

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ELIZABETH DIANE DOWNS,

Petitioner,

v.

SONIA HOYT, Superintendent  
OWCC

Respondent.

CV. 96-900-HA

Portland, Oregon  
January 25, 1999

TRANSCRIPT OF PROCEEDINGS

BEFORE:

THE HONORABLE ANCER HAGGERTY, U.S. DISTRICT COURT JUDGE

APPEARANCES:

For the Petitioner: Ms. Wendy Willis

For the Respondent: Mr. Jan Peter Londahl

COURT REPORTER: Jerry C. Harris  
United States Courthouse  
1000 S.W. Third Avenue  
Room 301  
Portland, Or 97204  
(503) 326-8184

1 THE COURT: This is the time set for hearing in the matter  
2 of Downs v. Hoyt. The Court has received a substantial  
3 amount of briefings by the parties. In addition to the briefings,  
4 Judge Marsh has rendered an opinion in the Whaley v.  
5 Thompson case.

6 The Court, at this junction, would advise the parties  
7 that the Court is going to follow Whaley insofar as its ruling  
8 is applicable.

9 Ms. Willis, I realize you had short notice, but I  
10 must assume that you assumed I might follow Whaley in this  
11 litigation.

12 MS. WILLIS: There are a few things packed into  
13 that question. Let's first talk about the AEDPA in general, talk  
14 about the specifics of the Brady claim.

15 Whaley did say that an opinion by the Oregon  
16 Court of Appeals, an affirmance of that opinion is an  
17 adjudication for purposes of AEDPA. They didn't talk though,  
18 much about what deference means. It did say it is an  
19 adjudication. All that means is subsection D applies, subsection  
20 D of 2254 applies to the case.

21 However, given that, you still--the Court and the  
22 parties still have an obligation under 2254(d) to determine--not  
23 to waive any of the arguments that were resolved by Whaley.  
24 Even applying that standard, it still has to be a reasonable  
25 application of law.



1           When you look at an affirmance of that opinion,  
2       you can't tell what laws are being applied, if the correct law  
3       is being applied, how it was applied, what facts it was applied  
4       to.

5           So even if we are in a situation where 2254 applies  
6       in fact or technically, it doesn't make much difference because  
7       there is nothing in there. You don't know if it was applying  
8       the correct Supreme Court precedent or how it was applying it  
9       to the facts.

10          As we cited in our cases, the case of Cardwell v.  
11       Green, that's a Fourth Circuit case that dealt with that issue  
12       specifically. Cardwell adopted a similar standard that the courts  
13       adopted in Whaley and then talked about--but what that meant  
14       even if you had standards that provide a fair amount of  
15       deference to the State Court, and I'll just read a quote from  
16       that case. It's 152 F.3d, 331. The court said:

17                "Of course, because the state court decision fails to  
18       articulate any rationale for its adverse determination of  
19       Caldwell's claim, we cannot review that courts's  
20       'application of clearly established Federal law,' but must  
21       independently ascertain whether the record reveals a  
22       violation of Cardwell's Sixth Amendment right to the  
23       effective assistance of counsel."

24               Of course, that was a Sixth Amendment claim. So,  
25       even conceding that that's standard, you can't do it because

1       there's nothing to refer to. There is nothing to evaluate.

2               So, they further go on to say:

3               "Where, as here, there is no indication of how the state  
4               court applied federal law to the facts of a case, a federal  
5               court must necessarily perform its own review of the  
6               record.... Thus, on the facts of this case, the distinction  
7               between de novo review and 'reasonableness' review  
8               becomes [in]significant."

9               So what that court was saying and what I'm saying  
10              is that even if that standard applies, it doesn't really make any  
11              difference because there is nothing to refer to.

12              Now, it is even exacerbated in the context of Brady  
13              for a few reasons in this case. The Brady issue was extinct  
14              from the very beginning. The parties made a very typical  
15              Brady motion in writing and then began litigating that in court  
16              almost immediately. Where, before trial, there was a hearing at  
17              which there was testimony and then that issue was raised again  
18              in court.

19              One of the reasons why state court's conclusion was  
20              it should be called into question--there were two things: One,  
21              the state court itself can't defer that that there was no review  
22              of that decision. That's the original decision. That's one  
23              point.

24              The second point is, given what you ordered us to  
25              have access to in discovery, the state trial court did not have

1 the full story.

2 The central detective for the sheriff's department  
3 testified at the first hearing. He testified there were 100 to  
4 150 calls into the sheriff's office in response to media reports,  
5 police press releases of a strange white man meeting a certain  
6 description, driving a yellow car, essentially, and those reports  
7 went out to the public.

8 In response to that, there were a 100 to 150 citizen  
9 calls and contacts that this particularly Detective Rick Kahn  
10 dealt with.

11 Mr. Kahn testified at the Brady hearing that he  
12 made 30 to 50 reports. But the rest of these things were just  
13 memorialized in notes; and, that those notes were gone. So,  
14 there are these 30 to 50 reports is all they have. The rest is  
15 destroyed, either by him or by his supervisor after he left.

16 At that point, the court-- After an additional  
17 hearing, the court takes the 30 to 50 reports, looks at them  
18 and give some of them to Ms. Downs. Many of those reports  
19 were never given to the court; many of the handwritten notes  
20 that we now know existed, that Detective Kahn said wasn't  
21 there. He said: "All handwritten notes are gone." We now  
22 know that's not true. The sheriff's files, 15 years later, shows  
23 that those reports are there.

24 So, the trial court and the Oregon Court of Appeals  
25 did not have that information. And, they are making their

1 determination. That is not the fault of Mrs. Downs. That is  
2 the fault of the state and that is the fault of the detective for  
3 essentially misleading the court for what was there.

4 So, for those two reasons, this is not a case  
5 affirmed without an opinion means this court has no discretion.

6 In addition to the arguments we've made based on  
7 some of the merits in Whaley, the Federal Court can't decide a  
8 constitutional violation in the context of habeas and interpreting  
9 the statute.

10 MR. LONDAHL: Your Honor, on the first point, I  
11 don't know how it is possible to read Whaley to allow the  
12 maneuvering on the issue.

13 Whaley says flat out that when there is an  
14 affirmance without opinion in the appellant court, this court will  
15 apply the deferential standard.

16 THE COURT: Whaley also said, if I'm not  
17 mistaken, where a petitioner has not been allowed to present the  
18 whole record down below, the court will take another look at  
19 it.

20 MR. LONDAHL: That's the second question here,  
21 Your Honor. We will get to that.

22 There is a question as to whether--in most cases,  
23 there is going to be a question as to whether you can bring in  
24 new materials to enhance the record or add to the record.  
25 Usually you can't do that unless you are claiming actual

1 innocence either under the statute or trying to get around a  
2 procedural default by claiming actual innocence.

3 This case is a little bit different or a little bit  
4 unusual because, as we indicated in the footnote of one of our  
5 cases, the investigator's report that seems to be one of the  
6 main questions in this case, was provided in camera to the  
7 court.

8 We don't know what was provided in camera, but it  
9 is fair to assume that everything they have now come up with  
10 was provided to the court in camera. Certainly there is nothing  
11 to see. There is no showing that all of the materials that they  
12 have now attempted to put into the record was not presented to  
13 the trial court and appellant court in camera.

14 We agree then that with respect to the investigative  
15 reports including some few reports that appeared in the hands  
16 of Mr. Kahn, that material come in and be reviewed under the  
17 first Brady issue.

18 We have several arguments as to why that material  
19 can't come close to providing a predicate for habeas corpus  
20 relief.

21 We have no difficulty with the Court taking the  
22 materials, and almost all of it is in the petitioner's exhibit P.P.,  
23 and reviewing that and seeing if it was material provided in  
24 camera to the State Trial Court.

25 Petitioner wants to argue that some of the materials

1 they have assembled in P.P. that relates to the citizen's tips or  
2 contacts were not provided to the trial court or to the appellant  
3 court in camera. I don't know how you can make that  
4 determination; and, we are willing to assume that all of it was  
5 provided in camera and introduced properly before this court in  
6 habeas corpus, at least the material that relates to the  
7 investigation reports, or part of the material that they want to  
8 present.

9 THE COURT: What about the documents that  
10 suggest a state or the police officers had reports of people who  
11 saw the vehicle in the area that matched the description as  
12 given by petitioner; and, what about the fact that the court  
13 suggested that Christie indicated that she does not know the  
14 person that went into her? Don't these types of documents  
15 suggest that they are exculpatory in nature and they should have  
16 been provided to the defendant in that case so they could at  
17 least pursue and see if there is any merits in the statement?

18 MR. LONDAHL: We have two sets of arguments  
19 relating to that, Your Honor.

20 The first set of arguments really revolve around ORS  
21 803.8(b). None of this material, because of 803.8(b) could  
22 have been introduced directly as evidence. 803.8(b) allows the  
23 introduction of public records, of course, excluding however, in  
24 criminal cases matters observed by police officers and other law  
25 enforcement personnel.

1 All of the documents that petitioner is complaining  
2 of are in exhibit P.P. and they are all police notes and  
3 typewritten reports that would have been excluded from evidence.  
4 That material, we would argue, fairly, squarely falls within  
5 the United States Supreme Court opinion in Wood v.  
6 Bartholomew.

7 In Wood, which is a procuring reversal in the Ninth  
8 Circuit, not the first one, holds that if all you're talking about  
9 is speculation about what inadmissible evidence would have led  
10 to, you don't really have a Brady problem. More precisely,  
11 you don't have a failure to disclose material evidence that there  
12 is a reasonable probability that would have changed the result at  
13 trial if it had been disclosed as required by United States v.  
14 Bagley.

15 THE COURT: I hate to interrupt this. I know  
16 how hard it is for an attorney to get back on his trend of  
17 thought. If I don't ask this, I'm afraid I might forget.

18 Are you saying that if Christie Downs took the  
19 stand and testified, "My mother shot him," that a defense  
20 attorney does not say to her on the stand: "Isn't it true you  
21 told the police officer that you did not know who shot him?"  
22 Are you saying that is inadmissible?

23 MR. LONDAHL: No, Your Honor. Actually the  
24 testimony from the people who heard it would have been--could  
25 have been introduced. In fact, one of the people who

1       apparently heard what happened, her uncle— Let me tell you  
2       exactly what the piece of paper is----

3               THE COURT: I want to know your position on  
4       my question. As Christie Downs is on the stand, she testifies  
5       that "My mother shot him..."

6               MR. LONDAHL: Uh-huh.

7               THE COURT: The defense counsel with this report  
8       in hand, could not ask her: "Isn't it true that at a prior time  
9       you told Officer X that you did not know who shot him?"

10              MR. LONDAHL: If that was what the document  
11       said, that wouldn't be, but the testimony would be admissible,  
12       that's correct. That is not what the document said.

13              THE COURT: What does the document say as  
14       best you know?

15              MR. LONDAHL: I can read it to you, Your  
16       Honor. The document is P.P. 29120260. It says 13:10, 13:25,  
17       Paula and Steve, apparently Paula Craudell, a district attorney,  
18       and Steve Downs went to the hospital, asked Christie if you  
19       knew someone hurt her; she shook her head, no. She,  
20       apparently, Craudell, asked her if she heard anything loud; she  
21       shook her head, no. She came in and out of--there's a word  
22       there I can't make out--by opening her eyes and then closing  
23       them. Christie didn't act like she wanted to talk.

24              None of this is a denial that her mother shot her.  
25       What this is, is somebody comes in to an eight-year old girl



1 and put a bullet hole in her after an operation and ask her if  
2 she knows she was hurt.

3 That can't be exculpatory. It has nothing to do  
4 with the identification of the shooter, neither of those statements.  
5 Neither, "Do you know that someone hurt you or did you hear  
6 something loud?" Neither one of those could possibly be  
7 exculpatory. And, even if they were exculpatory, they would  
8 be damaged by the fact this is a little girl in the hospital after  
9 an operation, going in and out of consciousness apparently.

10 That aside, this document wouldn't be admissible.  
11 But, surely the people who heard it could come in and testify  
12 to that effect if it was damaging to Christie Downs' testimony  
13 or impeaches Christie Downs' testimony. This document  
14 couldn't possibly lead to anything.

15 THE COURT: What about 803.6?

16 MR. LONDAHL: Beg your pardon?

17 THE COURT: What about 803.6?

18 MR. LONDAHL: 803.6, would exclude the  
19 document itself or 803.6 would----

20 THE COURT: Isn't that the medical treatment or  
21 was that the----

22 MR. LONDAHL: Our argument, Your Honor, would  
23 be that neither the document nor any testimony based upon that  
24 could possibly be exculpatory, because an eight-year old girl  
25 with a bullet hole in her, denies that she was hurt by someone;

1 the natural emphasis is that she was under medication, going in  
2 and out on that.

3 THE COURT: Anything else on that?

4 MS. WILLIS: May I just respond to a couple of  
5 things, Your Honor?

6 THE COURT: Yes.

7 MS. WILLIS: The first thing, just to give  
8 completion to the issue of Christie Downs' testimony, Christie  
9 Downs was a witness at trial. She testified that she was shot,  
10 the detail of the shooting and who shot her. Her memory was  
11 of significant debate, both at trial and now.

12 In fact, this interview was first disclosed to Ms.  
13 Downs either this year or last year and this proceeding is the  
14 first interview of Christie Downs. It is the 23rd of May  
15 before any of the other recorded interviews occurred. So, her  
16 memory of events is incredible significant to how much  
17 credibility her testimony should be given; and, it fits in with  
18 how her memory developed just with regard to Wood v.  
19 Bartholomew.

20 The argument there is because polygraphs aren't  
21 admissible--polygraph results aren't admissible, but that's not the  
22 issue here. The issue here is statements of witnesses, for  
23 example, if a codefendant in a case had confessed to whatever  
24 crime, a burglary, a burglary case said, "I did it. The  
25 codefendant didn't do it."

1           The state's argument suggest that the state doesn't  
2     have an obligation to turn that over because the report itself is  
3     not admissible; and, it's heartland Brady material as are the  
4     reports and notes that memorialize conversations with people  
5     describing an automobile and a person made the description  
6     given by Ms. Downs and a statement given by the state's key  
7     witness----

8           THE COURT: All right. I agree 803.6 does not  
9     apply.

10          MR. LONDAHL: Your Honor----

11          THE COURT: Go ahead.

12          MR. LONDAHL: If I may, I would point out with  
13     respect to all of this material, that the petitioner doesn't try and  
14     run any of this stuff down and prove to the Court what any  
15     of these people would have said.

16                As in Wood, all they wanted to do was make raw  
17     speculations about where this stuff would have lead. We would  
18     have had this witness; the witness would have said X, Y and  
19     Z. They don't try to prove any of that. All they wanted to  
20     do is rely on reports, 99 percent of which couldn't remotely  
21     have any relationship to any prosecution, and just speculate  
22     about what they might say were they to come in.

23     They don't try and prove any of that, A and B, what is in  
24     these reports if you look at them is: "I saw a bushy-haired  
25     stranger in Blue River last week. And, I saw a beat up

1 yellow car in a mall parking lot two days ago. And, three  
2 years ago, somebody beat me up; it looked like the bushy-  
3 haired stranger."

4 It is stuff that is not even close to bearing on any  
5 legitimate question, much less being exculpatory. None of this  
6 stuff is exculpatory.

7 The court went through--the trial court and the  
8 appellant court apparently, all went through this material and  
9 allowed them three witnesses and three references. Those three  
10 witnesses got on the stand and apparently testified to no  
11 apparent facts. And, the rest of the material, the court didn't  
12 allow them to have. If this is the material that the court  
13 didn't allow them to have, they rightly didn't allow them to  
14 have it, because it was pointless stuff.

15 MS. WILLIS: Can I respond, Your Honor?

16 MR. LONDAHL: I would also point out, Your  
17 Honor, that the petitioner never tried to get this stuff, Your  
18 Honor, on post-conviction when arguably she should have gotten  
19 it. I will withdraw that argument because the Brady issue was  
20 an issue on direct appeal, not on post-conviction.

21 MS. WILLIS: May I respond, Your Honor?

22 THE COURT: Yes.

23 MS. WILLIS: Just one thing, and that is the  
24 respondent--the state is trying to encompass everything that was  
25 included in the sheriff's file and what went to the state court.

1 That inference is contradictory to what the testimony was.

2 Kahn testified at this hearing that there were 30 to  
3 50 formal reports and all the informal stuff was thrown away.  
4 So, to infer that they provided this informal stuff that they said  
5 they had discarded, is an inference that is contrary to the  
6 record, because the record says that there were no handwritten  
7 notes existing at the time, which now they know is not true.  
8 The better inference is that the court did not have the benefit  
9 of this information, particularly the handwritten information.

10 THE COURT: Again, before you sit down, and  
11 again this just popped into my head, what is the petitioner's  
12 position at this point with respect to the venue matter?

13 MS. WILLIS: In the motion to amend the petition,  
14 one of the claims that was voluntarily dismissed was that one.

15 THE COURT: That one has been voluntarily  
16 dismissed?

17 MS. WILLIS: Yes, Your Honor.

18 THE COURT: Is the same true with respect to  
19 any forensic evidence pertaining to the ballistics?

20 MS. WILLIS: That's correct, Your Honor. The  
21 issues were narrowed down based on what we discovered in the  
22 discovery.

23 THE COURT: All right. Anything else you wish  
24 to argue at this point?

25 MS. WILLIS: At all or on Brady? I'm not sure

1       there is--there is so much material here, there is so briefing, I  
2       don't know what is most useful to the Court.

3               THE COURT: Because of Whaley, I think we are  
4       truly looking at three claims, although in your briefing you did  
5       not totally waive the procedural default as to the issues. I  
6       believe there is really two things that petitioner is really  
7       stressing, and that is, her Sixth Amendment right to counsel as  
8       well as the Brady questions on the notes. Those are the two  
9       that seems to stand out the greatest with respect to the  
10      petitioner's claim at this time.

11             MS. WILLIS: I will be glad to speak to the Sixth  
12      Amendment right to counsel.

13             Here is an outline of how I was thinking about  
14      proceeding with the arguments. I will hand it forward to the  
15      Court. If this is helpful to the Court, I will proceed. If  
16      there are particular things you wish, fine. The reason I think  
17      it is important to consider the prosecutory misconduct claim as  
18      a whole, is that they sort of create a backdrop to the whole  
19      thing.

20             The Brady claim and the Youngblood claim are  
21      closely related claims. And, if the Court wish to hear  
22      argument on that, I will be glad to do it.

23             The reason I think Whaley is not dispositive--I will  
24      try to say it a different way--is that what the State is asking  
25      the Court to do is to write an opinion on behalf of the

1 Oregon Court of Appeals that is perfect and then defer to it.  
2 That is not what the cases here say.

3 Even under the standards set forth in Whaley, it is  
4 impossible to imply without looking at the claims and the law,  
5 because there simply is nothing to consider.

6 Would the Court like to hear briefly on the other  
7 prosecutory misconduct claim?

8 THE COURT: Well, I think, as you said, there  
9 has been an awful lot of briefing in this case. I have always  
10 taken the position it is up to counsel to make their own  
11 specific record as to what they deem to be the most important  
12 points they can make in oral arguments.

13 As I saw it, it pertained to counsel and pertained to  
14 the question of respective notes that were not provided; but if  
15 you think there are other points that have greater significance,  
16 you can argue those.

17 MS. WILLIS: Let me at least speak to the issue  
18 of destruction of evidence. I think it is closely related to  
19 Brady and came up out of the context from Brady, really.

20 What happened in this case is, as we have certainly  
21 established, Detective Kahn gets on the stand and testifies that  
22 that there are 30 to 50 formal reports that I wrote; and, all  
23 these other notes, they got thrown away that dealt with how I  
24 responded to public calls either by me or by somebody else.  
25 He gets up and testifies to that affect.

1           A variety of things go on and ultimately the judge,  
2     after hearing Detective Kahn testify again, decided that he  
3     essentially is not credible, is what he says. "His manner of  
4     testifying frankly causes me some concern." That's what the  
5     trial judge said. Then he says: "Based upon Deputy Kahn's  
6     demeanor on the stand, I'm not willing to trust his judgment.

7           Then he pulls in the 30 to 50 formal reports that  
8     the trial judge believed existed. Then we get discovery in this  
9     case and find whatever it was that was that was filed, the 30  
10    to 50 reports aren't there. There are not 30 to 50 formal  
11    reports. That's true.

12           However, Detective Kahn--Deputy Kahn has his  
13    handwritten reports on every subject except on the suspect and  
14    the car. You can almost match these reports. There are  
15    handwritten notes on interviews with the hospital personnel.  
16    There are handwritten notes on interviews with people of the  
17    Downs' family visited just before the shooting.

18           There are handwritten notes with Mrs. Downs'  
19    coworkers made by Deputy Kahn.

20           There are handwritten notes by neighbors that was  
21    done by Deputy Kahn.

22           But, there are no handwritten notes on other suspects  
23    or the car, despite the fact he testified that that was one of  
24    his primary responsibilities.

25           Coupled with the judge's concerns about his



1     credibility, he said that based on his part, destroying selectively  
2     his handwritten notes because the rest of them were there and  
3     they appeared to be in sequential order day by day, that also  
4     kind of dovetailed with the State representation at this point  
5     explaining how they have this policy that they throw away these  
6     handwritten notes once the formal report is done; so, there is  
7     no bad faith on his part. Well, that's not true.

8             Trombetta has a great quote as to what bad faith  
9     means. The court says:

10            "We think the requiring of defendant to show bad  
11     faith both limits extent of police's obligation to preserve  
12     evidence to reasonable bounds and confines it to that class of  
13     cases where interests of justice most clearly require it."

14            "In other words, those cases in which police  
15     themselves by their conduct indicate that evidence could form  
16     basis for exonerating defendant."

17            So the police's bad faith itself satisfies the  
18     materiality. And, that's the situation we have here. This case  
19     is sort of infested with this sort of backdrop from the beginning  
20     of discovery all the way through to closing arguments when the  
21     prosecutor is reading from notes that he moved to have  
22     excluded.

23            So, these things proceed on. There is a great deal  
24     of briefing on Christie Downs' memory. So, if that's going to  
25     be helpful to the Court to discuss some of the factual high

1 points, I'd be glad to do it, but if it is not necessary, I won't  
2 do it.

3 THE COURT: I suppose with respect to your  
4 argument that Mr. Jagger was ineffective for failing to call Dr.  
5 Vergamini----

6 MS. WILLIS: That sort of fits together as Dr.  
7 Hyman, our expert made clear just how memory is developed.  
8 In Christie Downs' situation, the important points to his first  
9 question was she didn't know what happened to her. She said  
10 that to Dr. Vergamini. She also said that on another occasion  
11 apparently to the District Attorney's investigator according to the  
12 report. So, that was her initial position.

13 A year later, her position was she did know what  
14 happened, she could describe it in details, and she also said her  
15 mother wasn't sure. So, what happened in the middle is what  
16 is important. So, that's where the prosecutor's conduct comes  
17 in.

18 What Mr. Jagger did by not calling Dr. Vergamini,  
19 he deprived the jury of the first part.

20 He has a note that says Christie is thoroughly  
21 confused about what happened to her. Not only doesn't she  
22 not know, but her expert opinion is that she seems genuinely  
23 confused.

24 In fact, Mr. Jagger, knowing this is important, tries  
25 to have that admitted--that report admitted to the jury. He

1 knows it's relevant and he tries to have it admitted. The  
2 judge says no; he said he is not here, Dr. Vergamini is not  
3 here for cross examination; so, Mr. Jagger backs away from it.

4 Later, Mr. Jagger makes an affidavit why he didn't  
5 do it; he said: "Oh, Dr. Vergamini is a well-known child  
6 abuse expert," and speculates somewhat on what Dr. Vergamini  
7 would say.

8 But, in this instance, he knows what Christie Downs  
9 said and what the reports says and that it was critical and he  
10 didn't call Dr. Vergamini to testify.

11 There is this whole backdrop of the prosecutor  
12 having all the contact with Christie Downs. Eighty interviews  
13 with the police between the time of the conversations about the  
14 shooting and between the time of the shooting and the time of  
15 the trial. And, the first one is with someone who is not a  
16 police officer.

17 Mr. Jagger knows it is important, yet he doesn't  
18 call the witness. So, the jury never hears about it, never hears  
19 about what her first statement was.

20 And, one of the things that the State says is that it  
21 would have been accumulative as to Dr. Peterson. If I could  
22 speak to that, Dr. Peterson testified at trial and in deposition  
23 before this court that he believed that Christie Downs always  
24 knew what happened, she just wasn't telling it. She just  
25 needed to recover the memory.

1           That's different than Dr. Vergamini. Dr. Vergamini  
2       said that she said she doesn't know what happened and she is  
3       genuinely confused. So, in that regard it was critical testimony,  
4       if Dr. Vergamini would have had an opportunity to testify to  
5       that and the jury would have had the opportunity to consider it  
6       along with the other testimony at trial.

7           THE COURT: But again, under Whaley, the court's  
8       finding below was that Mr. Jagger made a strategic tactical  
9       decision in not calling Dr. Vergamini. How is this court to  
10      look at that underlying finding?

11          MS. WILLIS: It is not a finding. Even though  
12      they called it a finding, if you say this is a legitimate tactical  
13      decision, it is not a finding, it is actually an application of law.  
14      So, it still has to be reasonable. This court still has authority  
15      even under Whaley, even under the most strictest standard to  
16      determine whether that was a reasonable application of Stricklin.

17          So, that is not a factual finding, but rather, it's a  
18      legal determination. So, it is just clearly unreasonable, it may  
19      be speculation about somebody he has never talked to and  
20      about what they were going to say. The only thing he knows  
21      about what they are going to say is that it is something that  
22      will be helpful to his client and the theory of his case.

23          THE COURT: You can proceed with your other  
24      argument.

25          MS. WILLIS: The issue is similar--I mean the

1 prosecutor's conduct is similar but in cross examining Ms.  
2 Downs on whether her psychologist had diagnosed her--as the  
3 State wants to say, diagnosed her or labeled her a devious  
4 sociopath.

5 One of the important parts of that is that the term  
6 devious sociopath is commonly used. The jury could have  
7 easily inferred that a sociopath meant, one, an emotional liar  
8 and (b) she was dangerous. So, it was an extremely  
9 inflammatory statement that was not supported by what Dr.  
10 Jamison said or wrote in a letter.

11 It is unclear how the prosecutor even ended up with  
12 that MMPR report. The most likely way it appears is that she  
13 sent it to Dr. Peterson and that there is some kind of canon  
14 of ethics among psychologists, you don't go around showing  
15 MMPR reports to people who can't read them and you can't  
16 send them to other professionals.

17 So, apparently it appears that this MMPR report  
18 went to Dr. Jamison and apparently to Dr. Peterson and then to  
19 the prosecutor.

20 There is a cover letter going to Dr. Peterson saying:  
21 I did not find that she was a sociopath. The MMPR report is  
22 in normal limits.

23 So, he asked her this questions, of course, which is  
24 unobjected to, compounded by the trial counsel's ineffectiveness  
25 and, of course, Ms. Downs has never heard this and she

1 doesn't know; and then, Dr. Jamison, that day or the next day,  
2 writes the letter to the prosecutor saying: Dear Prosecutor, I  
3 did not diagnose her or label her a devious sociopath. She is  
4 not a devious sociopath. I don't know what you are talking  
5 about. Please clear this up in front of the jury or let me  
6 clear it up. And, he says nothing more about it.

7 The D.A. doesn't disclose that to the defense,  
8 although the defense ostensibly knows about it because he sees  
9 the letter. But, he doesn't clear it up in front of the jury.

10 The court's attitude about that comes out later  
11 because the prosecutor then says: "I'd like to put on Dr.  
12 Jamison and get more about this devious disorder."

13 And, the Court says: "You cannot put on this  
14 testimony for exactly the reasons we are talking about."

15 The trial judge says it is possible for the jury to  
16 relate this to a specific issue. But, the jury also may conclude  
17 that this defendant is diagnosed as a sociopath. She may lie  
18 on the stand. It is improper for that purpose.

19 He further said that the jury may also consider that  
20 because she has been diagnosed as a sociopath, she may have  
21 committed the crime, which is clearly inappropriate for that  
22 purpose.

23 So, the judge, recognizing the danger, keeps it out.  
24 But, it is too late because the jury has already heard about it.  
25 And, the prosecutor didn't do anything to correct it. Of

1 course, that is compounded by trial counsel's failure to do  
2 anything about it.

3 Similar situation, in closing, there is a whole bunch  
4 of medical records on the children produced during discovery  
5 involving all sorts of things, medications, they are all in the  
6 exhibits here, whatever. There all sorts of things, medication,  
7 as I said, they are all in the exhibits here, just some things in  
8 the hospital reports, nurses notes, doctors notes and also  
9 statements made by visitors and statements made by the children  
10 themselves.

11 Defense counsel seeks to have a bunch of these  
12 admitted. Within those medical reports are certain statements  
13 made by Danny Downs about various things; but one was about  
14 the shooter. The night before they began to close, the  
15 prosecutor moved to keep out the statements.

16 They argued about whether the rest of it should go  
17 in; but he said, specifically, I want to keep the statements out  
18 because this kid's statements are unreliable. This kid's  
19 statement about who shot her is unreliable. He said something  
20 about a monster shot or big ear and jack and a man, all these  
21 different people supposedly Danny knows. During the course of  
22 time, Danny identified all these people. The prosecutor moved  
23 to keep them out.

24 On rebuttal, he stands up and reads from one of  
25 these reports; and, in that section, it isolated that Danny Downs



1 identified his mother as the shooter. He said: "Mom shot  
2 me." Which is the first time the jury has ever heard this. It  
3 is (a), excluded evidence and, it is shocking and misleading.

4 He then goes on a little bit to say a man shot  
5 him. But, it doesn't give the full context to the jury. So  
6 they are left with the sort of misleading suggestion that Ms.  
7 Downs is a devious sociopath and her son identifies his own  
8 mother as the shooter.

9 So, that entire backdrop is left for the jury to go  
10 into in deliberations without having the whole picture.

11 THE COURT: May I interrupt you here? Again, I  
12 apologize, but what about the rule that a person who moves to  
13 exclude evidence and then that motion is granted? If you move  
14 to exclude something that is granted, then you proffer it; you  
15 can waive your own previous motion that was granted, can you  
16 not?

17 MS. WILLIS: A couple of things: One is, that  
18 may be correct in the context of offering evidence--makes sense  
19 in the context of offering evidence during the trial where you  
20 are actually offering the exhibits in, but this is in closing  
21 statements. So, at that point, all the evidence is in, so the  
22 defense counsel doesn't have a chance to respond to that and  
23 give it context. So, once again although there was sort of a  
24 quasi objection, no motion for mistrial, no vigorous objection, no  
25 request that the judge instruct the jury that that evidence is



1 excluded and can't come in.

2 THE COURT: Thank you.

3 MS. WILLIS: I'd like to speak to the Sixth  
4 Amendment. As the Court noted, Ms. Downs decided she was  
5 going to hire counsel. Her parents had the money to pay for  
6 it, so she hires a lawyer. Before she is even charged, she is  
7 clearly a suspect, she has been asked to testify before the  
8 grand jury and had been asked to take a polygraph, she hires  
9 Jim Jagger to represent her. She and her parents are  
10 increasingly dissatisfied with that representation. So, she decides  
11 to change counsel.

12 They began negotiations with Melvin Belli, a lawyer  
13 from San Francisco. Mr. Belli--there are letters back and forth  
14 apparently, according to the record, and Mr. Jagger shortly upon  
15 motion, filed a motion for substitution of counsel, at least to  
16 add Mr. Belli on. It is clearly stated that Mr. Belli had  
17 agreed to represent Ms. Downs and that she would wish that  
18 to happen.

19 She asked, as a result, that they set over the  
20 motions hearing. He explained that Mr. Belli had some  
21 previous commitments and couldn't come and get into the case  
22 right away.

23 The court said: No, we in Lane County, have a  
24 policy against setting trial dates over for a new counsel, and  
25 refused to allow him to do so and ordered that the motion

1       hearing go forward.

2               After the motions hearing, again he made a similar  
3       motion for the trial. Mr. Belli had committed to represent her.  
4       Ms. Downs had chosen him as her lawyer. And, they say in  
5       Lane, we have a policy, you can comply with the court's date  
6       or you won't have that representation. That is contrary to  
7       every stitch of case law on the right to counsel.

8               The Sixth Amendment establishes several prongs on  
9       what the right to counsel includes.

10              One of them is the right of a defendant who can  
11       hire a lawyer, they can choose their own lawyer. These cases  
12       are classic continued cases. This comes up in the context of  
13       continuous very often.

14              One of the most recent cases in this District where  
15       just before trial a client wishes to get rid of a retained  
16       lawyer-- excuse, get rid of a court appointed lawyer and get a  
17       retained lawyer. This is United States v. Lilly, and the court  
18       said: "No, we have a trial scheduled. Let's go forward."

19              The Ninth Circuit said you cannot do that. The  
20       court may have--there may be some interest if there are  
21       witnesses from out of state or something like that. There must  
22       be a compelling interest to abridge the right to choice of  
23       counsel.

24              In this case, the court didn't even acknowledge a  
25       compelling interest; it didn't give any interest, but just said:

1 "We have a policy."

2 The same thing in the United States Supreme Court  
3 case, Morris v. Slappy, was a similar case which said:  
4 Expeditionousness is fine, but you can't arbitrarily just deny  
5 someone their right of choice of counsel.

6 The state, of course, has argued that this was never  
7 raised in state court, which it was not.

8 THE COURT: On that point then, you have to  
9 establish that cause and freshness are the same?

10 MS. WILLIS: Because the doctrine of procedural  
11 fault is one of comity, there are layers of arguments in the  
12 briefs about why the court should consider this. One of them  
13 is one that was rejected by Whaley, holding that procedural and  
14 fault is no longer in existence.

15 Another one is that this should have been raised by  
16 the appellant lawyer and because of the ineffectiveness of  
17 counsel, the appellant lawyer did not raise it.

18 It was an issue that was litigated on the record.  
19 There were written motions. It was clearly in the heartland of  
20 the Sixth Amendment choice of counsel. And, they missed it.  
21 It should have been raised there and they did not raise it.  
22 Prejudice is obviously established by the strength of the claim.

23 If the Court rejects that, however, there is a length  
24 section in the brief about the manifest injustice argument.  
25 There is a manifest injustice for the court not to consider that

1 claim. Of course, that comes out of a whole series of cases  
2 that say, if there is a showing of actual innocence, the court  
3 can go through the gateway and consider the claim on the  
4 merits.

5 The State seems to want to suggest the standard is  
6 the Herrera standard, which basically says even if you have a  
7 perfect trial, it may be a constitutional violation in that case to  
8 execute an innocent person. That's not what this is. This is  
9 a gateway standard.

10 The Schlup standard is articulated as: If a  
11 petitioner submits evidence of innocence, a court cannot have  
12 confidence in the outcome of the trial unless the court is also  
13 satisfied that the trial was free of harmless constitutional error.

14 So, it is really kind of a two-step process. If there  
15 is a showing of innocence, then you look to see if it was a  
16 constitutional sound trial. If it wasn't, the person should get a  
17 new trial.

18 In this case, there is a person who has repeatedly  
19 confessed to the shooting. That person has told a number a  
20 people for a number of years he shot the Downs' family.

21 It is a very unique situation to have that number of  
22 affidavits talking about someone else confessing to the shooting.

23 The State spends a lot of time talking about the  
24 credibility of the affiants. If that is the issue, then that should  
25 be taken up in an evidentiary hearing.

1           On the face of the affidavits, these people all say  
2     that Jim Haynes confessed repeatedly to being the shooter.  
3     This began very shortly after the shooting and continued until  
4     the early 90's in a variety of circumstances.

5           Given that that person is out there and given the  
6     question about the taint in Christie Downs' testimony, that  
7     suggests the court should look beyond and make sure that this  
8     is a constitutionally sound conviction because those things do  
9     raise a question about whether we should be confident with the  
10    verdict. If you can't be, then we need to look at the  
11    constitutional issues. And, that's one of the ways you should  
12    consider the Sixth Amendment claim in addition to the charge  
13    to the jury that was given after 32 hours of deliberations.

14           THE COURT: I understand you challenge that, but  
15    if I recall correctly, the jury reported they had reached a  
16    verdict on the four counts and wanted to continue deliberation  
17    on the fifth count but did not in any way encourage the jury  
18    with anything more than that neutral statement that they should  
19    continue to deliberate.

20           MS. WILLIS: It is only a neutral statement if it is  
21    taken today without the context of what was going on then. I  
22    think the case is called Heminez (ph), it is talking about  
23    looking at the totality of the circumstances as to whether it is  
24    coerced; and, in that case, the instruction was the second charge  
25    to go back, and the Judge said something to the effect: "Just

1 go back and deliberate until the end of the day." I think  
2 there were two more hours left in the day or two and a half  
3 hours.

4 In this case, it was really remarkable, the first day  
5 after closing arguments, the jury started deliberating at 2:30;  
6 and, they went home at 10:15 that night. That's a Thursday.  
7 Friday, they started deliberating at 9:00 in the morning and they  
8 come back and they don't go home until 11:00 p.m.

9 Saturday, they go in at 8:00 and at 6:00, they write  
10 a note; it's been ten hours later. They said they reached a  
11 verdict on four but they are deadlocked on one and "the  
12 opinions are very set." This is 6:00 o'clock Saturday night.  
13 Given that context, it is extremely forcefully, they don't know  
14 when they are going to get out.

15 The Judge says to them go back and keep  
16 deliberating. At 7:00, 8:00, 9:00, 10:00 o'clock at night on  
17 Saturday night, and they are still sitting in that jury room and  
18 finally at 1:00 a.m. on Sunday morning after 17 hours of  
19 deliberations, one day and two full length days ahead of them,  
20 they come back with this verdict. The Court tried to cure that  
21 by saying something to the effect: "I'm not telling holdout  
22 jurors to give up their true conscience."

23 The Court didn't warn them, but instead sent them  
24 back out and basically said: "You are going to keep  
25 deliberating." And the exhaustion and the length of deliberations

1 just took over and caused an extreme coercive context.

2 THE COURT: I assume then your claim here  
3 would only apply to the Fifth?

4 MS. WILLIS: That's correct, Your Honor. There  
5 are a number of arguments that the State makes about things  
6 that are defaulted or what I would refer to as technical failures.  
7 If the Court wishes me to go through those, I will; otherwise,  
8 they are fairly well briefed unless you have a particular concern  
9 about something not presented.

10 THE COURT: Okay. Mr. Londahl, did you look  
11 at the fact that Ms. Downs desired to obtain counsel or  
12 associate counsel?

13 MR. LONDAHL: I did briefly, Your Honor. It  
14 was a garden variety default. They never raised that in State  
15 court anywhere as far as I can tell. It was never raise on  
16 any direct appeal. It was never raised in post-conviction; and,  
17 it was never raised on ineffectiveness of counsel. That's just  
18 a garden variety default as far as I can tell.

19 I didn't look deeply into it. The law might have  
20 developed after these events. It didn't appear to me to be a  
21 default that I would have to look deep into or look very  
22 carefully at because to me, there is no colorable way Diane  
23 Downs can claim anything near actual innocence.

24 She now alleges that James Haynes might have  
25 confessed to something. But, he didn't put a Ruger shell in her



1 rifle found in her house matching the extract marks on the 22  
2 bullets that were found on Old Mohawk Road, nor did he write  
3 a letter outlining the spectacular odd version of events to her  
4 attorney.

5 The evidence against her is pretty strong. And, I  
6 think we outlined the bulk of it in the quotes from my post-  
7 trial conviction which is found on page one of our brief in this  
8 case. The evidence is pretty strong.

9 The Pond's note question is also default. Petitioner  
10 claims it is an Arizona v. Youngblood and California v.  
11 Trombetta basically. Petitioner alleges that an investigator from  
12 the Sheriff's Office by the name of Roy Pond destroyed notes  
13 about contacts and sightings of a bushy-haired stranger or a  
14 yellow car.

15 Counsel represents that the record says: "He said  
16 they were destroyed." I'm not sure he was that factual about  
17 it. He said he destroyed some of them; and I think he said  
18 he thinks other were destroyed after "I left the office." He  
19 didn't say he destroyed them all.

20 In any event, the basic problem again with that  
21 claim is that it wasn't raised on direct appeal; and, it had to  
22 be raised on direct appeal in order for the point to be  
23 considered at all by the Oregon court.

24 The issue was fully litigated at trial; and, there is  
25 no reason why it wasn't raised on direct appeal other than it



1 would have been probably pointless to do so. The issue again  
2 has been defaulted and Ms. Downs has no colorable claim of  
3 innocence.

4 On this point, we can cite Whaley v. Thompson  
5 directly, which holds if there is an issue that could have been  
6 raised on direct appeal and wasn't, any attempt to raise it in  
7 post-conviction is irrelevant because ORS 138.550(2) says it  
8 can't be raised. This is not the kind of thing that could be  
9 raised in post-conviction.

10 It could have been raised on ineffective appellant  
11 counsel; but, it couldn't be raised as ineffective trial counsel  
12 because trial counsel raised and litigated it thoroughly.

13 The citation for that proposition in Whaley is 22 F.  
14 Supp. 1166.

15 Beyond that, even if the claim could have been  
16 raised post-conviction, petitioner didn't adequately raise it under  
17 the heavy standard or produce any records to support a  
18 Youngblood claim. The only thing she did was attempt to  
19 raise it sort of, without citing any case law.

20 As a substantive matter, the finding of due process  
21 violation under Youngblood required that the loss of evidence be  
22 shown to be material and exculpatory and that the evidence was  
23 destroyed in bad faith; that is, that it was apparent at the time  
24 it was destroyed that it was exculpatory.

25 Petitioner did not try to make that claim in State

1 Court; did not try to present any evidence of that in State  
2 Court and doesn't really attempt to do so here.

3 In fact, the notes apparently would have been  
4 inadmissible under ORCP 803(8) as were the investigation  
5 material that was the subject of the Brady claim. And, if the  
6 materials were anything like the materials that were produced on  
7 the Brady claim, it isn't exculpatory.

8 So, we don't see how it is possible for petitioner to  
9 argue either the fact that she made any record on this issue in  
10 State Court or that she has made any record here that would  
11 suggest any of this material would have been exculpatory and,  
12 that is a prerequisite under Trombetta or Youngblood.

13 In her brief, petitioner argues: Well, Youngblood  
14 doesn't require that it be exculpatory. It only requires bad  
15 faith. But, Youngblood cites and discusses Trombetta at length  
16 and particularly, in a footnote it cites the exculpatory  
17 requirement with approval.

18 There is no indication in Youngblood that it is  
19 overruling or discounting the Trombetta requirement that the  
20 material be exculpatory and that it is known to be exculpatory.  
21 It looks like the materials that Mr. Pond destroyed— I might  
22 note too, they do have some of the notes. And, those notes  
23 are pretty exact what is in the typewritten materials that were  
24 preserved. So, there is not indication that there was any  
25 difference between the typewritten notes and the notes that were

1 destroyed.

2 The remaining issues have been briefed below and  
3 many of them were defaulted. The Allen charge issue— It  
4 wasn't an Allen charge in the first place. In the second place,  
5 that was clearly defaulted.

6 The Vergamini issue I think was discussed at some  
7 length below. There was a finding of fact on it. And, the  
8 basic response is petitioner's attorney, Mr. Jagger, was weary of  
9 calling Mr. Vergamini because he thought he had good enough  
10 evidence on the question with Dr. Peterson and he didn't want  
11 to risk a disagreement.

12 In any event, the best that they would have gotten  
13 would have been accumulative evidence on the point.

14 THE COURT: What about Mr. Jagger's failure to  
15 object to the prosecutor's comment concerning the medical  
16 records and statements by Danny Downs?

17 MR. LONDAHL: I don't recall that that closely.  
18 But, if memory serves me right, that was material that Mr.  
19 Jagger tried to get in and the prosecutor objected to; and, the  
20 prosecutor on closing arguments apologized for it at the time,  
21 did raise it.

22 The medical reports, as I recall them, they were  
23 needless; what was said in the medical report neither helped or  
24 helped petitioner's case. As I recall, it was something to the  
25 effect that Danny Downs didn't remember much of anything.

1 THE COURT: Ms. Willis represented that the  
2 statement was something to the effect that Danny Downs said  
3 his mother was the shooter.

4 MR. LONDAHL: The medical reports says it both  
5 ways; he says one time his mother did shoot him and another  
6 time said his mother didn't shoot him. It was clear from the  
7 evidence that Danny Downs was asleep, as I recall correctly.  
8 He was only a three-year old child.

9 There also was a specific finding on that issue to  
10 the effect it wouldn't have been ground for a mistrial. The  
11 evidence could be construed as favorable to the defense's case  
12 or equivalent. But, that is a factual finding.

13 I would also argue that they are, to some extent,  
14 general and that those factual findings are still factual and not  
15 conclusion of law. Even if they were conclusion of law, they  
16 would entail factual findings.

17 THE COURT: One other point, petitioner offers  
18 these additional exhibits in order to extend the record. Does  
19 the State oppose the addition of these exhibits to extend the  
20 record?

21 MR. LONDAHL: I don't see how we can object  
22 to the material that petitioner offers about the investigator's  
23 notes and the stuff in exhibit P.P. because it is our view  
24 probably the material was provided to the State Court in  
25 camera. So, we wouldn't object to that.

1           This Court has taken the view that any material that  
2     petitioner wants to produce on the issue of actual innocence  
3     either under 2254(b) or (d) or evidence of actual innocence  
4     under the default standard under Tamayo-Reyes, we think is  
5     appropriate for those limited purposes. We would object to any  
6     evidence that is not introduced as a police investigator reports  
7     on the Brady claim or materials offered on the actual innocence  
8     issue either under the statute or under the procedural default.

9           THE COURT: Thank you. Ms. Willis, anything  
10    further?

11           MS. WILLIS: Just a couple of things. One is, I  
12    just want to make it clear for the record exactly what was said  
13    during the closing arguments. The prosecutor was reading when  
14    he said: There is this one where Danny said--asked about who  
15    shot you and there is this one where Danny says about who  
16    shot you replies "mommy, mommy shot you." I thought you  
17    said that a man shot you, I said, and he said they both shot  
18    me. So, it was fairly unequivocal that the jury hears that  
19    Danny Downs is saying that his mother is the shooter.

20           With regard to the Kahn report, the State is talking  
21    about the fact this should have been raised before, is somehow  
22    faulted. That makes sense if that was the position taken in the  
23    State Court because then you would have adequate independent  
24    State ground. The post-conviction court finds that this should  
25    have been raised, therefore, we are going to dismiss it or not

1 consider it or whatever.

2 In this case, it was raised in post-conviction; it was  
3 considered in post-conviction; it was raised on appeal and it  
4 was raised in the petition for review. There is not a  
5 determination by the court to the post-conviction that it was  
6 inappropriate before the post-conviction court. To state an  
7 opinion now that it should have been done on direct appeal  
8 doesn't change that. There is no adequate and independent  
9 State ground; there is no procedural finding on post-conviction.  
10 And, that's what a default is. It is not a jurisdictional issue  
11 where you can say the State Court dealt with this issue.

12 In addition, regarding Trombetta and Youngblood,  
13 both of those do talk about materiality requirement; but, the  
14 thing that makes Trombetta different than Brady is that there is  
15 bad faith. So, materiality then has to be proven. If it just  
16 had to be exculpatory, it wouldn't be any different than a  
17 Brady claim, it didn't get turned over and you, the defendant,  
18 the petitioner in this case, would have to prove it is  
19 exculpatory. But, since the evidence has been destroyed, you  
20 can't do that. The evidence doesn't exist anymore. So, you  
21 can't prove whether it is exculpatory.

22 So, in the situation there, Trombetta and  
23 Youngblood— You asked him how would you decide this  
24 material if the State has acted in bad faith; and that bad faith  
25 is on the State to prove whether it was material or not. And,

1     that's distinguishes Trombetta and Youngblood from Brady;  
2     otherwise, they would all be the same thing. If after  
3     destruction, the petitioner has to prove materiality, it is unfair.

4             Finally, with regard to the additional exhibits, some  
5     of the exhibits that Mr. Londahl referred to, it seems like we  
6     are in agreement. So, I won't address those. However, this  
7     Court has discretion under Rule 2254 to take any of those.

8             There are recent cases both in the U.S. Supreme  
9     Court and Ninth Circuit; Sidel v. Merkle is one, that says this  
10    Court can consider whatever it wants to to resolve claims.  
11    And, 2254(e) like Tamayo-Reyes, talking about evidentiary  
12    hearing, says that evidentiary hearings are time consuming and  
13    expensive; and, there are limitations on them. But, Rules 6, 7,  
14    and 8 weren't limited by Tamayo-Reyes and are not limited by  
15    2254(e). This Court can expand the record if it wishes.

16            In addition 2254(e) itself talks about--well, let me  
17    just read it. In a proceeding instituted by the application for a  
18    writ of habeas corpus, a determination of factual issue by the  
19    State Court should be presumed to be correct. An applicant  
20    shall have the burden of rebutting the presumption of  
21    correctness.

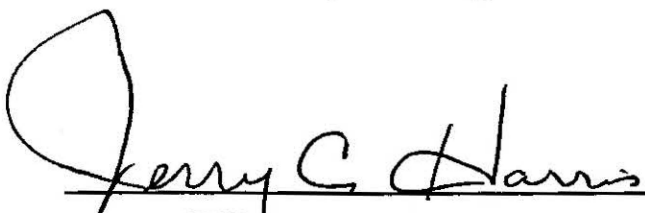
22            So, even given there is an assumption of correctness  
23    on the factual finding in State Court, Ms. Downs has the  
24    burden of rebutting that. She has to be able to rebut it with  
25    some factual showing. And, that's what these exhibits do. So,

1 the Court has the discretion to take them both in support of  
2 her request of an evidentiary hearing and also under the rules  
3 governing this situation.

4 THE COURT: Thank you, counsel. The Court will  
5 take the matter under advisement and will get an opinion out as  
6 quickly as we can.

7 — End of Proceedings —  
8  
9  
10

11 I certify that the foregoing is a correct transcript of  
12 the records of proceedings in the above-entitled case.

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15 \_\_\_\_\_  
16 Jerry C. Harris, Official Court Reporter

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\_\_\_\_\_ Mar 25, 99  
Date