

NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA,)
) COUNTY OF MONTGOMERY
 v.)
) 99 CRS 3818
SCOTT DAVID ALLEN,) 99 CRS 3820
)
 Defendant.)
)

TRANSCRIPT, VOLUME I OF I

(Pages 1 - 63)

Wednesday, December 19, 2018

December 19, 2018, Criminal Session

The Honorable Vance Bradford Long
Resident Superior Court Judge Presiding

(Appearances listed on Page 2)

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1 PROCEEDINGS OF WEDNESDAY, DECEMBER 19, 2018:

2 *(Proceedings began at approximately 10:34*
3 *a.m., on Wednesday, December 18, 2018.*

4 *Present at the bar were Mr. Nicholas Vlahos*
5 *and Mr. Jonathan Babb, Attorney General's*
6 *office for the State; Ms. Kristian Allen,*
7 *Assistant District Attorney for the State;*
8 *Mr. Michael Unti and Ms. Margaret Lumsden,*
9 *attorneys for the Defendant; the Defendant,*
10 *Scott David Allen.)*

11 THE COURT: If we could just go down the line,
12 starting with Ms. Allen, if counsel could introduce
13 themselves for the reporter's benefit, please.

14 MS. ALLEN: Kristian Allen.

15 MR. BABB: Jonathan Babb, the Attorney General's
16 office.

17 MR. VLAHOS: Nick Vlahos, Attorney General's
18 office, for the State.

19 MS. LUMSDEN: Margaret Lumsden for the Defendant.

20 THE COURT: Let the record reflect that the
21 Defendant is present in the courtroom. Yes, sir?

22 MR. UNTI: Michael Unti for the Defendant.

23 THE COURT: The record should reflect that we are
24 here pursuant to a pro se handwritten motion filed by the
25 Defendant in Montgomery County on July 23, 2018, which was

1 sent to the Senior Resident Superior Court Judge, now
2 presiding, in the form of a letter and a subsequent letter,
3 that the Court also takes as a motion, which was filed on
4 November 13, 2018, also written to the Senior Resident
5 Superior Court Judge, in the form of a letter.

6 The Court has caused the Defendant to undergo a
7 forensic evaluation and the results of that forensic
8 evaluation are contained on an eleven-page report authored
9 by Dr. Bruce R. Berger, forensic psychiatrist, employed by
10 Central Regional Hospital in the forensic services unit, and
11 is dated -- as of the date of execution, December 6, 2018.

12 Now, one of the motions that Mr. Allen initially
13 made was to discharge current counsel and ask for substitute
14 counsel. So we're going to proceed this way. Mr. Allen,
15 have you had an opportunity to see and read Dr. Berger's
16 report?

17 THE DEFENDANT: No, sir.

18 THE COURT: Well, we need to give you that
19 opportunity. I have read it. I have seen it. I want you
20 to have an opportunity to see it. I don't want to assume
21 anything. I don't think you'll find it objectionable.

22 He finds that you have the capacity to proceed and
23 he lists in great detail what you related to him about
24 things that you felt like were -- were problems that you
25 perceived with the judicial system and with the way your

1 case is being handled. I'd like to give you a chance to
2 review that. Okay?

3 THE DEFENDANT: Might I get a copy of this?

4 THE COURT: Absolutely. Yeah, yeah. I need that
5 copy back. I think that's the only copy in the file but I
6 will get you a copy. Yes, sir. Just take your time. I
7 regret that you don't have a copy of it yet, but I want you
8 to be able to review it. Take the time you need.

9 Court will be at ease while Mr. Allen has an
10 opportunity to review Dr. Berger's report.

11 MR. VLAHOS: I happen to have an extra copy.
12 I'll hand it to defense counsel to make sure it's the same
13 thing.

14 THE COURT: I don't want you to feel under the gun
15 because I am up here. You take your time to read it. You
16 need to read it word for word. Just read it. It's 13
17 pages. I don't know that I have the ability to get it to
18 you to read in prison but I've got things I can do. As soon
19 as you've read it, tell the Sheriff and the Sheriff will
20 come and get me and we'll crank up.

21 *(Pause in proceedings for Defendant to review*
22 *Dr. Berger's report.)*

23 THE COURT: Mr. Allen, have you had a chance to
24 read Dr. Berger's report?

25 THE DEFENDANT: Yes, sir

1 THE COURT: Do you need more time to look at it or
2 consider it?

3 THE DEFENDANT: No, sir.

4 THE COURT: May I have one of the copies back?
5 Let the record reflect the Defendant has been given his own
6 copy. I need one copy back for the file.

7 *(Copy of Dr. Berger's report was handed to the*
8 *Court.)*

9 THE COURT: Mr. Allen, do you have any opposition
10 to this being admitted for this hearing as Court's Exhibit
11 1.

12 THE DEFENDANT: No, sir.

13 THE COURT: Mr. Unti or Ms. Lumsden, do you have
14 any opposition to this being admitted as Court's Exhibit 1?

15 MR. UNTI: No, Your Honor.

16 MS. LUMSDEN: No, Your Honor.

17 THE COURT: Mr. Babb? Mr. Vlahos:

18 MR. BABB: No.

19 MR. VLAHOS: No objection, Your Honor.

20 THE COURT: Ms. Allen?

21 MS. ALLEN: No, sir.

22 THE COURT: Madam Clerk, if you would mark this,
23 please, as Court's Exhibit 1 and order that this matter be
24 sealed -- that the report be sealed. I tell you what, can I
25 keep it out just to refer to it. After the hearing is

1 concluded, if you would be kind enough to seal it for us,
2 please, Madam Clerk. Thank you, ma'am.

3 *(Court's Exhibit Number 1 was marked and*
4 *admitted into evidence.)*

5 THE COURT: All right. Just one second. These
6 letters are filed and of record. I think it's appropriate
7 to read them into the record.

8 The letter which was filed on July 23rd reads as
9 follows:

10 "Dear Judge Long, it is with regret that I must
11 inform you that the recently submitted brief pertaining to
12 the February 2018 evidentiary hearing was submitted with
13 omission errors and without my having seen or having
14 approved it for submission by my current attorneys.

15 "I had on more than one occasion expressed
16 explicitly to them both, before and after the delivering of
17 the transcript, that my contribution and approval of this
18 brief, was non-negotiable. I personally received a copy of
19 the brief just yesterday, July the -- " 7th or 9th, I think.

20 THE DEFENDANT: 9th.

21 THE COURT: "...fully a week after it was
22 submitted, hence the delay in this letter to you.

23 "Barring a short allocated time for reversions, I
24 request a consideration on your part in reference to the
25 conclusion and/or prayer for relief section of the brief,

1 and by extension, the MAR in its entirety."

2 That consideration being that it be known that I
3 am in no" -- "no" underlined -- "way whatsoever seek any
4 relief granted in the form of a sentencing hearing. I would
5 object to and appeal that ruling, were it given.

6 "Further, I seek only" -- "I seek only either the
7 opportunity to finish the proceeding begun at the August 25,
8 2017, hearing that you ordered continued at the October 30,
9 2017, session. I understand that you ruled on September 27,
10 2017, on what little transpired on August 25th, but the
11 defense still had at least four other witnesses subpoenaed
12 to offer testimony in regards to the guilt/innocence Claim 3
13 H, I, J and K. These, not being the same heard during the
14 February 2018 hearing. The latter half of the
15 aforementioned either is relief granted in the form of a new
16 trial.

17 "Further I apologize for this inconvenience but
18 feel these matters can only be addressed to you directly. I
19 am scheduled to meet with my attorneys later today and will
20 address these same concerns with them. I plan also to
21 inform them that after the submission of the" -- I don't
22 know what that word is -- "I plan also to inform them that
23 after the submission of the" -- court -- of the brief,
24 maybe, "of the brief due August 1st that they remove
25 themselves from my case. This due to repeated conflict of

1 interest and refusal to follow my lawful instructions in
2 regard to my case."

3 Signed by Mr. Allen and sworn and subscribed
4 before Michael Zinc, notary public.

5 Then the second motion letter which was filed
6 November 13th reads:

7 "Dear Judge Long, this is in regards to the order
8 of the Court dated 18 September 2018. Reference, paren 13
9 'and the apparent insistence of the moveant that he be
10 allowed to proceed pro se.'"

11 And there are quotation marks quoting from
12 Paragraph 13, "'And the apparent insistence of the moveant
13 that he be allowed to proceed pro se.'"

14 "Not once have I, the moveant (Scott David Allen),
15 insisted upon proceeding pro se, and for the Court to assert
16 such a claim indicates, at a minimum, both confusion and
17 error.

18 "I did state that I do want current counsel
19 removed, but" -- the "but" is underlined -- "this was with
20 the intent of counsel being replaced" -- "replaced" is
21 underlined -- "with new counsel that represents my interest.

22 "I did also state that I would submit a new or
23 amended brief if" -- and "if" is underlined -- "there was no
24 option but to do it myself. If the Court would have" -- "if
25 the Court would have had me to clarify this situation and so

1 to my intent, this could have been settled without further
2 delay or without the apparent intent to deter" -- I think --
3 "deter this motion to remove, replace" -- "replace"
4 underlined -- "counsel by ordering the apparent prejudicial"
5 -- "prejudicial" underlined -- "psychiatric evaluation to be
6 conducted by the State.

7 "By now calling me in to clarify to the Court my
8 intent and to clear up any further confusion, it should
9 expedite the matter."

10 The first thing I want to try and be as -- proceed
11 as cautious as I can and truncate my comments as much as I
12 can, Mr. Allen. But I will agree with you to this extent, I
13 allowed other -- not necessarily folks in the courtroom with
14 us now but folks maybe in the capital defenders' office, the
15 grand poobahs, to say that they really felt like when you
16 filed this motion, of course, it created some ripples in the
17 water.

18 It was their opinion that we needed to get a
19 psychiatric evaluation and make sure that you had the
20 competency to make decisions about your counsel. That's
21 probably the safe procedure. I sort of went against my
22 instincts which was to bring you down here into the
23 courtroom and just have you tell us what it is you were
24 trying to do, which I think is what you said you would have
25 liked. But we are where we are now.

1 You saw Dr. Berger. Dr. Berger has found that you
2 are competent to make these decisions about your counsel.
3 You have the right to keep Ms. Lumsden and Mr. Unti. You
4 have the right to proceed pro se and discharge them. And if
5 you request that other counsel be appointed, I'm sure the
6 capital defenders' office will appoint other counsel.

7 We are going to discuss this more fully but we are
8 not -- we are not going back and re-hearing -- I think what
9 is sort of in there is a motion to re-open evidence for a
10 new evidentiary hearing or for me to reconsider the rulings
11 that dismissed your claims for a new trial.

12 Look, there's no animus between me and you or Ms.
13 Lumsden and Mr. Unti. They are great lawyers. My -- my
14 wishes don't enter into this. I have a personal wish as to
15 whether you would keep them or not but that's your
16 constitutional right and your decision. If the Supreme
17 Court says, "Judge Long, you know what, the trial judge
18 screwed up when the trial judge did not give us -- did not
19 give Mr. Allen access to" -- I can't remember the lady's
20 name now but -- "her mental health records.

21 "And then further, Judge Long, you screwed up when
22 you didn't say the trial judge screwed up, and he should get
23 -- Mr. Allen should get a new trial." I'll just say
24 congratulations, guys, y'all were right all along. Good
25 luck. I hope everything goes well for you.

1 But we're not going back and doing all that again.
2 So I want to make that clear to you. Okay? So I'm going to
3 let the lawyers -- I have the benefit of having great
4 lawyers here and very wise people and skilled people in
5 these types of cases, so I'm going to let them give me their
6 advice as to how they think we should proceed. The final
7 say is going to be yours. Okay? We'll decide how we need
8 to proceed after this. Okay?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Thank you for your patience, Mr.
11 Allen.

12 Okay. Whoever wishes to be heard, go ahead,
13 please.

14 MR. VLAHOS: Thank you, Your Honor. Your Honor, I
15 think one of the things that might help is if I just put a
16 brief procedural history in the record, and ask Mr. Unti and
17 Ms. Lumsden at the end if there are any additions or
18 corrections they want to make to it which might help us.

19 First, on February 12th through the 15th of 2018,
20 this Court conducted an evidentiary hearing on Claim 7 of
21 Defendant's Motion for Appropriate Relief, and Claims 8 and
22 9 of Defendant's Motion for Appropriate Relief and
23 Supplemental Motion for Appropriate Relief, which all
24 alleged ineffective assistance of counsel at Defendant's
25 capital sentencing proceeding. In other words, they were

1 only sentencing claims.

2 All other claims of Defendant's MAR and SMAR have
3 been dismissed by this Court through written orders. One
4 order, August 18th of 2016, and the other order of January
5 the 4th of 2018. At the conclusion of the February 2018
6 evidentiary hearing, this Court granted the parties' request
7 for each party to file a post-hearing brief at a later date
8 after the parties could obtain access to the transcript of
9 the hearing.

10 Subsequently, this Court, via email, directed both
11 parties to prepare proposed orders in the Word format to
12 submit with their briefs.

13 On July the 2nd of 2018, the parties submitted
14 copies of their post-hearing briefs to the Court via email
15 and sent the briefs to the Montgomery County Clerk of
16 Superior Court for filing. In fact, I got the copy of the
17 State's brief back and it was stamp-filed July the 5th of
18 2018. So we sent them off and gave them to the Court July
19 2nd of 2018.

20 By email to the Court, I requested -- in my email
21 to the Court I requested that the time for submitting the
22 proposed orders be extended until August the 1st, 2018. Mr.
23 Unti acknowledged in his email that Defendant's post-
24 conviction counsel agreed to my request for additional time
25 to submit the proposed orders.

1 Then, on or about July the 13th of 2018 -- going
2 by the notary seal on the letter that Defendant Allen filed
3 -- Defendant Allen mailed a letter to this Court which he
4 dated July 10th, and in which Defendant Allen claimed he did
5 not personally receive a copy of Defendant's post-hearing
6 brief until July the 9th.

7 And this is the important part: In that letter,
8 for the first time before this Court, Defendant Allen raised
9 an objection to his receiving relief in the form of the new
10 capital sentencing proceeding. He had never before raised
11 an objection through any of the filings or through sitting
12 through four days of a hearing on those issues, Your Honor.

13 Defendant Allen sent two follow-up letters to this
14 Court which he dated August the 5th, 2018, and October the
15 17th of 2018. Meanwhile on September the 14th of 2018, this
16 Court entered an order pursuant to its own motion and
17 completed an AOC-CR-208A form, both directing Central
18 Regional Hospital to require a certified forensic examiner
19 to perform a forensic evaluation of Defendant Allen at
20 Central Prison to determine his capacity to proceed.

21 On October 22nd, 2018, after all counsel informed
22 the Court that they were available for a hearing today, this
23 Court entered an order scheduling today's hearing.

24 Now, that's just a brief summary. It's not
25 absolutely everything that happened but it's the highlights

1 of what happened on the procedural history. I want to give
2 Mr. Unti and Ms. Lumsden any chance they need to add or
3 correct any of that procedural history if they wish to do
4 so.

5 MR. UNTI: We have no objection to the statement.

6 THE COURT: Thank you, sir. Thank you, ma'am.

7 MR. VLAHOS: Your Honor, that brings us to the
8 issue of capacity to proceed. The State has got Dr. Berger
9 who -- you've got his report here -- under subpoena. He's
10 here available to testify.

11 Would Your Honor like to take evidence in this
12 matter and have the State ask him questions, and defense
13 counsel ask him questions and go through all that?

14 THE COURT: Well, let's do this. I'm satisfied
15 with Dr. Berger's report but I want to give each of you the
16 opportunity to present evidence and give Mr. Allen the
17 opportunity if he wishes to call Dr. Berger or present
18 evidence as to his capacity to proceed. So we'll just start
19 with the State.

20 Does the State wish to present anything further
21 other than the receipt of Dr. Berger's report as an exhibit?
22 Anything further on the issue of Mr. Allen's competence?

23 MR. VLAHOS: Yes, Your Honor. The State would
24 call Dr. Berger.

25 THE COURT: Dr. Berger? If you'll be kind enough

1 to come up, Dr. Berger. Thank you for coming down and
2 taking time out of your busy schedule, Dr. Berger, to -- to
3 help us out in this case. We appreciate it.

4 DOUGLAS BERGER, M.D.,
5 having been called as a witness by the State, was sworn.

6 MR. VLAHOS: May I have a moment, Your Honor?

7 THE COURT: Absolutely. Yeah. Sure. Sheriff,
8 could we get the doctor some water?

9 *(Brief Pause in Proceedings.)*

10 MR. VLAHOS: Your Honor, after conferring with
11 post-conviction counsel, at this time it appears that post-
12 conviction counsel is not going to oppose capacity to
13 proceed and that the Court has the report in front of it
14 which states what it states. So at this time, the State is
15 not going to need to call Dr. Berger, if that is, in fact,
16 the case that they are not opposing capacity to proceed, and
17 we did not have to have the full hearing for that, Your
18 Honor.

19 THE COURT: Thank you. All right. The State has
20 no further evidence to introduce at the hearing as to
21 capacity to proceed.

22 Ms. Lumsden, Mr. Unti, while we have Dr. Berger
23 here, any questions of Dr. Berger?

24 MR. UNTI: Your Honor, I have no questions unless
25 Ms. Lumsden wants to. I didn't see any ambiguity or

1 anything that needs to be cleared up. We're not objecting
2 to his conclusions.

3 THE COURT: Okay. We're sort of in an unusual
4 position, Mr. Allen, because you have made -- I understand
5 your second motion seems to sort of back away from the
6 notion of you proceeding pro se, but you have at least --
7 you have at least raised the specter of doing that.

8 Before we get down to that, I want to give you the
9 opportunity to question Dr. Berger if you desire to do so.
10 Dr. Berger's report says, as you've been able to read for
11 yourself, that in his professional opinion you are competent
12 to proceed. And it sets out, as you have seen the problems
13 that you have perceived with the way your Motion for
14 Appropriate Relief has been handled and problems with the
15 court system has dealt with you and I think death penalty
16 cases in general.

17 So I understand that but I want to give you a
18 chance to question Dr. Berger if you have any questions
19 about his report or his conclusions.

20 THE DEFENDANT: I am fine with the report.

21 THE COURT: Thank you. Does anyone object to Dr.
22 Berger being released from his subpoena?

23 MR. VLAHOS: No objection, Your Honor.

24 MR. UNTI: No objection.

25 THE COURT: Dr. Berger, thank you for coming. I

1 know you didn't get a chance to testify but you being here
2 has helped us very much and we appreciate you very much.
3 Thank you, sir.

4 Other than Dr. Berger, does anyone else have any
5 evidence they wish to present at this hearing concerning Mr.
6 Allen's competence? On behalf of the State?

7 MR. VLAHOS: Not on behalf of the State, Your
8 Honor.

9 THE COURT: On behalf of the Defendant?

10 MR. UNTI: No, Your Honor.

11 THE COURT: Mr. Allen, do you have any evidence
12 you want to present other than -- other than Dr. Berger's
13 report?

14 THE DEFENDANT: No, sir.

15 THE COURT: The Court makes the following findings
16 of fact beyond a reasonable doubt:

17 One, the Defendant was previously convicted of
18 first-degree murder and received a sentence of death.

19 Two, a Motion for Appropriate Relief was filed in
20 this matter and an Amended Motion for Appropriate Relief was
21 filed, the dates of which are of record.

22 Three, the Court disposed of several claims by
23 dismissing them pursuant to the State's Motion to Dismiss.

24 Next number. The Court ordered an evidentiary
25 hearing on claims -- some of the claims in which the

1 Defendant asserted the right for a new sentencing hearing.
2 This hearing was held in Montgomery County, North Carolina,
3 the week of February --

4 MR. VLAHOS: 12th through the 15th, Your Honor.

5 THE COURT: -- 12th through the 15th, 2018.

6 Next number. The Defendant filed two motions --
7 two handwritten motions with the Court: One filed in
8 Montgomery County July 23, 2018, the second filed November
9 13th, 2018, in which the Defendant raised the possibility
10 that he may wish to discharge current counsel and consider
11 proceeding pro se.

12 Next number. The Court, after considering the
13 Defendant's motion, determined that the Court must first
14 determine whether the Defendant is competent to proceed in
15 making these decisions -- whether the Defendant is competent
16 to exercise his constitutional right to discharge counsel or
17 to proceed pro se.

18 Next number. Dr. Bruce Berger, at Central
19 Regional Hospital, conducted an examination of Defendant
20 which has been admitted -- and prepared a report dated
21 December the 6th, 2018. This eleven-page report concludes
22 that Defendant is -- that Defendant does have the capacity
23 to proceed.

24 Next number. State, the Defendant himself, and
25 counsel for the Defendant have no other evidence to present

1 on the issue of the Defendant's capacity.

2 Next number. Dr. Berger was present and available
3 for both examination and cross-examination at the hearing,
4 and all parties declined, including the moveant, to examine
5 Dr. Berger.

6 The Court finds that the moveant does not have --
7 does not suffer from any type of significant mental disease
8 or defect. The Defendant is capable of dealing with the
9 issues in this case in an intelligent, knowing and voluntary
10 way; that the Defendant is aware that he has a lack of legal
11 training or knowledge, and that that lack of legal training
12 or knowledge could prove a hindrance to him if he decides to
13 proceed pro se.

14 The Court ultimately finds and concludes that the
15 Defendant/Moveant, Mr. Scott David Allen, does have the
16 capacity to proceed with his motions, does have the capacity
17 and the ability to participate in a meaningful way in his
18 legal proceedings, and work with his attorney in an
19 affirmative way should he choose to do so.

20 The Court concludes that he is capable of
21 proceeding to prosecute his motions or to exercise his
22 constitutional -- and/or exercise his constitutional rights
23 to proceed pro se or to proceed with counsel.

24 The Court therefore decrees the Defendant has the
25 capacity to proceed as to his motions filed July 23rd and

1 November 13th.

2 Madam Reporter, if you would be kind enough to
3 prepare this and send it to Mr. Arbaza for its final form.
4 The substance of this order will not change. I may -- the
5 Court reserves the right for grammatical purposes to add,
6 delete or modify the order as to the way it reads. The
7 substance of the order will not be modified. The Court
8 reserves the right to make these changes until the final
9 order is prepared, executed and filed in this matter.

10 What I would suggest, guys, and I'm open to -- Mr.
11 Unti, Ms. Lumsden, Mr. Babb, Mr. Vlahos, I'm open for
12 suggestions, but what I would like to do now is to have Mr.
13 Allen -- and maybe he shared this with you guys. I'm not
14 certain where we are. Have Mr. Allen tell us what his
15 desire is, what he wants to do, what he's trying to
16 accomplish.

17 I know Mr. Allen says I failed to divine from the
18 first letter that what he really wanted was substitute
19 counsel. And you said that was an error or a confusion.
20 And if it is, I apologize, Mr. Allen. I didn't see any
21 reference to appointing other counsel or substitute counsel
22 but if that was your intention, I didn't -- I didn't gather
23 that from the first motion.

24 Why don't you just -- I'm going to have you sworn.
25 We're not going to ask -- we're not going to talk about the

1 substance of your case. We're only going to talk about
2 procedurally what it is you want to do today and how it is
3 you want to proceed.

4 Yes, sir?

5 MR. VLAHOS: Your Honor, before we do that, may
6 the State be heard?

7 THE COURT: Yes, sir.

8 MR. VLAHOS: First thing is the form AOC-CR-208A
9 that this Court filled out. There's a portion of that form,
10 and I've alerted the clerk, there's a capacity determination
11 portion where Your Honor checks a block finding him capable
12 to proceed, as Your Honor did. I just ask that the Court
13 fill that out on that form in addition to the order. That
14 might make things completely clear to anybody coming to
15 check the record.

16 THE COURT: Have we got -- do we know where that
17 form is, guys? If y'all can locate the form, I'll check the
18 box.

19 MR. VLAHOS: Just wanted to make sure we're
20 dotting all our i's and crossing all our t's, Your Honor.

21 THE COURT: All right.

22 MR. VLAHOS: Then, the State has a position on
23 this before hearing from Defendant Allen that I'd like to
24 tell Your Honor about.

25 THE COURT: Thank you.

1 MR. VLAHOS: Now that Defendant Allen has been
2 found competent to proceed, the State would ask this Court
3 to rule on his three remaining MAR and SMAR claims before
4 entertaining any motion to withdraw those claims. This
5 Court considered Claim 7 of his MAR and Claims 8 and 9 of
6 his MAR and SMAR which all allege ineffective assistance of
7 counsel at his capital sentencing proceeding, ordered an
8 evidentiary hearing on those claims, and conducted a full
9 and fair evidentiary hearing over the course of four days
10 with Defendant personally present.

11 At the conclusion of the hearing, this Court
12 ordered counsel for the parties to submit post-hearing
13 briefs which they did, making the three remaining claims
14 ripe for adjudication at this point.

15 Now that Defendant Allen has been found competent
16 to proceed, nothing stands in the way of this Court
17 adjudicating his three remaining claims.

18 In its post-hearing brief the State argued that
19 Defendant's remaining claims are without merit and should be
20 denied. If this Court denies those claims, any motion to
21 withdraw the claims becomes moot at that point. Defendant
22 has no right to appear both by himself and by counsel.
23 Having elected for representation by appointment -- by
24 appointed defense counsel, Defendant cannot also file
25 motions on his own behalf or attempt to represent himself.

ref. Feb
hearing

1 Your Honor, I've got cases on these points of law.
2 If you want a citation, I'll tell you but I'll jump over and
3 state the law. I can cite them later on.

4 The State contends that Defendant's letters of --
5 that he dated -- July 10th of 2018, August 5th of 2018, and
6 October 17th of 2018 to this Court show that he's attempting
7 to manipulate the legal system and interfere with this
8 Court's ruling on his MAR and SMAR claims -- the remaining
9 claims.

10 In essence, what he's attempting to do is employ
11 the same scheme that he employed at trial. At trial, at the
12 start of his capital sentencing proceeding, Defendant
13 directed trial counsel to stop advocating in his defense.

14 Then, they spent a whole weekend convincing him to
15 allow them to put on a mitigation case, he finally agreed to
16 let them do that. He turned right around in post-conviction
17 and filed ineffective assistance of counsel claims for what
18 they did at the capital sentencing proceeding.

19 The State contends that what Defendant is seeking
20 to do here by these letters to the Court, is right when he
21 knows the Court is about to rule on his case, he wants to
22 throw a monkey wrench into everything, he wants to reshuffle
23 the deck and start over.

24 This Court should not allow him to do that. One
25 of the ways of doing that is to go ahead and rule on his

1 claims. That is why, Your Honor, the State is asking this
2 Court to rule on his claims before entertaining his motions
3 to withdraw those claims. They're ripe for adjudication.
4 You've heard everything on them. You've heard the arguments
5 of both sides. There's no reason not to rule on them.

6 Thank you, Your Honor.

7 THE COURT: Thank you. Mr. Unti? Ms. Lumsden?

8 MR. UNTI: Well, Your Honor, I disagree
9 fundamentally with the State's position that this matter is
10 entirely ripe for a final decision on the Claims 7, 8 and 9
11 on the MAR and SMAR for the very simple reason that Mr.
12 Allen wrote the Court before the submission of the proposed
13 order that you had asked us to submit. Whether Mr. Allen
14 knew it or not, it seems to me that he was timely in stating
15 in the letter, number one, that he wanted to remove his
16 attorneys, and number two, that he did not want to pursue
17 the sentencing relief.

18 Now, through very brief meetings and even before
19 this controversy arose, Mr. Allen was made aware of the very
20 significant prejudice that he could suffer by removing his
21 counsel now when the deadline for a petition for certiorari
22 to the Supreme Court is only 90 days after the adjudication
23 of the MAR and the SMAR. He is aware that that is a very
24 short window for new counsel to come in.

25 He is also aware that some of the evidence that

1 was brought into the record at the evidentiary hearing on
2 Claims 7, 8 and 9, which were sentencing claims, but that
3 some of the evidence concerning the circumstances of the
4 crime could be useful for consideration by the Supreme Court
5 and argument by counsel or by Mr. Allen, if he proceeds pro
6 se. So he's aware of the very real chances of prejudice
7 here.

8 But I do think he has a right today, and has had
9 the right at any point along this journey, to decide for
10 himself, warned of some of the legal implications I just put
11 on the record, I think he has the right to withdraw his
12 claims if that is what he wants to do. I don't think the
13 timing of his request was something that the State should
14 take advantage of. I think he has a right to withdraw his
15 claims although I have counseled him not to do so.

16 Ms. Lumsden?

17 THE COURT: If his claim is denied, can't he just
18 do it, just say, "Okay. I don't want to appeal this. I
19 abandon my right to appeal these claims for a new trial --
20 for a new sentencing hearing." I mean, what's the
21 difference?

22 MR. UNTI: There really is no difference. There
23 really is no difference. That's why I'm saying Mr. Allen
24 gets to choose whether he wants the sentencing claims to be
25 pursued in this court and in the Supreme Court.

1 That's all I have, Your Honor.

2 THE COURT: Ms. Lumsden?

3 MS. LUMSDEN: Nothing further.

4 THE STATE: Over the State's objection, I'm going
5 to hear what Mr. Allen has to say. I may go back and adopt
6 the State's position.

7 Tell me what you're trying to do, Mr. Allen, so
8 that I can understand it. I'm not trying to talk down to
9 you. I didn't gather from your first motion that you wanted
10 -- just tell me what you're trying to do. Today, what is it
11 you're trying to do.

12 THE DEFENDANT: I am trying to -- I am trying --

13 THE COURT: Raise your right hand for me. Would
14 you affirm him to his testimony, please?

15 *(Defendant was affirmed.)*

16 THE COURT: Thank you, Mr. Allen. You can stay
17 seated there as long as you can speak loud enough that
18 counsel can hear you, and the court reporter and I can hear
19 you. If you can't, I'm going to need you to come up and
20 take the stand. Go ahead.

21 THE DEFENDANT: Initially with the three -- four
22 claims, 3 H, I, J and K, which were in part of the hearing
23 of August 25th. I had concerns with it at the time as far
24 as what relief was asked for. I expressed to both my
25 attorneys that I am in no way seeking reduced sentence or

Ref Aug 25 hearing

1 sentencing hearing. We thought we would continue the August
2 25th hearing on October 3rd so we were preparing for that.

3 And the ruling -- Your Honor's ruling of 9-27 came
4 -- we had to go in a different direction thinking ahead to
5 the February hearing and the Claims 7, 8, 9

6 THE COURT: Which were for a new sentencing
7 hearing.

8 THE DEFENDANT: Which were for a new sentencing
9 hearing. My belief in going forward with that and not
10 objecting at that point was that some of those claims
11 overlapped to a small degree the ineffective claim of 3-I --

12 THE COURT: Okay. All right.

13 THE DEFENDANT: -- of which we never got to. I
14 wanted the opportunity to elicit as much testimony as
15 possible in regards to ineffective counsel, et cetera,
16 anything that could come up.

17 During this time I was in discussion with both of
18 my attorneys about -- I don't want to say discontinue
19 hearing of August but the repercussions of dropping my
20 claims of the sentencing hearing of February.

21 They advised me the -- of the risk of it. They
22 didn't tell me to do anything or not do anything but --. So
23 I informed them that I would go ahead with my February
24 hearing but that in no way was the relief again of the
25 resentencing to be asked for. The relief sought is a

1 revisit of the claims from August for a new trial.

2 I do not want to entertain in any way a
3 resentencing but I did note that I had to get as much
4 testimony to help every claim that I could. Going forward
5 with this brief we had initially 90 days. The transcript
6 delay made it 120. I last saw both my attorneys on March
7 8th.

8 THE COURT: Before you go further, it's my
9 understanding -- and I will let you or your counsel address
10 this. It's my understanding that you forbade -- that you
11 removed them from your approved visitor list and they were
12 unable to visit you at some point. I don't know when that
13 occurred. That's my best understanding.

14 THE DEFENDANT: That was August 2nd.

15 THE COURT: Go ahead.

16 THE DEFENDANT: The hearing for February was
17 February 12th through the 15th. The order was made February
18 15th. I saw both my attorneys on February 22nd and March
19 8th of which I instructed them both that for this brief, I
20 would have ultimate say and approval before it was
21 submitted.

22 Past March 8th, I only had occasion to visit with
23 Mr. Unti. I never saw Ms. Lumsden again. Mr. Unti informed
24 me that due to her background she would be drafting the
25 brief. I saw Mr. Unti on April 24th, May 24th, and June

1 12th alone. All those times we talked about what we were
2 going to include in the brief, about how to include other
3 whatever in it. But I had sent written instructions by the
4 mail. I had given them both instructions personally during
5 the visit that this brief was not to be turned in unless I
6 approved it.

7 The brief was due and submitted on July 2nd. I
8 got the final copy on July 9th. Now, I did have a rough
9 draft prior to that maybe a month. At that time I sent more
10 instructions, which Mr. Unti has informed me never arrived
11 at his office. I did speak to him personally. He said that
12 he did get the initial instructions of which I had already
13 orally discussed with both my attorneys.

14 Mr. Unti came again alone on July 10th, the day
15 after I got the copy. I asked him at that time to answer
16 why number one the copy to me so late and that it was
17 submitted without my approval, and that it was submitted
18 without my notes or what subject matter I wanted included
19 into it.

20 He had no answer because he had not directly
21 talked to Ms. Lumsden about the certain subject matter that
22 I was bringing up at that point, and we would have to
23 discuss it with her when she could come.

24 At that point I asked him, well, how can he defend
25 that. He said he would have to collect his thoughts before

1 he would express them. The visit was over and that was the
2 last time I had a visit with him. So I did object initially
3 to the August 25th hearing brief. I did say that I wanted
4 certain things in the February hearing which were not
5 included ultimately. I felt at that time that I had to
6 address it with the Court. That's what puts us here.

7 THE COURT: Okay. So what are you trying to do
8 today because I read your second motion as being -- and this
9 is probably through some fault of my own -- as being a
10 little bit inconsistent with how I read the first motion.
11 So you tell me what you're trying to do now.

12 THE DEFENDANT: I seek new counsel all together
13 due to ongoing internal matters of conflict with current
14 counsel. I don't want to get into too much as far as --

15 THE COURT: And you shouldn't.

16 THE DEFENDANT: But I feel that there's too much
17 of my insistent repeatedly and it not being followed -- my
18 instructions.

19 THE COURT: It's not my job to pitch for any team,
20 Mr. Allen, but you have to understand that you proceeded
21 with this week-long hearing understanding -- let's set aside
22 the rulings. They may all be wrong. You will have a chance
23 to argue those in front of the Supreme Court, you know,
24 "Long is an idiot. He should have granted this relief," but
25 that's been done.

1 The only relief that was available to you was a
2 new sentencing hearing, and you understood that. And we
3 proceeded with a week-long hearing. I don't remember -- I
4 can't swear -- did it end on Thursday or Friday. It may
5 have been Thursday. I don't remember. Four days of a
6 hearing in this courtroom, and you sat through the whole
7 thing and never said, "Hey, listen. I really don't want a
8 new sentencing hearing. I really don't want -- if you grant
9 this, I'm not going to -- I'm going to withdraw my request."

10 That was the only -- that was the only relief that
11 was available the whole time we conducted that hearing.
12 That was all that was available to you.

13 I don't understand exactly what you're saying. So
14 in your -- in your mind, you would get new counsel appointed
15 and how would this -- if things go exactly the way you want
16 it, tell me how you perceive this happening. You get new
17 counsel appointed and they do what?

18 THE DEFENDANT: I'm not adverse to submitting a
19 brief of my approval. At that point I would expect the
20 Court to rule with the intent of objecting to any relief
21 granted for sentencing.

22 THE COURT: Say that again.

23 THE DEFENDANT: I would expect the Court to rule
24 that I would object going forward with any relief granted to
25 sentencing.

1 THE COURT: Okay. Well, that's --

2 THE DEFENDANT: My point --

3 THE COURT: Go ahead. Excuse me. I beg your
4 pardon.

5 THE DEFENDANT: My point being that I felt that I
6 needed this testimony for the record ultimately. And I risk
7 going forward with the sentencing hearing to get that
8 testimony in. I am willing to suffer, for lack of a better
9 word, relief on that with the intent of going forward and
10 objecting because I feel that the testimony was relevant
11 enough to do such.

12 THE COURT: Okay. Mr. Unti and Ms. Lumsden, do
13 either of you have any questions for Mr. Allen?

14 MS. LUMSDEN: No, Your Honor, I don't.

15 MR. UNTI: Your Honor, the only thing I would like
16 to mention, if I understand Mr. Allen's statement, is that
17 he felt that the evidentiary hearing on the sentencing
18 Claims 7, 8 and 9 was a useful vehicle to bring in
19 additional evidence about the circumstances of the crime
20 that also relates back to the guilt phase of the trial.

21 Mr. Allen needs to understand that if he withdraws
22 the claim today, they will not be taken up in the petition
23 for certiorari or for further appeal, and that the record of
24 that evidentiary hearing, therefore, will not be considered
25 by the Supreme Court. And so the valuable evidence that --

1 that's my understanding of the law. But that transcript
2 will not be something that will be reviewable by the Supreme
3 Court. And he needs to weigh the value of some of that
4 evidence in his mind versus his desire not to pursue the
5 sentencing claim. He needs to understand this decision
6 today is likely to prejudice him severely before the Supreme
7 Court.

8 THE COURT: Thank you, Mr. Unti. Yes, sir, for
9 the State?

10 MR. VLAHOS: I have no questions of the Defendant,
11 Your Honor.

12 THE COURT: Okay. So, do you hear what Mr. Unti
13 is saying?

14 In other words, if you abandon -- if you are
15 allowed to proceed pro se or if you get new counsel
16 appointed and they say, "Hey, let's just -- we're chucking
17 it." It's almost, to be perfectly frank with you, if they
18 appoint somebody out of the capital -- somebody who has been
19 trained as a capital defender in the state, I just -- to be
20 honest with you -- I can't imagine anybody saying, "Okay.
21 I'll participate in this. I'll allow you to withdraw after
22 we've had a hearing. I'll allow you to withdraw your claim
23 for a new sentencing hearing," and that evidence not be
24 presented to the Supreme Court. I can't imagine anybody
25 participating in that and saying, "Yeah. Okay. If that's

1 what you want to do, that's what we'll do."

2 It's just difficult for me to imagine that because
3 that's a valuable right that you have. I mean, look, I
4 can't go under -- I don't know what all the layers to this
5 are. If what you're saying is, "I don't want to spend the
6 rest of my life in prison. If those are my options, I'd
7 rather see the sentence carried out as opposed to, you know,
8 not."

9 I mean, it's the way -- and I read, you know, in
10 your statements to Dr. Berger -- I can't disagree that these
11 things are sort of slow walked through the system, but you
12 know you are sort of the anomaly. Most people who have
13 received a death sentence don't object to things being slow
14 walked through the system. That's just the honest way it
15 goes. Because it's usually how it works, most people don't
16 object.

17 I had a case, an MAR claim, heard in 2006. The
18 last time I saw Mr. Widenhouse, I said, what ever happened
19 to that case. He said, "I don't know." I guess it's still
20 sitting on somebody's desk in the Supreme Court. I don't
21 know. I don't know where it is. I asked Gregson what
22 happened to it. He said, "I don't know."

23 Now, the ruling took a little while but they've
24 had it for ten years anyway. It's been up there since 2008
25 or something like that. I don't know what's going on.

left to
Some cases
MAR

1 So, you understand what Mr. Unti is saying. If
2 you -- if you wanted these claims pursued -- and I'm not
3 going to ask your lawyers. They can't reveal confidences
4 that you made to them. Even if everything you say is
5 correct, and they may disagree with that. We're not going
6 to put them on record about that.

7 They may disagree with that, but even if
8 everything you said is correct that you said, "Okay, guys, I
9 really don't want to do sentencing hearing. I'm not
10 interested in a hearing. But let's go ahead with an
11 evidentiary hearing on the sentencing claims because I want
12 you to develop a record just -- a record of insufficient
13 assistance of counsel, and I want to get that -- I want to
14 get that down on paper so the Supreme Court can see that.

15 "And then as the Supreme Court considers my claim
16 for a new trial, they can sort of keep this in mind and sort
17 of look back at the evidence in the sentencing hearing as
18 they think about Judge Long dismissing my claims outright
19 for a new trial and think about some of this evidence. I
20 think they'll do that. Whether they are supposed to or not
21 is a different question but I think they will do that."

22 So what Mr. Unti is saying is that if you abandon
23 your claims, if you discharge and abandon your claims, or if
24 you get new counsel and they abandon your claims, that
25 evidence is not going to be before the Supreme Court because

1 that evidence came in, in a very narrowly defined issue as
2 to whether or not you get a new sentencing hearing. If you
3 abandon your claim for a new sentencing hearing, it's gone.

4 We don't -- we don't require the court reporter
5 just to go through the process of typing up a transcript and
6 the transcript doesn't apply to your claim -- technically it
7 doesn't apply to your claim.

8 I understand you're projecting out that they might
9 sort of wink and nod and consider it. But if you abandon
10 your claims that information is not going to be in the file
11 which sort of, you know, puts the pin in your whole plan
12 about getting that information in front of the Supreme
13 Court. Do you understand?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Okay. Go ahead.

16 THE DEFENDANT: Knowing that, prior to this, this
17 is why ultimately I went through with the hearing.

18 THE COURT: Okay.

19 THE DEFENDANT: I knew that the option of pulling
20 the claims was mine.

21 THE COURT: Say that again.

22 THE DEFENDANT: I knew that the option of pulling
23 the claims -- dropping the claims was mine, and I did not.
24 I do want everything to go before the Supreme Court. I have
25 no intent at this point of dropping the claims, but I do

1 request of the Court that new counsel be allowed to submit a
2 brief of my approval.

3 THE COURT: That's a little bit -- that's a little
4 bit different deal. You told Dr. Berger at one time, did
5 you not, Mr. Allen, that it would not be your preference to
6 continue with Mr. Unti and Ms. Lumsden, but that you felt
7 like you could work with them. Maybe I'm paraphrasing. I
8 don't have it in front of me. I don't remember the exact
9 wording but that's -- I remember somewhere in his report a
10 line very close to that. I'm not trying -- if you disagree
11 with that, you're free to disagree with that. That's the
12 way I remember Dr. Berger's recounting of something you told
13 him. That's sort of like double-hearsay.

14 THE DEFENDANT: Your Honor, no one is more
15 conscious of things that cause delay. I want to avoid as
16 much of that as I can. What I think that is in reference to
17 is that if necessary I would go forward to expedite matters
18 with Mr. Unti and Ms. Lumsden, solely for the purpose of
19 submitting the brief, if that could avoid a long delay in
20 getting new counsel, but I do ultimately want new counsel.

21 THE COURT: You have to understand, I mean, that
22 this is not a -- I mean, I'm not sharing any state secrets
23 with you, you have to understand that if we appoint a new
24 counsel -- let's say this is all going to work the way you
25 want it to. Okay?

1 You guys are out. The appellate defender gives us
2 two new guys. They know nothing about your case. They're
3 going to come there to see you. The files are that thick.

4 Let's forget about -- let's forget about what's
5 happened. They are going to be -- at a minimum, they're
6 going to have to read the transcripts of the hearings. They
7 are going to have to read the MAR. I guess they are going
8 to have to read the trial transcript. I'm not trying to
9 talk you in or out of anything but you have to understand, I
10 have no idea how long this is going to take. For them then
11 to prepare to file their own brief about the hearing.

12 I mean, maybe it could be done on a expedited
13 basis. I don't know. But, see, these people are all just
14 like Mr. Unti and Ms. Lumsden. Your case is vitally
15 important to them but this is not their only case. The same
16 is going to be true whoever else we appoint.

17 So, I mean, there's no way I can guarantee you
18 that it's not going to slow -- I can guarantee you that it's
19 going to take some time, I don't know how much time. I
20 don't know if it's going to be within what you think it too
21 much time. Only you can define that. I have no idea. I
22 just sort of know how things work, how much -- how much
23 effort it would take for someone else to bring themselves up
24 to snuff to feel like they are doing what they are required
25 to do and zealously representing you and filing the

1 appropriate brief and -- and trying to sort of navigate
2 between what you want and what the law says and what the
3 case are. I have no idea how long that will take. I
4 couldn't hazard a guess about that.

5 Okay. Does anybody else wish to be heard about
6 any of this?

7 MR. VLAHOS: Your Honor, the State is going to ask
8 that you deny Defendant Allen's motion to replace his
9 counsel. I just want to put some reasons on the record
10 briefly.

11 First, an indigent defendant does not have the
12 right to have counsel of his choice appointed to represent
13 him. The United States Supreme Court has rejected the
14 argument that criminal defendants have a constitutionally
15 protected right to counsel when mounting collateral attacks
16 on their conviction, which is where we are now in post-
17 conviction with the MAR.

18 Even if Defendant Allen had a constitutional right
19 to post-conviction counsel, he would not be entitled to have
20 new or substitute counsel in this case. A trial court is
21 not constitutionally required to appoint substitute counsel
22 unless representation by counsel originally appointed would
23 amount to denial of defendant's right to effective
24 assistance of counsel.

25 So, when it appears to the trial court that the

1 original counsel is reasonably competent to present
2 defendant's case and the nature of the conflict between the
3 defendant and counsel is not such as would render counsel
4 incompetent or ineffective to represent that client, denial
5 of defendant's request to appoint substitute counsel is
6 entirely proper.

7 Now, nothing shows -- nothing that you've heard in
8 this case shows that counsel is not reasonably competent to
9 represent defendant, both Mr. Unti and Ms. Lumsden. They
10 were appointed by the office of indigent defense services,
11 they are required to meet certain criteria in order to be
12 appointed to these cases, you've seen how hard they've
13 argued for their client and what they've done navigating
14 through these difficult waters in this case. I've got other
15 cases with Mr. Unti and I've got other briefs and things
16 that I've read from Ms. Lumsden. They are both competent,
17 capable counsel.

18 THE COURT: Well, saying that they are reasonably
19 competent in my observation of Mr. Unti and Ms. Lumsden,
20 saying that they are reasonably competent damns them with
21 faint praise. I mean, I think they are far beyond that.

22 MR. VLAHOS: I'm saying they meet the reasonable
23 standards.

24 THE COURT: I understand that.

25 MR. VLAHOS: They are far better than that, but I

1 think they meet the legal standards.

2 THE COURT: I understand that.

3 MR. VLAHOS: Nothing shows that this conflict
4 would render counsel incompetent. What you've got, you've
5 got two decisions that defendants routinely make in criminal
6 cases. One is a decision about the object of the
7 proceedings, whether to make a claim or not.

8 The other one are tactical decisions. Okay.
9 Courts are universal in that the object of a proceeding --
10 the object of the defense -- defendant has a right to drive
11 the boat on that. However, when you're talking about
12 tactical decisions, they usually are made by counsel.

13 There is one exception to that in North Carolina.
14 Okay? In North Carolina, you have the doctrine of absolute
15 impasse which when defense counsel and a fully informed
16 criminal defendant reach an absolute impasse as to tactical
17 decisions, the client's wishes must control. Okay? It's
18 based on the principle agent, nature and theory of the
19 attorney-client relationship.

20 However, it's not without limitation. I think
21 this is really important on what I believe, judging from
22 what Defendant Allen was arguing, what he wants lawyers to
23 argue in his brief -- some lawyers to argue in his brief.
24 There are two limitations that are important.

25 First, the absolute impasse rule applies only when

1 defendant's wishes with regard to trial strategy are lawful.
2 Okay? So, he can't have his lawyers argue something that's
3 unlawful. Also, this does not apply when the defendant
4 seeks to have counsel assert frivolous claims.

5 What I'm saying to Your Honor is we had the
6 hearing on the three remaining claims which are capital
7 sentencing proceeding claims. It sounds like Defendant
8 Allen wants lawyers to submit briefs that argue
9 guilt/innocence when they are supposed to be arguing the
10 sentencing claims.

11 He can't force this counsel or other counsel to
12 make arguments on guilt/innocence when Your Honor is only
13 hearing the sentencing claims. He's not going to be able to
14 make other lawyers do this either, so I don't think he's
15 going to be able to get what he wants.

16 The gist of all that is there is no reason to kick
17 these lawyers out of this case and stop them from
18 representing him.

19 If Your Honor believes it is wise and important to
20 let other counsel handle the petition for writ of certiorari
21 or any appellate relief that may be done, that may be an
22 option, but as far as these proceedings in this court, to
23 end this litigation in this court, which it should be ended
24 now because it has run its full course, then Your Honor
25 should deny his motion to get new counsel in these

1 proceedings. If it's something later on down the road,
2 appeal habeas or something, then maybe. But these
3 proceedings, absolutely not in this court, Your Honor.

4 THE COURT: Ms. Lumsden, Mr. Unti, do you wish to
5 be heard? I understand you guys are also sort of threading
6 a needle here. If you wish to be heard, I will give you
7 that opportunity. If you don't, then, I'm not going to
8 require you to be heard.

9 MR. UNTI: One point that Mr. Vlahos just made
10 about the petition for certiorari and who represents Mr.
11 Allen for that petition concerns me because of the deadline
12 for that petition. Your Honor was just discussing how much
13 effort it would take for new counsel to come in and write a
14 closing brief from the evidentiary hearing in February. The
15 difficulty -- the level of difficulty for new counsel to
16 come in and put together a petition for certiorari by the
17 deadline would very likely result in severe prejudice for
18 this gentleman.

19 And depending on how Your Honor rules on these
20 claims or whether you allow him to withdraw, that I see as
21 the greatest risk here of prejudice. I don't want Mr. Allen
22 to make a choice without truly understanding how treacherous
23 that ground is he's walking on.

24 THE COURT: Thank you. Well, I will allow Mr.
25 Allen to correct me but this is -- I want this to be in the

1 record. It is my understanding from what you've said, Mr.
2 Allen, you have now withdrawn -- if in fact it ever existed,
3 you have withdrawn your request to proceed pro se. You are
4 either asking one, your preference would be to have new
5 counsel assigned; or two, to proceed with Ms. Lumsden and
6 Mr. Unti. That's what I think I hear you saying. Is that
7 correct?

8 THE DEFENDANT: I would only want to proceed with
9 Ms. Lumsden and Mr. Unti for the purposes of this brief
10 only.

11 THE COURT: Did you hear what he just said?

12 THE DEFENDANT: Yes.

13 THE COURT: You're time limited -- if you --
14 you're time limited on getting the petition before the
15 Supreme Court. I don't -- I have no idea and I don't
16 pretend to know how difficult it would be to get them to
17 extend the time periods for you because of the unusual
18 circumstance of this case. Barring that, you're just
19 saying, "Judge, you're saying it's going to take them a
20 while to get up to caught up to file a brief as to the" --
21 you heard what he said. You understand it. You're a smart
22 guy. You understand what he said.

23 "If you can imagine, Judge, how much time it would
24 take them to get ready to file this brief, imagine how much
25 time they're going to need to go back and read all these

1 different transcripts and file an appeal of your rulings,
2 Judge, denying the hearing and, then, bring themselves up to
3 speed to file other potential claims." He's just saying he
4 doesn't want to see you caught in that trap.

5 So, what I thought I heard you say was you didn't
6 want to represent yourself. Your preference would be for me
7 to appoint you new lawyers going forward but if it meant
8 representing yourself or working with Mr. Unti -- Mr. Unti
9 and Ms. Lumsden -- and, again, this is me sort of
10 synthesizing what I thought I heard you say, you would
11 prefer to go forward with current counsel and work with
12 them. Maybe I didn't hear you right. I thought -- I
13 thought after we filtered through everything, I thought
14 that's what you just said.

15 THE DEFENDANT: I don't know how to explain it in
16 a way that doesn't risk exposing too much. I'm willing to
17 take the risk of new counsel having a limited time in
18 preparation as opposed to the knowledge I already have of
19 the difficulty I'm facing now.

20 THE COURT: All right.

21 MR. BABB: Your Honor, may I say one thing?

22 THE COURT: Yes, sir.

23 MR. BABB: Just to address the Court's concern, in
24 a petition for writ certiorari, the Defendant can -- new
25 counsel could ask for extension of time which is exactly

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1 what happened in another case of Mr. Unti's that I'm
2 opposing counsel in where at the end of the MAR there were
3 issues. Judge Sasser ruled and then allowed the attorneys
4 to withdraw after ruling on the claims. New counsel then
5 sought an extension of time. It was Mr. Ferguson -- Jay
6 Ferguson. And extension of time was given for filing
7 petition of writ of certiorari. So I understand the concern
8 about prejudice that Mr. Unti has raised about time, but in
9 those situations if new counsel is appointed, I really can't
10 see the Supreme Court not granting an extension of time in a
11 capital case.

12 THE COURT: All right. The Court will dictate a
13 proposed order in open court for the convenience of the
14 parties notifying them of the Court's ruling. The final
15 order -- the convenience of the Court is using the service
16 of the court reporter. The final order will not -- the
17 final order will actually be constituted when this order is
18 executed and filed. The Court reserves the right unto
19 itself to add, modify or delete findings of fact and
20 conclusions of law.

21 Madam Court Reporter, if you would use the first
22 findings of fact that are briefly set out that defendant was
23 convicted of first-degree murder and received the death
24 penalty, an MAR was filed in -- I think I called it AMAR
25 instead of SMAR -- it's an SMAR -- supplemental MAR and use

1 those findings of fact in this order, please, and the date
2 of the motions filed by defendant, pro se.

3 These findings of fact are found beyond a
4 reasonable doubt based upon the record established in this
5 matter and testimony of Defendant and legal arguments of
6 counsel.

7 The Court finds the Moveant/Defendant acknowledges
8 that he understood that the sentencing hearing, which was
9 conducted the week of February 12th, 2018 -- strike that --
10 the evidentiary hearing that was conducted the week of
11 February 12th, 2018, was only -- was limited -- strike that
12 -- the Defendant acknowledges that he understood the only
13 relief that was before the Court at the evidentiary hearing
14 of February 12, 2018, was a new sentencing hearing.

15 Next number, the Defendant/Moveant elected to
16 proceed with the evidentiary hearing as the Defendant
17 desired to establish a record to place before the Supreme
18 Court in the hope that the Supreme Court may consider
19 portions of that record in ruling on the trial court's
20 dismissal of the Defendant's claim for a new trial without
21 an evidentiary hearing.

22 Next number, the Defendant continues in his desire
23 to have the evidentiary record from the February 12, 2018
24 hearing before the North Carolina Supreme Court as the
25 Supreme Court considers the Defendant's -- this Court's

1 denial of the Defendant's request for an evidentiary hearing
2 for a new trial.

3 Again, I will probably jiggle around the order
4 these are in.

5 The counsel for both the State and the Defendant
6 submitted briefs in support of their positions, pursuant to
7 the orders of this Court, by the established deadline of
8 these briefs being filed July 5th -- July 2nd, maybe, 2018.

9 Next number, the Defendant insists he does not
10 want a new sentencing hearing but is only interested in
11 receiving a new trial.

12 Next number, the Defendant withdraws any portion
13 of his motions -- pro se motions of July 23rd and November
14 13th which could be construed as a request to allow the
15 Defendant to proceed pro se.

16 Next number, the Defendant now requests that the
17 Court withhold ruling on the motions for a new sentencing
18 hearing and appoint counsel to file a second brief.

19 Next number, the Court read both the briefs
20 submitted by the State and the briefs submitted by counsel
21 for the Defendant. The Court finds that counsel for the
22 Defendant, throughout these entire proceedings, have
23 diligently, meticulously and with great effort pursued the
24 Defendant's claims both in the writing, both in the filing
25 of the motions, the writing of the briefs and in litigation

1 in open court.

2 The Court finds that counsel -- current counsel
3 for the Defendant are far and above the standard of being
4 reasonably able to prosecute the Motion for Appropriate
5 Relief and the Supplemental Motion for Appropriate Relief
6 previously filed on behalf of the Defendant and to pursue
7 these claims before the North Carolina Appellate Courts.

8 While the Court is unable to question the
9 Defendant as to the Defendant's desires in the filing of a
10 second brief, the Defendant's intentions are clear to the
11 Court in that the Defendant wishes to have a second brief
12 filed that somehow incorporates the evidence that was heard
13 on the issue of a new sentencing hearing into the dismissed
14 claims for a new trial.

15 The Court finds the Defendant has no right to file
16 a second brief citing to evidence at the evidentiary hearing
17 for a new sentencing hearing in his claims for a new trial.

18 I think I've already said this and I can strike it
19 out if I have.

20 The Court finds the Defendant, since the end of
21 September of 2018, understood that the February -- since the
22 end of September of 2017, understood that the hearing to be
23 held the week of February 12th, 2018, was to be only as to
24 his claim for relief of a new sentencing hearing.

25 The Defendant at this hearing -- next number --

1 the Defendant at this hearing stated that he had not seen
2 counsel since March 6, 2018, before he filed his motion.
3 Perhaps, the Defendant was referring to Ms. Lumsden but he
4 stated "counsel." He then went on to recount seeing Mr.
5 Unti numerous times, perhaps as many as a half dozen,
6 between March the 6th and the filing of his motion in July.

7 The Defendant is not entitled to pick and choose
8 counsel -- appointed counsel at any stage of the criminal
9 proceeding in the State of North Carolina.

10 There has been no assertion by current counsel
11 that any disagreements with the Defendant have risen to a
12 level that counsel believes, in their professional opinion,
13 that they are prohibited from representing the Defendant
14 zealously as they -- zealously.

15 The Court finds that current counsel, as noted
16 above, through their efforts are well schooled in this case
17 and the trial transcript amongst other things.

18 The Court finds that appointment of substitute
19 counsel would inevitably run the risk of causing possibly
20 substantial delay in new counsel attempting -- strike that --
21 - familiarize -- strike the word "attempt" -- familiarizing
22 themselves with the issues in this case to file either a
23 second brief on the sentencing hearing and/or an appellate
24 brief.

25 The Court concludes -- and, again, I reserve the

1 right to add additional findings of fact, delete or modify
2 the findings of fact that exist -- that the Defendant has
3 failed to show good cause that counsel should be discharged.
4 The Court finds that counsel are more than reasonably able
5 to represent the Defendant.

6 The Court concludes that as to the issue of the
7 filing of the brief requesting a sentencing hearing that the
8 Defendant -- that as the Defendant knowingly allowed the
9 sentencing hearing to proceed, an evidentiary hearing on the
10 issue of new sentence to proceed, and as the Defendant
11 understood the only relief available to him at this hearing
12 was a new sentencing proceeding, and as the Defendant
13 allowed -- strike that -- and as the Defendant, today's
14 date, requests that the Court proceed to rule on the
15 sentencing hearing, and that the only issue for which the
16 Defendant objects is the wording of the brief filed by
17 counsel, and as the Defendant has no right to have a second
18 brief filed which somehow attempts to incorporate dismissed
19 claims for new trial relating to evidence educed at the
20 sentencing hearing that the rules -- that absolute impasse
21 does not govern the request for substitute counsel, it is
22 therefore ordered that the Defendant's request for
23 substitute counsel -- the Defendant's request, either made
24 orally in open court or through the motions filed -- pro se
25 motions filed for substitute counsel to prosecute the

1 request for a new sentencing hearing by filing a new brief,
2 is denied.

3 Two, the Court decrees that the Defendant has
4 withdrawn his request to proceed pro se.

5 Three, to the extent that the Defendant has moved
6 the Court in his pro se motions to reconsider the motion
7 dismissing the Defendant's claims for a new trial, the
8 motion to reconsider is denied.

9 Four, to the extent that the Defendant's pro se
10 motions move the Court to reopen an evidentiary hearing on
11 the issue of the sentencing hearing -- the need for a new
12 sentencing hearing, that motion is denied.

13 Now that I think about it, Mr. Vlahos, will you
14 draft this order for me?

15 MR. VLAHOS: Yes, Your Honor.

16 THE COURT: And, of course, show it to -- as I
17 know you guys always do. You guys have been great about
18 that.

19 Guys, I have your briefs. I've read the briefs.
20 I'm a little bit at loose ends because after almost 14 years
21 together, Ms. Jones retired Friday, which is -- I mean, she
22 functioned like a judge really up there. So I'm really sort
23 of at loose ends. They are in her office and on her
24 computer. I have a great guy. I hired a gentleman who is
25 going to be outstanding. He is going to be great but he and

1 I are sort of feeling each other out.

2 So if you guys could do me a favor, please, and
3 email the briefs to me again, email the proposed orders to
4 me again as soon as possible, please. We'll get this order
5 signed.

6 Mr. Allen, I'm not going to give you substitute
7 counsel for the purpose of filing this brief. I'm going to
8 ask that you -- I do not have a right to do this. I'm not
9 ordering you to do this. I'm going to ask you that you talk
10 to Ms. Lumsden and Mr. Unti about the filing of -- after the
11 ruling has come down, whatever that is, about them
12 proceeding as your appellate counsel and how that could
13 prejudice you to dismiss them. And the potential -- again,
14 Mr. Babb -- I want to make this clear to you, as you see me
15 stuttering and stammering up here, you understand I've got
16 my hands full trying to be a trial judge.

17 I don't know anything about how the Supreme Court
18 works. I don't know what the opportunity is for you to get
19 an extension, not get an extension. I don't know how that
20 would work and I don't pretend to. They do. Mr. Babb does.
21 Mr. Unti does. They have experience in that. I do not.

22 You have the right to proceed pro se. That's sort
23 of the basis of this order. You have the right to proceed
24 pro se. You have the right to have counsel. You don't have
25 the right to say, "You know what, I don't like what these

1 guys said in the brief because even though I said I wanted
2 a sentencing hearing, after a week, you know, I really want
3 that evidence to be considered on my new trial motion.
4 That's what I really want.

5 "And if I have to spend the rest of time in
6 prison, I really don't want to do that. I really don't want
7 them to do this sentencing hearing. But I still want the
8 Court to rule on it and I still want it to go to the Court
9 of Appeals, I just want different lawyers."

10 You don't have the right to do that. There's no
11 constitutional right to pick and choose who you want to
12 represent you.

13 To me, after it all comes down to it, I think
14 that's what I hear you saying. You've got great lawyers.
15 They are outstanding lawyers. I think you made a wise
16 decision to proceed with attorneys rather than proceed pro
17 se. I think that would be a disaster.

18 As smart as you are, as articulate as you are, I
19 think it would be a disaster to proceed pro se. It's not my
20 job to advise you but I hope you won't do that. That would
21 just be a mess. It would -- you shouldn't do that. That's
22 as plain as I know how to say it.

23 You've got good lawyers. They're trying -- they
24 disagree with my decision to dismiss your claim for a new
25 trial. They're going to take that to the Supreme Court if

1 you allow them to do so. You may win. As I said, they may
2 say, "You know what" -- I'm not going to state my opinion
3 about things. But they may say, "The trial judge," as I
4 told all these folks in private, I might have done something
5 different had I been the trial judge. The trial judge may
6 should have given you that stuff about that mental health
7 information, and Judge Long saying that you needed to get a
8 new trial because of that, that was a mistake, too, that's
9 an error. That's an error." That may happen. I don't
10 know. We'll see.

11 And, then, you've got a whole new D.A.'s office.
12 If it happens, then, that changes the calculus. You know,
13 you've got somebody who didn't try the case if they give you
14 a new trial and a new sentencing. I don't know. I don't
15 know what's going to happen.

16 They may say, "We're good to go. You got a fair
17 trial. You got a good sentencing hearing. You're good to
18 do. Everything that Judge Long did is going to be okay and
19 we're good to go."

20 I don't know what they're going to do. But I know
21 you need still advocates to represent you, and I think
22 you're smart enough to know that, too. It's a minefield. I
23 don't want you to say anything else and I'm not going to
24 continue talking. I just want you to know it's a minefield
25 where you could easily mess up in a major way and you need

1 these guys' help. That's what I will say.

2 MS. LUMSDEN: Your Honor, may I approach?

3 THE COURT: Yes, ma'am.

4 *(There was a bench conference.)*

5 THE COURT: Mr. Vlahos, if there's any findings of
6 facts and conclusions, if you could add those but highlight
7 them to Mr. Unti and Ms. Lumsden's attention that you are
8 requesting that I adopt these findings of facts or
9 conclusions and highlight to them that that's something you
10 don't believe I dictated.

11 If you could also put out -- set out in the
12 preface or the Court's findings of fact -- I don't want the
13 whole thing set out in nuts and bolts but a synopsis -- a
14 procedural synopsis of the case.

15 MR. VLAHOS: Yes, Your Honor.

16 THE COURT: The record should further reflect that
17 the Court is informed by Ms. Lumsden, as an officer of this
18 Court, that Ms. Lumsden was unable to visit Mr. Allen
19 because unfortunately in April Ms. Lumsden had an injury to
20 her back which required surgery -- in July, Ms. Lumsden?

21 MS. LUMSDEN: Yes, Your Honor.

22 THE COURT: -- in July, and was dealing with a
23 severe back injury which necessitated surgery, as stated by
24 the Court, in July and had appeared on convalescence where
25 she continued to work from her home but was unable to go out

1 and report to the office and see clients.

2 So, again, you know, and that's just something,
3 Mr. Allen, again, knowing your intelligence, knowing your
4 articulateness, knowing that you know how the world works,
5 you have to understand, "sort of, kind of what I heard a
6 little bit is, you know, what somebody charged with armed
7 robbery in the Randolph County Jail says. You know, well, I
8 haven't seen my lawyer but twice in eight months and that
9 sort of decreases my comfort level with them a little bit."

10 I mean, then you went on to recount that Mr. Unti
11 was down there, like, four, five, six times since the
12 hearing in February until the filing in -- I know this is
13 your life. I understand that. But these guys also have
14 lots of other clients they have got to see and they can't be
15 down there every day. And I kind of heard a little bit of
16 that coming through this, too.

17 Okay, guys. That will be the order of the Court.
18 If you guys could -- like I said, I think I know where that
19 stuff is. I think it's in an expandable file but once all
20 this started coming down, I laid it down in her office and I
21 moved onto other things. I need to go back and find it.
22 You guys can save me some time if you will just send it to
23 me. Okay? Thank you.

24 MR. VLAHOS: Three administrative matters in this
25 case, Your Honor. First, can we get an agreement that the

1 orders -- all the orders, including ruling on the last
2 claims, can be signed out of term, out of session and out of
3 county, if that's okay with defense counsel?

4 MR. UNTI: No objection to that.

5 THE COURT: Thank you, sir.

6 MR. VLAHOS: And, then, Your Honor, I've got --
7 just to clarify, is the Court going to draft the competency
8 order and I draft the second order or should I draft the
9 whole thing?

10 THE COURT: You're really going to ask me that?

11 MR. VLAHOS: I can do it any way Your Honor wants
12 me to. Mr. Unti and I can hammer out the details, or Ms.
13 Lumsden and I.

14 THE COURT: Madam Reporter, could you email just
15 the competency order portion to Mr. Unti and Ms. Lumsden,
16 Mr. Babb and Mr. Vlahos, as well as the dictation that I did
17 for the motion denying Mr. Allen's motion for substitute
18 counsel, please. Just email that to all four in a rough
19 draft form and they can use it as sort of a jumping off
20 point. Okay? I'm going to let you do both of them.

21 MR. VLAHOS: Thank you, Your Honor.

22 THE COURT: Thank you for your help. I appreciate
23 it.

24 MR. VLAHOS: The last matter administrative, I'm
25 going to slide this over to defense counsel. It's a

1 proposed order to produce a transcript of these proceedings
2 today. I didn't put a deadline on it because as long as I
3 get that little part about the orders, I won't need it very
4 fast -- the whole transcript, just the little pieces.

5 Mr. Babb reminded me about one last thing. The
6 AOC form that has to be signed, the competency part of it,
7 make sure we dot our i's and cross our t's. That's the only
8 thing.

9 MR. UNTI: No objection.

10 THE COURT: We need to get it signed today because
11 -- and you guys will need to remind me. Probably -- I'll
12 put it in the file but I will probably, from here on out,
13 I'll probably have to get permission to execute orders if we
14 don't get it done by December 31st. I hope we can but if we
15 can't, we can't. I'm not going to be -- I'm not going to
16 have the authority of senior resident.

17 MR. UNTI: No objection to this order.

18 THE COURT: Thank you, sir. Madam Clerk, I know
19 you haven't had a chance to find that. But could you have
20 somebody -- I know you're going to be busy in here. Could
21 you have somebody from your office look through that and see
22 if we can find it? I just don't want to take up your lunch.
23 But if somebody could find it, I'll have it signed before we
24 leave here today, guys. Okay?

25 Thank you, guys. Mr. Allen, thank you for your

1 patience. Thank you for your motions. Madam Clerk, could
2 you put this back in here and mark this a Court's Exhibit 1
3 and put that under seal in the file for me, please?

4 Sheriff, would you adjourn court for us until 2:00
5 please?

6 (Proceedings were concluded at 12:29 p.m.)

7

8 (END OF TRANSCRIPT)

9

CERTIFICATION OF TRANSCRIPT

I, Kimberly A. Stephenson, CVR, the officer before whom the foregoing proceeding was taken, do hereby certify that said transcript is a true, correct, and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This the 1st day of April, 2019.



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