join in on
12 that. We would for those reasons make a Motion for Mistrial
13 and we would request the Court to inquire of the jurors, and
14 I understand the Court's feelings on that, but that would be
15 our request.

16 THE COURT: No evidence that anybody discussed the
17 particular facts of this case with anybody outside the jury.
18 Is that correct?

19 MR. HARP: No evidence that they did or did not as
20 far as the conversation with the minister is concerned.

21 THE COURT: No evidence that they did though. Is
22 that correct?

23 MR. HARP: No, sir.

24 THE COURT: All right. Well, I'm going to deny the
25 request to start questioning this jury about what may or may