SLIP OPINIONS FOR THE SECOND CIRCUIT COURT OF APPEALS

SECTION B

BASE PERIOD, Date of Award to September 30, 2008

CLIN	Description	Est. Quantity	Unit	Unit Price	Total price
0001	Opinion pages	7,000,000	Page		
0002	Mailing service fee	350,000	Opinions		
0003	Postage	TBD		TBD	Reimbursable at actual cost
0004	Overnight mail	TBD		TBD	Reimbursable at actual cost
0005	Surcharge Fee for 24 hour turnaround	2	Page		
0006	Additional Opinion copies	2,000	Page		

OPTION 1, October 1, 2008 to September 30, 2009

CLIN	Description	Estimated Quantity	Unit	Unit Price	Total price
1001	Opinion pages	7,242,000	Page		
1002	Mailing service fee	369,750	Opinions		
1003	Postage	TBD		TBD	Reimbursable at actual cost
1004	Overnight mail	TBD		TBD	Reimbursable at actual cost
1005	Surcharge Fee for 24 hour turnaround	2	Page		
1006	Additional Opinion copies	2,000	Page		

OPTION 2, October 1, 2009 to September 30, 2010

CLIN	Description	Estimated Quantity	Unit	Unit Price	Total price
2001	Opinion pages	7,975,000	Page		
2002	Mailing service fee	404,250	Opinions		
2003	Postage	TBD		TBD	Reimbursable at actual cost
2004	Overnight mail	TBD		TBD	Reimbursable at actual cost
2005	Surcharge Fee for 24 hour turnaround	2	Page		
2006	Additional Opinion copies	2,000	Page		

OPTION 3, October 1, 2010 to September 30, 2011

CLIN	Description	Estimated Quantity	Unit	Unit Price	Total price
3001	Opinion pages	8,700,000	Page		
3002	Mailing service fee	435,000	Opinions		
3003	Postage	TBD		TBD	Reimbursable at actual cost
3004	Overnight mail	TBD		TBD	Reimbursable at actual cost
3005	Surcharge Fee for 24 hour turnaround	2	Page		
3006	Additional Opinion copies	2,000	Page		

OPTION 4, October 1, 2011 to September 30, 2012

CLIN	Description	Estimated Quantity	Unit	Unit Price	Total price
4001	Opinion pages	9,300,000	Page		
4002	Mailing service fee	465,000	Opinions		
4003	Postage	TBD		TBD	Reimbursable at actual cost
4004	Overnight mail	TBD		TBD	Reimbursable at actual cost
4005	Surcharge Fee for 24 hour turnaround	2	Page		
4006	Additional Opinion copies	2,000	Page		

SECTION B – PRICING/SCHEDULE

B.1 DESCRIPTION OF CONTRACT LINE ITEM NUMBERS (CLINs)

This section provides a description of each Contract Line Item Number (CLIN).

B.1.1 CLIN X001: PRINTING AND DELIVERY OF OPINION COPY BOOKLET TO THE COURT

The price given under CLIN X001 is a "per page" price and includes all costs associated with producing each page of the slip opinion, including but not limited to receipt of electronic transmissions, formatting, proofreading, printing, conversion of occasional hard copy opinions to electronic format, delivery of electronic version of opinions to the court, and delivering to the court the original printed opinions and any required copies. (See Attachment J-2 for estimated quantities and Attachment J-3 for transmission requirements)

B.1.2 CLIN X002: MAILING SERVICE FEE (See Section C, Paragraph C.9.2)

CLIN X002 includes mailing envelope, mailing envelope preparation and mailing list maintenance.

The contractor shall mail (via first class mail or overnight delivery) or deliver to the clerk's office the number of copies of opinions, by no later than the number of working days from the contractor's first receipt of the opinion text in electronic form (or, if not received electronically but received in paper form only, by the specified number of working days of the contractor's first receipt), as specified in Attachment J-5. Saturdays, Sundays, and official federal holidays are not considered working days. The contractor shall advise the clerk's office, immediately after the award of the contract, of any days the contractor will be closed other than Saturdays, Sundays and official federal holidays.

B.1.3 CLIN X003: POSTAGE

The actual U.S. Postal Service charges for mailing slip opinions will be reimbursed or paid by the Government.

B.1.4 CLIN X004: OVERNIGHT MAIL

The actual overnight mail charges for mailing slip opinions will be reimbursed or paid by the Government.

B.1.5 CLIN X005: SURCHARGE FEE FOR 24 HOUR TURNAROUND

CLIN X005 is a surcharge, added per page, for any opinion that the court requests be produced within 24 hours of delivery from the court to the contractor. This surcharge is in addition to CLIN X001.

B.1.6 CLIN X006: ADDITIONAL OPINION COPIES

CLIN X006 is the per page price for printing additional slip opinions. Price includes setup for another production run of slip opinion copies. The contractor shall not charge under CLIN X006 for additional copies ordered if the production run is consecutive and no setup is required.

SECTION C - DESCRIPTION/SPECIFICATIONS/WORK STATEMENT

C.1 BACKGROUND AND INTRODUCTION

Slip opinions are the initial printed format for judicial opinions. The opinions resulting from legal cases may be first issued as "slip opinions" or pamphlets that a court issues along with any dissenting and concurring opinions.

The United States Court of Appeals issues their opinions in electronic and written form. Circuit judges; federal district, magistrate, and bankruptcy judges within the circuits; other courts and court units; the practicing bar; and the general public may require copies of the courts' decisions. To meet this need, the court has copies of their opinions printed and mailed to their subscribers.

Because of the great demand among judges and the participating bar to review the court's opinions in slip opinion form promptly upon issuance, the court has traditionally contracted with a printer to process the volume of opinions required in a timely fashion. The court places a high priority on the accuracy of their opinions and demand that the appearance of the finished opinion be of superior industry quality.

The court may require that electronic versions of their slip opinions be transmitted to the clerk electronically when the printed version is mailed. The electronic versions are made available to persons and organizations that have access to the court's internet or intranet sites and are relied upon by them in place of the printed version. The court may also use the electronic versions provided by the printer to archive their opinions in electronic format.

This Statement of Work provides general information pertaining to this solicitation. Specific circuit requirements will be referenced in Section J.

C.2 SCOPE OF THE CONTRACT

Services required by this solicitation include, but are not limited to, proofreading and correcting text provided by the court, formatting the opinion, printing the required number of slip opinion copies, transmitting data electronically, and mailing, or delivering by other methods, printed opinions to the court and subscribers.

Contractors shall print slip opinions using a computer-assisted photo typesetting and photo-offset, laser offset, or a comparable process, in accordance with the specifications in this Section. The contractor shall meet the opinion requirements stated in J-2 in addition to this Statement of Work. Photocopying is NOT an acceptable method for reproduction.

C.3 OPINION FORMAT

C.3.1 Opinions shall be formatted as required in Attachment J-2 (the Excel spreadsheet), items 5 through 29.

C.3.2 Text shall be printed double sided (e.g. on front and back of each page).

C.3.3 The heading on printed opinions shall read "United States Court of Appeals, _____Circuit" or "United States Court of Appeals for the _____ Circuit," depending upon the preference of each individual court, on the cover page of each opinion as shown on the headings in the sample opinions, Attachment J-4.

C.3.4 The grade of paper opinions are printed upon shall be at least No. 1 Offset, Substance 50, equal to JCP A61; weight equal to 20/50 pounds offset or better; and color as shown in Attachment J-2, item 23 and in the sample opinions contained in Attachment J-4.

C.3.5 Each opinion shall be collated, folded and stapled, as shown in the sample opinions, Attachment J-4.

C.3.6 No editorial summary, comments, logo or other notation shall be included by the contractor in the printed opinion, unless otherwise specified in Attachment J-2, item 1.

C.3.7 Italic and boldface type, type features, and standard symbols shall be employed where specified in the opinions provided by the court.

C.3.8 If there is more than one opinion in a case, the succeeding opinion shall commence where specified in Attachment J-2, item 26.

C.3.9 Listing of counsel may be required as specified in Attachment J-2, item 28.

C.3.10 If a court of appeals requires the listing of counsel, the separation of that listing and the opinion text shall be as specified in Attachment J-2, item 29.

C.3.11 The format for printed opinions shall conform to the sample opinion at Attachment J-4 of this contract. All font styles, type size, centering, spacing, footnote style, and headings shall conform, as closely as possible, to the sample opinion provided.

C.3.12 The opinion and copies shall be of consistent quality, with standard font type that is readable, of the size and scale as specified (Attachment J-2). Defects including but not limited to, smears, smudges, incomplete type, blurred lines, unnecessary characters, crimped pages, or uneven edges, are unacceptable and may be cause for rejection and reprint in accordance with C.10.7.

C.3.13 The court may require that the last page of every opinion shall be left blank (see Attachment J-2, item 27).

C.3.14 The court may require that opinions shall have continuity of numerical pagination from page

to page and from opinion to opinion and shall be printed in **chronological sequence** (see Attachment J-2, item 22).

C.4 PROOFREADING

C.4.1 The contractor shall ensure the uniformity of format and identify any discontinuities in the opinions provided by the court (see Attachment J-2, item 30). The contractor shall perform other proofreading responsibilities as specified below.

C.4.1.a The court may require that a skilled proofreader or an attorney with experience reviewing federal appellate opinions proofread all opinions prior to printing (see Attachment J-2, items 40, 41 and 42). The contractor shall promptly advise the designated point of contact at the court of any questions that arise in the course of such proofreading and the court contact will resolve the issue. Upon prompt notification from the court, the court may suspend the delivery schedule until the contractor receives a resolution from the court. (See Attachment J-2, Item 4)

C.4.1.b The court may require the contractor to identify discontinuities that arise in electronic transmission (see Attachment J-2, item 31). The contractor shall promptly advise the designated court contact of any discontinuities that are identified and the court contact will provide resolution. (see Attachment J-2, item 40).

C.4.1.c The court may require the contractor to identify spelling and typing errors and any errors made by the court in grammar, usage, or sentence structure (see Attachment J-2, item 32). The contractor shall promptly advise the designated court contact of any errors that are found and the court contact will provide resolution (see Attachment J-2, item 40).

C.4.1.d The court may require the contractor to identify any errors made by the court in citations or other legal terminology or usage, and shall confirm the accuracy of citations (see Attachment J-2, items 33 and 34). The contractor shall promptly advise the designated court contact of any errors that are found and the court contact will provide resolution (see Attachment J-2, item 40).

C.4.1.e Reserved

C.4.1.f The court may require the contractor to confirm the accuracy of any cross-references to another part of the same opinion or to a majority, concurring, or dissenting opinion (see Attachment J-2, item 36).

C.4.1.g The court may require the contractor to confirm that footnotes are numbered consecutively within each opinion, with footnotes in a separate concurrence or dissent beginning again at one (see Attachment J-2, item 37).

C.4.1.h The court may require the contractor to identify any instances in which words, sentences, or paragraphs appear to be missing; where the meaning is obviously contradictory (for example, where a "not" has been left out of a sentence); where a party is obviously misidentified; or where the way in which the court refers to a party is inconsistent throughout the course of the opinion (see Attachment J-2, items 30, 31, 37, 38, 39 and 40). The contractor shall promptly advise the designated court contact of the problems or inconsistencies, and the court contact will provide resolution.

C.4.1.i The court may require the contractor to proofread the copy produced by the contractor's process against a version of the original document sent by the court, except as specified in C.6.1 (see Attachment J-2, item 38).

C.4.2 The contractor is not responsible for the price of reprinting an opinion when the Government is at fault. The court will require the contractor to reprint opinions based on substantial omissions of text, either from faulty transmissions from court or errors contained in the authoring judge's opinion. The need for reprinting shall be determined by the clerk.

C.4.3 The contractor shall provide galley proofs to the court for review by a judge prior to final printing as specified in Attachment J-2, item 43.

C.5 ELECTRONIC TRANSMISSION OF OPINIONS TO THE CONTRACTOR

C.5.1 Opinion copy will usually be electronically transmitted from the clerk's office to the contractor using standard electronic communications software selected by the court. The clerk's office will maintain its own equipment for transmission of opinions in electronic format. Electronic transmission requirements are specified in Attachment J-3. The contractor shall be responsible for installing and maintaining its own compatible equipment (at the contractor's facility) necessary to complete transmission between the clerk's office and the contractor.

The contractor shall also maintain at its site, Group 3 Compatible facsimile equipment for receipt of opinions on those occasions when the court directs rush transmittal of an opinion in a form other than by standard electronic means.

C.5.2 The Government reserves the right to change the software version or versions required during the term of the contract to reflect new software releases. The court will give the contractor a minimum of 30 days written notice of any update or modification of word processing software or other interface requirements described in Attachment J-3.

C.5.3 The court may electronically transmit or otherwise provide opinions to the contractor at any time during the work day.

C.6 CONVERSION OF OCCASIONAL HARD COPY OPINIONS TO ELECTRONIC FORMAT (See Attachment J-2, Item 3)

C.6.1 On limited occasions (very infrequently) if ever, when electronic transmission is not possible from the court, the contractor shall be required to convert opinions supplied by the court in typewritten

format into electronic format. Opinions may be faxed to the contractor or sent by overnight mail at the discretion of the court. The contractor shall verify the copy produced by the contractor's process against the typewritten version sent by the court for accuracy. This requirement will not be separately priced. The price for this situation shall be included in the price (CLIN X001).

C.6.2 Opinions furnished in typewritten format shall proceed through the same composition, typesetting, and proofreading process as opinions furnished electronically.

C.7 DELIVERY OF ELECTRONIC VERSION OF OPINIONS TO CLERK'S OFFICE (Note: not required in all circuits - see Attachment J-2, items 46 - 48)

C.7.1 As soon as it is available (but in no event later than the date of delivery of printed opinions to the court as specified in Section C.8.1), the contractor shall provide the electronic version of each printed opinion to the court consistent with the requirements set forth in Attachment J-2, item 48. Editorial summaries may be required to be provided to the court in any electronic version of the opinion furnished to the court, as specified in Attachment J-19, Editorial Summaries. (See Attachment J-2, Item 2 for delivery requirements)

C.7.2 The electronic version(s) of the slip opinion shall be formatted, edited, and paginated to match the printed slip opinion as closely as possible. The typeface need not be the same as that appearing on the printed slip opinion, but the text shall appear at the same place on the same page of the electronic version(s) as it does on the printed version of the slip opinion prepared by the contractor. The type line, including footnotes, shall not exceed 80 characters in order to permit the conversion of the typeset slip opinion into the electronic formats. (This requirement applies only to specific circuits, see Section J-12).

C.7.3 Where applicable (see Attachment J-2, Item 46), the contractor shall confirm the court's receipt of each electronically transmitted version of the slip opinions to the court with the clerk's office via email or written communications.

C.8 DELIVERY OF PRINTED OPINIONS TO THE CLERK'S OFFICE

C.8.1 The contractor shall mail (via first class mail or overnight delivery) and/or deliver to the clerks' offices, the number of copies of opinions specified in the delivery order, in accordance with the delivery schedule given in Section F.3.

C.8.2 The court, at its option, may require the contractor to re-date and reprint for the next working day, <u>at no additional charge to the Government</u>, opinions received late.

C.8.3 GALLEYS/PROOFS – For circuit specific requirements, refer to Section J-2, item 43.

C.8.4 ADDITIONAL COPIES OF OPINIONS - On occasion, the court shall require copies in excess of the amount originally ordered. In such case, the court will issue another delivery order specifying the number of additional copies required, as well as the delivery location(s). The contractor may only charge for additional copies as described in Section B.1.6.

C.9 DELIVERY OF PRINTED OPINIONS TO SUBSCRIBERS

C.9.1 DELIVERIES BY MAIL

C.9.1.1 For the circuits to which it applies, the contractor shall collate and mail opinions to the addressees on the DAILY LIST on a daily basis. Mailings shall be made on the same day copies of an opinion are sent (via overnight mail) or delivered to the clerk's office (see C.8.1 above). The contractor shall pack all of the opinions for one addressee into the same envelope, if feasible, using additional envelopes only as necessary. Each envelope shall contain a daily inventory of enclosed opinions. Attachment J-6 contains estimates of the number of addressees on the DAILY LIST for the applicable circuits.

C.9.1.2 The contractor shall collate and mail on a weekly basis a copy of each opinion completed in the course of the week to every address on a list of names to be supplied by the court. This list shall be known as the WEEKLY LIST and shall not contain any more than the number of addressees shown in Attachment J-7.

Mailings shall be made on the same day each week as agreed to by the contractor and the court. The contractor shall pack all of the opinions for one subscriber into the same envelope, if feasible, using additional envelopes only as necessary. Each envelope shall contain a weekly inventory of enclosed opinions.

C.9.1.3 The contractor shall mail on a weekly basis a copy of each opinion completed in the course of the week in civil appeals (non-criminal and non-prisoner appeals) to every address appearing on a list of names to be supplied by the clerk. This list shall be known as the WEEKLY BANKRUPTCY LIST and shall not contain more than the number of addressees shown in Attachment J-17.

Mailings shall be made on the same day each week (as agreed to by the contractor and the court). The contractor shall pack all of the opinions for one subscriber into the same envelope, if feasible, using additional envelopes only as necessary.

C.9.2 GENERAL REQUIREMENTS FOR MAILING OF OPINIONS

C.9.2.1 From address lists of daily, weekly, and in the circuits noted in Attachments J-6 and J-7 and/or weekly bankruptcy subscribers that the court will provide to the contractor immediately following contract award, the contractor shall establish and maintain the mailing/subscription lists. The contractor shall update the mailing/subscription lists as notified by the court. The contractor shall inform the court of opinions returned for incorrect address to permit the court to update or correct the information.

C.9.2.2 The contractor shall address the envelopes and shall apply metered postage at first-class mail or priority mail rates to each package containing opinions which are mailed to the daily, weekly, and weekly bankruptcy lists. Each package shall be endorsed as being either "First-Class Mail" or "Priority Mail."

C.9.2.3 The United States Postal Service requires non-Government Printing Office (GPO) contractors to affix actual postage on mail pieces that are printed and mailed on behalf of Federal Agencies. It shall be the responsibility of the contractor to ascertain and comply with current United States Postal

Service regulations regarding contractor mailing of papers, documents, opinions, and packages required by this contract.

C.9.2.4 The return address on each package mailed shall be that of the contractor. The contractor shall print the words "Official Business" below the contractor's return address.

C.10 PERFORMANCE

C.10.1 The court reserves the right to make opinions available in any form they choose to any person or concern they desire. As noted in Attachment J-19, Editorial Summaries, specific circuits will not disseminate the electronic version with a summary prepared by the contractor to the general public. However, the court reserves the right to make the electronic version, with the editorial summary, available on the judiciary's Intranet and accessible to judiciary employees.

C.10.2 Although each delivery order for printing shall be either electronic or in writing, the designated deputy clerks may contact the contractor orally to place an order, which shall be confirmed thereafter, in writing, as soon as practicable.

C.10.3 Pursuant to Regulation 13, Government Printing & Binding Regulations, no Government publication or other Government printed matter, prepared or produced with either appropriated or non-appropriated funds or identified with an activity of the Government, shall contain any advertisement inserted by or for any private individual, firm, or corporation; or contain material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service.

C.10.4 Pursuant to Regulation 40, Government Printing & Binding Regulations, all documents and publications printed at Government expense shall have printed thereon the identification as to the branch, bureau, department, or Office of the Government responsible for publishing the same (e.g., Administrative Office of the U.S. Courts), and the date of issuance. The Contractor shall ensure this regulation is met.

C.10.5 The contractor shall treat each opinion delivered to it by the Government, whether electronically or in writing, as confidential. The contractor shall use the material contained therein solely to develop the printed slip opinion, unless the contractor is instructed, or authorized, in writing by the court contact to provide the material in electronic or printed form to another party.

Slip opinions shall not be used by a contractor for any purpose without the express written permission of the affected United States Court of Appeals.

C.10.6 Prior to the public release of each opinion by the court, the contractor shall <u>not</u> allow access by anyone other than its employees, to any draft opinion, galley/proof or printed opinion, nor shall the contractor allow anyone to access its computer database or other electronic representation of the text of the opinion. Employees who have access to data under this contract prior to its release shall <u>not</u> have any other law related employment or practice during the performance of this contract.

C.10.7 If copies of an opinion delivered to the clerk's office, in the sole judgment of the clerk or the clerk's identified designee, are of unacceptable quality or appearance, the court contact may, within 24

hours of receipt of the clerk's office copies, reject the opinion and require the contractor to re-date and perform a full reprinting of the opinion at the contractor's expense. The court generally does not reprint slip opinions for typographical, spelling or minor grammatical errors.

C.11 Clauses in the rest of this contract referring to "Contracting Officer's Technical Representative" shall be read as "Court Contact Person".

SECTION D - PACKAGING AND MARKING

D.1 CLAUSES INCORPORATED BY REFERENCE (see Section I.1)

CLAUSE NUMBER	CLAUSE TITLE	DATE
2-45	**Packaging and Marking**	**AUG 2004**

[End of Section D]

SECTION E - INSPECTION AND ACCEPTANCE

E.1 CLAUSES INCORPORATED BY REFERENCE (see Section I.1)

CLAUSE NUMBER	CLAUSE TITLE	DATE
2-5A	Inspection of Products	JAN 2003
2-5B	Inspection of Services	AUG 2004
2-10	Responsibility of Products	JAN 2003

As applicable per J-2.43, Galley Proof:

E.2 ACCEPTANCE/REJECTION OF DELIVERABLES (SEE C.4.3 GALLEY PROOFS)

The Contractor shall submit all deliverables in to the court. The court will review the deliverables for accuracy, quality, quantity and completeness. The court will provide to the Contractor written comments on draft deliverables. If the court's comments are extensive, the court may request that a second draft be submitted for review.

Upon receipt of the court's comments, the Contractor shall have the same amount of time specified in Attachment J-5 for delivery, to make any corrections, incorporate comments, if required, and deliver the final deliverable to the AOUSC.

Determination of the acceptability of each final deliverable will be made by the court. The court will review and verify that all corrections have been made and comments, if any, have been incorporated into the final deliverables. If rejected, written notice of the reason for rejection will be clearly stated.

[End Section E]

SECTION F - DELIVERIES OR PERFORMANCE

F.1 Clauses Incorporated by Reference (see Section I.1)

CLAUSE NUMBER	CLAUSE TITLE	DATE
2-25A	Delivery Terms and Contractors Responsibilities	JAN 2003
2-30A	Time of Delivery	JAN 2003
2-60	Stop Work Order	JAN 2003
7-200	Judiciary Delay of Work	JAN 2003

F.2 DELIVERABLES

F.2.1 The Contractor shall provide the deliverables required by the Statement of Work. Deliverables shall be submitted in the format described in Section C3, Opinion format.

F.2.2 Format and Place of Delivery: All deliverables shall be provided in hard copy and electronic format. All deliverables shall be submitted to the court contact person identified in Section G.

F.3 REQUIRED TIME OF DELIVERY

Deliverables shall be submitted in accordance with Attachments: J-5, Delivery Of Printed Opinions To The Clerk's Office; J-6, Daily List – Opinions To Be Collated And Mailed To Addressees On The Daily Lists By Circuit; J-7, Weekly List – Opinions To Be Collated And Mailed To Addressees On The Weekly L ist; J-15, Deliveries By Mail; and J-17, Weekly Bankruptcy List.

F.4 PERIOD OF PERFORMANCE

The period of performance for this contract shall be from date of award through September 30, 2008, with four (4) one-year option periods to be exercised at the Government's discretion in accordance with Clause I.4, Option to Extend the Term of the Contract.

F.5 WAIVER OF DELIVERY SCHEDULE

None of the following conditions shall be regarded as an extension, waiver, or abandonment of the delivery schedule or a waiver of the Government's right to terminate the Contractor for default:

(i) Delay by the Government in terminating for default; or
(ii) Acceptance of delinquent deliveries; or
(iii) Acceptance or approval of deliverables submitted either after default in delivery or in insufficient time for the Contractor to meet the delivery schedule.

Any assistance rendered to the Contractor on this contract, or acceptance by the Government of delinquent goods or services hereunder, will be solely for the purpose of mitigating damages.

Further, such assistance, if rendered, shall not be considered as intention on the part of the Government to condone any delinquency.

[End Section F]

SECTION G - CONTRACT ADMINISTRATION DATA

G.1 CLAUSES INCORPORATED BY REFERENCE (see Section I.1)

CLAUSE NUMBER	CLAUSE TITLE	DATE
7-1	Contract Administration	JAN 2003
7-5	Contracting Officer's Representative	JAN 2003
7-125	Invoices	JAN 2003

G.2 JP3 7-10 CONTRACTOR REPRESENTATIVE (JAN 2003)

(a) The Contractor's representative to be contacted for all contract administration matters is as follows (Contractor completes the information):

Name:
Address:
Telephone:
Email:
Fax:

(b) The Contractor's representative shall act as the central point of contact with the judiciary, shall be responsible for all contract administration issues relative to this contract, and shall have full authority to act for and legally bind the Contractor on all such issues.

G.3 AUDITS

The Contractor shall cooperate fully in periodic, program, and financial audits of this contract that may be conducted by the AOUSC or Contractors acting on behalf of the AOUSC. This assistance shall include providing information and access to all relevant files and records concerning the collection, invoicing and marketing of application and program information materials and corresponding fees, as well as information and access to all files related to the development and administration of the program.

[End Section G]

SECTION H - SPECIAL CONTRACT REQUIREMENTS

H.1 CLAUSES INCORPORATED BY REFERENCE (see Section I.1)

CLAUSE NUMBER	CLAUSE TITLE	DATE
1-1	**Employment by the Government**	**JAN 2003**
3-75	**Limited Criminal Background Suitability Check**	**JAN 2003**

H.2 RIGHTS IN DATA -- SPECIAL WORKS (AOUSC FEB 2008)

(a) *Definitions*. As used in this clause—

"Data" means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

"Unlimited rights" means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) Allocation of Rights.

(1) The Government shall have—

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause.

(ii) The right to limit assertion of copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in that data, in accordance with paragraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause.

(2) The Contractor shall have, to the extent permission is granted in accordance with paragraph (c)(1) of this clause, the right to assert claim to copyright subsisting in data first produced in the performance of this contract.

(c) Copyright—

(1) Data first produced in the performance of this contract.

(i) The Contractor shall not assert or authorize others to assert any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When copyright is asserted, the Contractor shall affix the appropriate copyright notice of 17 *U.S.C. 401 or 402* and acknowledgment of Government sponsorship (including contract number) to the data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all delivered data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the Contracting Officer

shall direct the Contractor to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use, release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity.* The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and obtains the Contractor's consent to the settlement of any claim or suit other than as required by final decree of a court of competent jurisdiction; and these provisions do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

SECTION I - CONTRACT CLAUSES

I.1 JP3 B-5 CLAUSES INCORPORATED BY REFERENCE (AUG 2004)

This procurement incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the contracting officer will make their full text available. Also, the full text of a clause may be accessed electronically at this address: http://www.uscourts.gov/procurement/clauses.htm

CLAUSE NUMBER	CLAUSE TITLE	DATE
B-20	Computer Generated Forms	JAN 2003
1-5	Conflict of Interest	AUG 2004
1-10	Gratuities	JAN 2003
1-15	Disclosure of Contracting Information to Public	AUG 2004
2-20C	Warranty of Services	JAN 2003
2-50	Continuity of Services	JAN 2003
2-55	Privacy or Security Safeguards	JAN 2003
2-95	Material Requirements	JAN 2003
3-25	Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	JAN 2003
3-35	Covenant Against Contingent Fees	JAN 2003
3-40	Restrictions on Subcontractor Sales to the Government	JAN 2003
3-45	Anti-Kickback Procedures	JAN 2003
3-50	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 2003
3-55	Price or Fee Adjustment for Illegal or Improper Activity	JAN 2003
3-65	Limitation on Payments to Influence Certain Federal Transactions	JAN 2003
3-105	Audit and Records - Negotiation	JAN 2003
3-120	Order of Precedence	JAN 2003

3-205	Protest After Award	JAN 2003
4-105	Integrity of Unit Prices	JAN 2003
6-30	Insurance	JAN 2003
6-40	Federal, State, and Local Taxes	JAN 2003
7-15	Observance of Regulations/Standards of Conduct	JAN 2003
7-20	Security Requirements	JAN 2003
7-25	Indemnification (Judiciary Property)	AUG 2004
7-30	Public Use of the Name Federal Judiciary	JAN 2003
7-35	Disclosure or Use of Information	AUG 2004
7-40	Judiciary-Contractor Relationships	JAN 2003
7-75	Subcontracts	JAN 2003
7-80	Competition in Subcontracting	JAN 2003
7-85	Examination of Records	JAN 2003
7-100A	Limitation of Liability (Products)	JAN 2003
7-100B	Limitation of Liability (Services)	JAN 2003
7-110	Bankruptcy	JAN 2003
7-130	Interest (Prompt Payment)	JAN 2003
7-135	Payments	JAN 2003
7-140	Discounts for Prompt Payment	JAN 2003
7-150	Extras	JAN 2003
7-175	Assignment of Claims	JAN 2003
7-185	Changes	JAN 2003
7-195	Excusable Delays	JAN 2003
7-210	Payment for Emergency Closures	AUG 2004
7-215	Notification of Ownership Changes	JAN 2003
7-220	Termination for Convenience of the Judiciary (Fixed-Price)	JAN 2003
7-230	Default (Fixed-Price Products and Services)	JAN 2003
7-235	Disputes	JAN 2003

I.3 JP3 2-90C OPTION TO EXTEND SERVICES (JAN 2003)

The judiciary may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The contracting officer may exercise the option by written notice to the Contractor within 30 calendar days prior to the then current expiration date of this contract.

I.4 JP3 2-90D OPTION TO EXTEND THE TERM OF THE CONTRACT (JAN 2003)

(a) The judiciary may extend the term of this contract by written notice to the Contractor within 30 calendar days prior to the then current expiration date of this contract; provided that the judiciary gives the Contractor a preliminary written notice of its intent to extend at least 60 calendar days before the contract expires. The preliminary notice does not commit the judiciary to an extension.

(b) If the judiciary exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 5 years.

[End Section I]

SECTION J - LIST OF ATTACHMENTS

SECTION J

J-1	**Estimates Of Opinions, Pages, And Copies Of Opinions**
J-2	**Appellate SLIP Opinion Printing Requirements**
J-3	**Electronic Transmission Requirements**
J-4	**Sample SLIP Opinion**
J-5	**Delivery of Printed Opinions To The Clerks' Offices**
J-6	**Daily List - Opinions to be collated and mailed to addressees on the Daily Lists by Circuit**
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J-8	**Past Performance Questionnaire**
J-9	**Manuscript Versions of SLIP Opinions**
J-10	**RESERVED**
J-11	**DOES NOT APPLY**
J-12	**RESERVED**
J-13	**RESERVED**
J-14	**RESERVED**
J-15	**RESERVED**
J-16	**RESERVED**
J-17	**DOES NOT APPLY**
J-18	**DOES NOT APPLY**
J-19	**DOES NOT APPLY**

ATTACHMENT J-1
SECOND CIRCUIT COURT OF APPEALS

ESTIMATES
OF
OPINIONS, PAGES, AND COPIES OF OPINIONS

The information in this attachment is each court's best estimate of slip opinion requirements through fiscal year 2012. The number of original pages is the estimated quantity shown in the Section B Schedules for CLIN 1001. The number of copies is the total number of copies of each opinion (see Sections C.8.1, C.9.1.1, C.9.1.2, and C.9.1.3) required for the court and for subscribers. **The following explanation/interpretation is provided merely to illustrate how to work with these numbers:**

In FY 2008 the United States Court of Appeals for the Second Circuit estimates it will issue a total of approximately 700 original slip opinions amounting to approximately 14,000 original pages of opinion text. This means that the average length of each opinion is 20 pages (14,000 pages/700 opinions). To satisfy the needs of the Court and its subscribers, the printing contractor must print and distribute 500 copies of each opinion which means the printer must print approximately 10,000 pages for each opinion (500 copies x 20 pages). Annually, then, the printer will produce approximately 7,000,000 pages (10,000 pages x 700 opinions) in satisfying the 2nd Circuit's FY/08 requirements.

The following tables show the estimated printing requirements of the Second Circuit Court of Appeals:

2nd CIRCUIT

	FY/08	FY/09	FY/10	FY11	FY12
Original Opinions	700	725	735	750	775
Original Pages	14,000	14,200	14,500	15,000	15,500
Average No. of Pages per Opinion	20	20	20	20	20
Copies	500	510	550	580	600
Printed Pages per Published Opinion	10,000	10,200	11,000	11600	12000
Total Print Pages Produced	7,000,000	7,242,000	7,975,000	8,700,000	9,300,000

ATTACHMENT J-2 - APPELLATE SLIP OPINION PRINTING REQUIREMENTS

	CONTRACT DATA	Second
No.	REQUIREMENTS	Second
	Basic Specifications	
1	Editorial Summary	No
2	Turnaround Days - Elec. Copy	2
3	Additional Days for Hard Copy	0
4	Additional Days if Questions	0
5	Columns per Page	1
6	Resolution	600dpi
7	Font (Straight Matter)	Times Roman
8	Font (Footnotes)	Times Roman
9	Font (Case # and Header)	Times Roman
10	Leading (Tabular Text)	Not Specified
11	Leading (Tabular Header)	Not Specified
12	Leading (Straight Matter)	14 pt.
13	Leading (Titles/Captions/ Hdrs)	Not Specified
14	Leading (Footnotes)	11 pt.
15	Type (Tabular Text)	12 pt.
16	Type (Tabular Headings)	12 pt.
17	Type (Straight Matter)	12 pt.
18	Type (Titles/Capts./Hdrs.)	12 pt.
19	Type (Footnotes)	9 pt.
20	Type (Errata)	8 pt.
21	Page Numbers	Bottom Center
22	Continuity of Numerical Pagination	No
23	Paper Grade, Color, & Weight	Equal to JCP A61- White - Weight 20/50 lbs. Offset or Better
24	Page Size-Trim	6 1/8 x 9
25	Page Size- Print	4.5 x 7.25
26	More than 1 Opinion	Minimum of 2 Lines
27	Blank Last Page	Not Specified
28	Counsel Listing Required	Yes
29	Space between Text and Counsel Names	2 Lines

ATTACHMENT J-2 - APPELLATE SLIP OPINION PRINTING REQUIREMENTS

No.	REQUIREMENTS	Second
	Proofreading Required	
30	-Format	Yes
31	-Missing Contents	Yes
32	-Typos	Yes
33	-Legal Usage	Yes
34	-Check Citations	Yes
35	-Check +/or Provide Parallel Citations	No
36	-Check Cross References	Yes
37	-Footnote Numbering	Yes
38	-Proofread to Court Copy	No
39	-Misidentified Party	Yes
40	-Notify Court First	Yes
41	-Skilled Proofreader Required	Yes
42	-Attorney Required	Yes
43	-Galley Proof	No
	Printing Medium	
44	-Typesetting	Yes
45	-Photo-Offset	Yes
	Electronic Copy	
46	-E-mail	Yes
47	-3 1/2" Diskette	N/A
48	-Format	WP+PDF
	Mailing	
49	-Daily	Yes
50	-Weekly	Yes

ATTACHMENT J-3
SECOND CIRCUIT COURT OF APPEALS

ELECTRONIC TRANSMISSION REQUIREMENTS
for the
SECOND CIRCUIT

The contractor shall have the capability to interface with the court's microcomputer hardware and software configuration as follows:

1. The contractor shall be capable of sending and receiving opinions and corrections to opinions in WordPerfect and PDF using e-mail. In addition, the contractor shall be capable of sending and receiving opinions and corrections to opinions in WordPerfect and PDF via the internet using the File Transfer Protocol (FTP).

2. All formatting and footnotes must be preserved. The court may periodically upgrade to different versions of word processing software, and may elect to change its word processing software. For transmission of the electronic version of opinions to the court (see C.7), opinions shall be in WordPerfect and PDF in single column format, and without the editorial summary.

3. The court may modify any of the foregoing interface requirements including its electronic mail system. The contractor shall be responsible, at its own expense, for altering or replacing its own equipment and software as required by any such changes in the court's automation solution. In the event the court decides to change its word processing standard to something other than WordPerfect, the contractor will be provided with a minimum of 30 days written notice in order to modify its system(s).

ATTACHMENT J-4
Second Circuit Court of Appeals

SAMPLE SLIP OPINION

This attachment consists of sample slip opinion.

(A paper copy of the sample slip opinion will be available upon request. Contact Vernelle Cleveland at Vernelle_Cleveland@ao.uscourts.gov)

ATTACHMENT J-5
SECOND CIRCUIT COURT OF APPEALS

DELIVERY OF PRINTED OPINIONS
TO THE CLERKS' OFFICES

NOTE: In the following, the time is always the local time at the court.

2ND CIRCUIT

If the electronic version of the opinion is delivered to the contractor before 10:00 a.m., the printed opinions are due at the court by 10:30 a.m. on the 2nd work day following the day of delivery.

If the electronic version of the opinion is delivered to the contractor after 10:00 a.m., the printed opinions are due at the court by 10:30 a.m. on the 3rd work day following the day of delivery.

NUMBER OF COPIES:

FY08	FY09	FY10	FY11	FY12
275	280	280	300	300

ATTACHMENT J-6

DAILY LIST - Second Circuit Court of Appeals

Opinions to be collated and mailed to addressees on the Daily Lists by Circuit:

Number of Addressees

Circuit	FY08	FY09	FY10	FY11	FY12
Second	70	70	75	75	80

ATTACHMENT J-7

WEEKLY LIST - SECOND CIRCUIT COURT OF APPEALS

Opinions to be collated and mailed to addressees on the Weekly List:

Circuit	FY08	FY09	FY10	FY11	FY12
Second	155	160	195	205	220

ATTACHMENT J-8 - Second Circuit Court of Appeals
SLIP OPINION PRINTING
PAST PERFORMANCE QUESTIONNAIRE

SLIP OPINION PRINTING PAST PERFORMANCE QUESTIONNAIRE

Your organization has been provided as a reference for past performance in a proposal submitted to the Administrative Office of the United States Courts (AOUSC) in response to a solicitation. Past Performance is an important evaluation criteria for this acquisition. We would greatly appreciate you taking the time to complete this form. The information is to be provided directly to the AOUSC's Contracting Officer, and the identity of individuals who provide information on past contractual performance will not be disclosed to the Offeror. Please provide an honest assessment and return directly to the AOUSC, by mail or fax to the address or number below no later than the date specified by the offering company. If you have any questions, please contact Ms. Vernelle Cleveland on 202-502-1326.

Mail Form to:
Administrative Office of the United States Courts
Vernelle Cleveland, Contracting Officer
OIS-PMD, Suite 3-250
One Columbus Circle, N.E.
Washington, D.C. 20544

Fax Form to:
Administrative Office of the United States Courts
Attn.: Vernelle Cleveland, Contracting Officer
Fax Number: 202-502-1066
Voice Number: 202-502-1326

OFFERING COMPANY'S NAME: _____

CONTRACT NAME/NUMBER: _____

DATE OF CONTRACT AWARD: _____

DATE CONTRACT COMPLETED: _____

NAME OF EVALUATOR: _____

TELEPHONE NUMBER: _____

AGENCY/COMPANY NAME: _____

TYPE OF CONTRACT AND NATURE OF WORK PROVIDED:

Please indicate a rating of the offering company's performance for each of the following performance factors:

1. Quality of the printed products.

   ☐ **Outstanding** ☐ **Above Average** ☐ **Average** ☐ **Poor**

2. Ability to consistently meet deadlines.

   ☐ **Outstanding** ☐ **Above Average** ☐ **Average** ☐ **Poor**

3. Ability to accurately maintain subscriber lists.

   ☐ **Outstanding** ☐ **Above Average** ☐ **Average** ☐ **Poor**

4 Quality of key individuals who worked with you.

   ☐ **Outstanding** ☐ **Above Average** ☐ **Average** ☐ **Poor** ☐ **Not Applicable**

5. How would you rate the offering company's overall performance on this contract?

   ☐ **Outstanding** ☐ **Above Average** ☐ **Average** ☐ **Poor**

6. Would you recommend the offering company for other contracts or task orders? ☐ **Yes** ☐ **No** (Please explain.)

Cite any strengths or weaknesses noted during the period of performance:

*Signature:*_____ *Date:*_____

ATTACHMENT J-9
SECOND CIRCUIT COURT OF APPEALS

TEXT VERSIONS OF SLIP OPINIONS

Attached is a manuscript version of a slip opinion for proposal purposes. See L5.2.2 Part 1(1)

[SAMPLE]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 14, 2007
THOMAS K. KAHN
CLERK

No. 06-14388
Non-Argument Calendar

D. C. Docket No. 05-00303-CV-3-LAC-MD

ROBERT ELLIS LOWERY,

Petitioner-Appellant,

versus

JERRY CUMMINGS,
Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(November 14, 2007)

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

Robert Ellis Lowery, who is currently serving a life sentence for second-degree murder, appeals the district court's denial of his pro se 28 U.S.C. § 2254 petition in which he argued that his trial counsel was ineffective in her failure to: (1) take the necessary steps to establish a Post Traumatic Stress Disorder ("PTSD") defense; (2) call additional witnesses to testify about an eye injury allegedly incurred during his altercation with the victim; (3) request a jury instruction on the justifiable use of non-deadly force; and (4) object to the trial court's inadvertent substitution of two jurors with alternate jurors. Upon thorough review of the record, we affirm.

I. BACKGROUND

A. PTSD

At his trial, Lowery testified to the following: On the evening of John Tillery's death, Lowery, after calling Tillery's house several times looking for his girlfriend, Cheryl Harrelson, and being told she was no longer there, finally went there in search of her. He knocked on the screen door and heard someone tell him to enter. Upon entering, he saw no one in the living room, but heard a voice ask

him what he wanted. Lowery asked whether Tillery[1] had seen his girlfriend. Tillery said no. As Lowery turned to leave, Tillery called him names and told him that Harrelson did not love Lowery anymore. Lowery replied in kind and, as he turned to leave again, heard a noise behind him that sounded as though something was being thrown at him. The next thing he knew, he was "halfway to the floor" with his left arm pinned behind his back and his right hand gripping a hand that was poking at his eye. R1-26, Exh. H, Vol. V at 838-39.

Lowery was repeatedly pulled down on top of what he eventually came to realize was a person. Tillery continued to poke his eye, and Lowery believed Tillery was trying to poke his eye out. Lowery was "just swinging out knocking [loose] the hand" that held him in an attempt to stand up. Id. at 844. At one point, as Lowery was pulled to the floor, his hand landed on something he subsequently discovered to be Tillery's face. Tillery was still gripping his pants when he heard a deep voice telling him that he was not going anywhere. Lowery looked up and saw a face covered in blood. Believing a third person had swung at him and hit Tillery instead, Lowery "figured [he had] better get on out of [t]here" and slapped the face with his hands. Id. at 848. Lowery ended up on the ground again beside Tillery,

[1]Neither party disputes that it was Tillery's voice that Lowery heard.

who was holding his jaw and saying, "um, um." Id. Lowery jumped up and, after ducking because he thought something was about to hit him, he left the house and drove away.

Lowery further testified that: (1) he had the impression that there was a third person involved because of the blood on Tillery's face; (2) after the altercation, he hoped that he had not broken Tillery's jaw as a result of slapping or falling on him; (3) he thought that Tillery was alive when he left; (4) he had no malice or hatred towards Tillery; (5) he did not intend to kill or seriously harm Tillery; and (6) he felt that he was in danger. Lowery testified that, at the time of the altercation, he was between 5'7" and 5'8" tall, between 155 and 165 pounds, and in good physical shape.

Detective Allen Cotton, the sheriff's office investigating officer, testified to the following: He and another officer later found Lowery outside of his neighbor's house, and Lowery agreed to come down to the police station with them to discuss the incident. During the interview, Lowery's demeanor and mood were erratic. Cotton's account of Lowery's account of the fight between him and Tillery paints Lowery as more aggressive. However, the account remains consistent as to Lowery's insistence that Tillery was alive when he left the house and that Tillery

struck him first. Cotton admitted that Lowery did not confesss to killing Tillery.

Outside the presence of the jury, John Bingham, Ph.D., an expert psychologist in the field of PTSD, explained to the court that a person suffering from PTSD has experienced "a very traumatic event," and that a subsequent similar event triggers a re-experience, causing the person to react disproportionately, or not in "a normal fashion." R1-16, Exh. H, Vol. IV at 671, 672. This "dysfunction" causes the person to act inappropriately, make inappropriate decisions, and respond impulsively when confronted with a triggering event. Id. at 674-75.

After this proffer, the trial court ruled that, pursuant to several Florida state cases involving battered spouse syndrome ("BSS"), if Lowery intended to have an expert testify about PTSD in his case, he should have notified the state in writing and permitted the state to have him undergo a mental evaluation. Lowery's trial counsel, Katherine Snowden, admitted that, although the state was aware that Bingham's deposition had been taken regarding PTSD, she had not given formal notice to the state of a potential PTSD defense. Also, the state's request to have Lowery examined by its expert had been denied. Accordingly, the court ruled that Lowery would not be allowed to present expert opinions about himself specifically, but could still present expert testimony about PTSD generally as to a hypothetical

person, provided he established a sufficient factual basis to support it. The court also determined that medical records purportedly showing previous injuries to Lowery's skull were inadmissable because they had not been disclosed to the state during discovery.

To test for a sufficient predicate to permit a PTSD defense and general PTSD expert testimony, Lowery made a proffer to the court, outside of the presence of the jury, of the following: He was hit in the head several times with a pipe in 1982, which broke his skull and required brain surgery. He was hit in the face with a pipe in 1986, which knocked out his teeth, broke his jaw, and knocked him unconscious. Since those attacks, he has tried "to stay away from any type" of dangerous situation. Id. at 715. When he finds himself unable to flee dangerous situations, such as the altercation with Tillery, he is likely irrationally to hit someone. He attempted to get away from Tillery, but could not. After the final time Tillery pulled him down, Lowery saw blood on Tillery and "figured somebody else swung at me and hit" Tillery, so he slapped "that man" to get away. Id. at 716. At the conclusion of Lowery's proffer, the state court found that a "sufficient factual predicate ha[d] been established to support the use of expert testimony regarding [PTSD] in support of the defense of self-defense." Id. at 738.

During his testimony before the jury, however, Snowden did not ask Lowery about the pipe attacks. Accordingly, the state argued that PTSD testimony should be excluded because Lowery had failed to lay a basis before the jury. The court ruled that there had been "no factual foundation . . . presented to the trier of fact which would allow introduction of th[e] expert testimony." R1-26, Exh. H, Vol.V at 955.

B. Eye Witnesses

Lowery testified that, two days after he was arrested, a nurse had examined his eye, as had "a Dr. Timmons" and James Boyd, M.D. Id. at 915. The nurse washed out his eye, but told him that she thought he needed to see a doctor. One of the doctors told him that he needed to have x-rays taken of his eye. Cotton testified that Lowery never complained of having an eye injury during his interview at the sheriff's office, and that a photograph of Lowery's face taken the morning of the arrest did not reveal an eye injury.

Boyd, who had been working as a surgeon at the jail where Lowery was incarcerated after his arrest, testified that he had diagnosed Lowery with conjunctivitis, for which he had prescribed antibiotic eye-drops and an eye patch.

He also affirmed that "almost anything" can cause conjunctivitis, and that Lowery apparently did not "have any real problems," and the injury "definitely was not severe." Id. at 966, 967. Snowden then called Winifred Carnley, a nurse at the jail's infirmary, who testified that she had not seen Lowery at the jail in the month of his arrest, and Elizabeth Broderick, another nurse at the jail's infirmary, who testified that, on the night of his arrest, Lowery had complained to her about a problem with his eye, but that she could not see anything "gross or acutely abnormal about . . . Lowery's eye." Id. at 973.

C. Non-Deadly Force Instruction

The trial court gave the jury an instruction on the justifiable use of deadly force, which read: "A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or the imminent commission of aggravated battery against himself or another." R1-26, Exh. H, Vol. VI at 1086-87. Snowden made no objection to the jury instructions given.

D. Alternate Jurors

Prior to deliberation, the trial court released two jurors, whom it understood to be the alternates. Snowden did not object. Following trial, the court advised

both parties that it had inadvertently replaced two original jurors with alternates. Snowden filed a motion for mistrial and argued that, because Florida has different rules for picking regular jurors and alternate jurors, the replacement of two regular jurors with both alternates was a fundamental error. The motion was denied over Lowery's objection.

E. Post-Trial Procedural Developments

On direct appeal, through different counsel, Lowery made arguments related to the excluded PTSD evidence and the alternate jurors. The District Court of Appeal affirmed without discussion. Lowery filed a pro se petition for a writ of habeas corpus in state court, arguing ineffective assistance of counsel in several respects. The state habeas court denied the petition and a subsequent motion for rehearing and clarification without opinion. Lowery then filed a pro se motion for state post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, in relevant part, attacking his counsel's failure to: (1) give notice to the state of her intent to use PTSD as a defense, to provide medical records to the state, and to lay a factual predicate for the use of expert testimony in support of his PTSD defense; (2) procure the testimony of Joseph Timmons and "Mary Johnson[-Briere]," who he claimed would have testified as to the severity of his eye injury, R1-12. Att. 1, Exh.

E1 at 14-16; and (3) object to the substitution of two regular jurors with alternates. Lowery's then-appointed counsel amended the Rule 3.850 motion to include, inter alia, a claim of ineffective assistance of counsel for failure to request a non-deadly-force jury instruction.

The state post-conviction court held an evidentiary hearing on the motion at which Snowden testified to the following: She and Lowery had discussed PTSD as a possible defense, but Lowery was not interested in pursuing it. In his statement to her of the events that had transpired on the night of the Tillery's death, Lowery "painted Mr. Tillery as the aggressor and [himself] as someone who was trying to flee," which she had found to be "a little bit difficult factually," because Tillery was 76, slender, had cancer, and used crack, while Lowery was healthy and physically fit. R1-12, Att. 1, Exh. E4 at 17. Lowery's statement of the events had changed often, and he had initially contended that he never hit Tillery or fell on top of him.

Snowden also testified that she had investigated Lowery's eye injury, but thought it "was a red herring" because the booking photograph did not support his claim, and he complained only that "it bothered him," not that it was painful. Id. at 22. According to Snowden, there was also confusion as to whether Lowery had a preexisting eye injury. Snowden testified that she spoke on the telephone with: (1)

Timmons, who did not have time to be deposed, but who wrote her a letter stating that Lowery had conjunctivitis; and (2) a nurse, named either Wilson or Johnson,[2] who had no recollection of treating Lowery. She stated that, in light of the booking photograph, which revealed no eye injury, she had decided that putting on another witness, who could not confirm a significant eye injury, would have diminished Lowery's credibility and added nothing to the defense. Johnson-Briere testified that she observed an injury to Lowery's right eye at the jail infirmary a couple of days after his arrival. At that time, his eye had appeared "very red and inflamed" and, when a doctor applied dye and a black light, she had seen that his eye was cut. Id. at 117, 119-20. Finally, Snowden testified that she did not think a non-deadly force instruction fit the facts of the case and that it would have been "a little disingenuous to talk about that use or nonuse [of deadly force] when someone has died as a result of extreme beating." Id. at 49.

The state court denied Lowery's Rule 3.850 motion for state post-conviction relief. As to the PTSD defense, the court reasoned that, even if notice had been given, the defense would not have been permitted because there was no evidence in the record to support a finding that Lowery was suffering from PTSD at the time of

[2]Snowden testified that she could not remember the name, and the related documents were destroyed during a hurricane. R1-12, Att. 1, Exh. E4 at 26.

the altercation. More specifically, the court observed (1) that Lowery had contradicted himself in his motion by asserting, alternately, that PTSD testimony would have shown why he reacted "so aggressively" to Tillery's provocation, and that it would have demonstrated that Lowery did not use brutal force and was only trying to escape Tillery, R1-12, Att. 2, Exh. E5 at 14; and (2) that Lowery had not testified that he had reacted aggressively, "blacked out, overreacted, lost his ability to reason because of his past trauma," or relived prior events, id. at 14-15. The court concluded that Snowden's omissions had not prejudiced Lowery.

Next, the state post-conviction court found that Snowden's decision not to present additional testimony regarding the purported eye injury was tactical and reasoned in that it appeared that such testimony would have impaired Lowery's credibility in light of the facts that (1) the booking photograph revealed no eye injury; (2) the examining doctor had testified that the injury was not severe; and (3) Lowery had not complained of an eye injury to Cotton, the officer who documented his injuries on the night of the incident. The court also reasoned that the evidence would, at most, have shown only that there was a violent altercation between Lowery and Tillery, not that Lowery acted in self-defense or did not cause Tillery's death.

The state court then found that, because Snowden raised the issue of the replacement of the two original jurors with alternates in a motion for mistrial/new trial, for which a hearing had been held, and because the issue had been fully litigated and raised on appeal, it was inappropriate for consideration under Rule 3.850. The court found also that Lowery failed to argue facts that would have established a reasonable probability that the originally-selected jury would have returned a different verdict in light of "the overwhelming evidence of [Lowery's] guilt." Id. at 24.

Finally, the state court found that Lowery was not entitled to relief on his claim that Snowden failed to request a non-deadly-force jury instruction because there was no reasonable probability that the jury would have acquitted Lowery or found him guilty of a lesser included offense. The state appellate court affirmed without discussion.

Lowery filed a petition for federal habeas relief on the same grounds. The magistrate judge recommended that Lowery's § 2254 petition be denied for, inter alia, the following reasons: (1) "[A] PTSD defense would have flown in the face of petitioner's claimed innocence" and, therefore, Lowery could not show that he was prejudiced by Snowden's failure to lay the necessary predicate and that Snowden

"did not cause Lowery to lose a PTSD defense because [based on the rest of his testimony before the jury] he did not have a viable PTSD defense to begin with." R1-28 at 25, 26. (2) The state court's finding that Snowden's decision not to call Johnson-Briere as a witness to Lowery's eye injury was a reasoned tactical decision and was well supported by the record. (3) Lowery had failed "to explain how a non-deadly force instruction would have helped him," and a jury finding that Lowery "used non-deadly force to kill a man would be an absurdity" and, thus, Tillery's death precluded a non-deadly-force instruction. Id. at 28. The magistrate judge further explained that the district court would not second-guess the state court's determination of state law that, if Lowery had requested a non-deadly-force instruction, it would have been denied and that this determination foreclosed Lowery's "ability to demonstrate deficient performance and prejudice." Id. at 28-29. Finally, (4) the magistrate judge found that there was no underlying structural defect in the trial court's inadvertent replacement of two regular jurors with alternate jurors before deliberation and that, even if Snowden had been deficient for failing to object, and even if the error had been structural, Lowery had not demonstrated prejudice because (a) deliberations had not started when the regular jurors were inadvertently excused; (b) the alternates were qualified in the same

manner as the rest of the jurors and did not know that they had been designated as alternates and, thus, would have had no reason to be less attentive during the trial; and (c) the alternates' potential bias had been fully subject to peremptory challenge and challenge for cause. As to each issue, the magistrate judge emphasized that the state court's factual findings were well-supported, objectively reasonable, and did not result in a decision contrary in unreasonable application of established federal law.

The district court adopted and incorporated the magistrate's report and recommendation, and denied Lowery's § 2254 petition and his subsequent motion for a certificate of appealability. We granted a certificate of appealability as to each of these four issues.

II. DISCUSSION

We review a district court's denial of a § 2254 habeas petition de novo. McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005), cert. denied, 547 U.S. 1073, 126 S. Ct. 1828 (2006). We review the district court's factual findings for clear error, and mixed questions of law and fact de novo. Id. An ineffective assistance of counsel claim is a mixed question of law and fact that we review de novo. Id.

Under § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). A state court's decision is "contrary to . . . clearly established federal law" if it either (1) "applie[s] a rule that contradicts the governing law set forth by [the] Supreme Court," or (2) contradicts the holding of a Supreme Court case in which "materially indistinguishable facts" were presented. Id.; Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006), cert. denied, 2007 WL 1449744 (U.S. Oct. 1, 2007) (No. 06-11285). A state court's decision is "an 'unreasonable application' of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case." Osborne, 466 F.3d at 1305 (citation omitted). "[A] federal habeas court may not issue the writ [under the unreasonable application clause] simply because that court concludes in its independent judgment that the

relevant state-court decision applied clearly established federal law erroneously or incorrectly." Williams v. Taylor, 529 U.S. 362, 411, 120 S. Ct. 1495, 1522 (2000). Under the AEDPA, a state court's determinations of fact are "presumed to be correct," and the habeas petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." U.S. Const. amend. VI. When a convicted defendant claims that his counsel's assistance was ineffective, "the defendant must show that [(1)] counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

"For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence." Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) (quotation and citation omitted). "A strategic decision by defense counsel will be

held to constitute ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." See Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987) (per curiam) (quotation and citation omitted). Reviewing courts must be "highly deferential" in reviewing counsel's performance, and must utilize the "strong presumption that counsel's performance was reasonable." Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc). "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." Id. at 1315.

To show prejudice, a petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. We have noted that, in the context of requests for federal habeas relief predicated upon ineffective assistance of counsel by state prisoners, the petitioner must not only satisfy the Strickland standard, but must also show that the state court applied Strickland "in an objectively unreasonable manner." Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004).

A. PTSD

Lowery first argues that Snowden's failure to give notice, hand over his medical records and lay the proper predicate at trial, prejudicially deprived him of a PTSD defense. In Florida, PTSD evidence may be offered to support a claim of self-defense and "to help the jury understand why the victim would subjectively fear increased aggression against" him. State v. Mizell, 773 So.2d 618, 621 (Fla. Dist. Ct. App. 2000).

Although it is true that Snowden failed properly to lay the groundwork for a PTSD defense, the state post-conviction court found the testimony Lowery did give at trial to be inconsistent with a PTSD defense because Lowery maintained throughout his testimony that "he accidentally fell on [Tillery] one or two times" and merely slapped him a few times with open hands, not that he reacted in an overly aggressive manner. R1-12, Att. 2, Exh. E5 at 14. The court further noted that Lowery had been consistent throughout in his contention that he had used negligible force. Accordingly, the court concluded that Lowery was not prejudiced by Snowden's deficient performance because she could not have caused him to lose a PTSD defense he did not have in the first place. Because Lowery has not rebutted the court's finding that his testimony was thus inconsistent by clear and convincing

evidence, it is presumed correct.[3] See 28 U.S.C. § 2254(e)(1). In light of our own review of the record, neither we do not find it to be an unreasonable determination. Because Lowery's trial testimony actually conflicted with a PTSD defense, the state court's conclusion that Lowery suffered no prejudice, and thus no ineffective assistance of counsel, is not an unreasonable application of clearly established federal law. See Strickland, 466 U.S. at 687, 104 S. Ct. 2064, 2068. Accordingly the district court correctly denied Lowery relief as to the issue of a PTSD defense.

B. Eye Witnesses

Lowery argues that the state and district courts misrepresented the record as establishing that the testimony of the two witnesses would have been "additional" or "cumulative," thereby leading the courts to overlook the "actual implications" of Snowden's strategy. Appellant's Br. at 28. He contends that Snowden failed reasonably to investigate the severity of his eye injury and consequently called the wrong witnesses at trial. Lowery particularly challenges her decision not to call either Timmons or Johnson-Briere, both of whom actually treated his eye injury immediately after he was arrested.

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[3]In addressing this issue, Lowery insists that "PTSD evidence was needed to show why he believed his actions were necessary to defend himself." Appellant's Br. at 27. But he does not specify the actions to which he refers or explain specifically how those actions are consistent with PTSD. Thus, we are left with nothing more than conclusory allegations.

The state court determined, based on Snowden's testimony at the evidentiary hearing and other evidence in the record, that Snowden had appropriately investigated the eye injury prior to trial. There is evidence in the record that she interviewed several treating medical personnel, and at least spoke to Timmons and to someone she believed to be Johnson-Briere, and that none of them confirmed a serious eye injury. R1-12, Att. 2, Vol. V at 935-38. The record also shows that no injury to Lowery's eye is apparent from the booking photograph taken after his arrest in connection with the fight with Tillery, and that the arresting officer was unaware of any such injury. Id., Att. 2, Vol V at 935; id., Att. 1, Exh. E4 at 634, 642. . Therefore, we find that it was not unreasonable for the state court to conclude that Snowden's strategic choice not to call more witnesses, because she believed they would have been cumulative and particularly because she believed they might diminish Lowery's credibility, was not so patently unreasonable that no competent attorney would have made the same choice. See Kelly, 820 F.2d at 1176. Accordingly, the state post-conviction court's finding that Snowden's performance was not deficient was also objectively reasonable.

Even if the state post-conviction court had found Snowden's performance deficient as to this issue, it properly concluded that Lowery failed to meet his

burden in demonstrating prejudice. The state court reasoned that additional testimony from Johnson-Briere or Timmons that Lowery had an eye injury while incarcerated would have shown nothing as to the nature of the altercation, that it would not have demonstrated that he received the injury while defending himself or that he received it during the altercation with Tillery. The court thus objectively reasonably concluded that Lowery failed to satisfy his burden of demonstrating that there was a reasonable probability that presenting testimony from additional witnesses would have altered the outcome of the trial. Accordingly, we find that the state court's finding that Lowery was not prejudiced by Snowden's failure to call additional witnesses to testify about the severity of Lowery's eye injury and so had no claim for ineffective assistance of counsel was not contrary to, or an unreasonable application of clearly established federal law, and that the district court properly denied Lowery relief as to this issue.[4]

C. Non-Deadly Force Instruction

Lowery argues that Snowden's testimony at the evidentiary hearing about

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[4]The district court did not specifically address Snowden's failure to call Timmons. However, because Timmons conducted the examination of Lowery's eye about which Johnson-Briere testified, and his testimony presumably would have been the same as hers, our analysis would be the same for Timmons. Accordingly, the district court's failure to address the issue of Timmons does not alter this conclusion.

why she did not ask for a non-deadly force instruction was based on hindsight and conflicted with the trial transcript, which revealed that she did not present a defense based on, or evidence of, the justifiable use of deadly force. He notes that the non-deadly-force instruction explicitly provides that it can be given when the victim has died. Without the instruction on non-deadly force, Lowery contends that "the jury was left with absolutely no alternatives." Appellant's Br. at 47. He asserts that it would have been "far easier" to convince the jury that he faced "the imminent use of unlawful force," as per in the non-deadly-force instruction. Id. at 48.

In Florida, "[i]t is well settled law that the defense is entitled to jury instructions on his theory of defense if evidence has been introduced to support those instructions." Cooper v. State, 573 So.2d 74, 76 (Fla. Dist. Ct. App. 1990) (per curiam). "The trial court should not weigh the evidence for the purpose of determining whether the instruction is appropriate." Garramone v. State, 636 So.2d 869, 870 (Fla. Dist. Ct. App. 1994). Where a firearm is discharged and the victim dies, deadly force is used as a matter of law, and a defendant is not entitled to a jury instruction on the justifiable use of non-deadly force. Miller v. State, 613 So.2d 530, 531 (Fla. Dist. Ct. App. 1993) (per curiam). On the other hand, Florida courts have held that, generally, where the defendant claims self-defense, the question of

what type of force was used is a question for the jury. See Garramone, 636 So.2d at 871 (holding that, where an attacker was thrown off a bridge into water and drowned, the jury should have been instructed on the justifiable use of non-deadly force). See also Howard v. State, 698 So.2d 923, 925 (Fla. Dist. Ct. App. 1997) (holding that, where defendant testified that the victim was stabbed when he lunged at her, jury should have been instructed on the justifiable use of deadly and non-deadly force).

While the state post-conviction court did not explicitly apply Strickland to determine whether Snowden was ineffective for failing to request a non-deadly-force jury instruction, it stated that, had the instruction been given, "there is still no reasonable probability that the jury would have acquitted [Lowery], or found him guilty of a lesser included offense." R1-12, Att. 2, Exh. E5 at 31. The court based its decision on the finding that Lowery's "contention that he merely slapped the victim with an open hand is wholly incredible, and no reasonable juror could believe such a claim." Id. Thus, the state post-conviction court appears to have assumed that Snowden's performance was deficient for failing to request a non-deadly-force instruction, but determined that Lowery was not prejudiced by this deficiency because counsel's failure to request the instruction did not change the

outcome of Lowery's trial.[5] We find this was not an unreasonable conclusion in light of the evidence presented, including: (1) evidence of the nature and extent of Tillery's injuries, R1-26, Exh. H, Vol. II at 307-14; (2) testimony that Tillery died of blunt force trauma, id., Vol. III at 444; and (3) evidence of extensive blood spatter, id., Vol. II at 272-76; see § 2254(d)(2), (e)(1). Accordingly, the state post-conviction court's conclusion was not contrary to, or an unreasonable application of Strickland. As such, the district court was correct to deny Lowery's petition as to that issue.[6]

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[5]Lowery's contention that the deadly-force instruction was inconsistent with the force he testified to Tillery having used is also meritless because the instruction as given stated that deadly force is justified to prevent "great bodily harm . . . or the imminent commission of aggravated battery," and Lowery testified that Tillery was trying to gouge out his eye. See R1-12, Att. 1, Exh. A at 18; R1-26, Exh. H, Vol. V at 839-41. Florida law provides that "[a] person commits aggravated battery who . . . [i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.045.

[6]We observe that the district court did err in that it found that an instruction on the justifiable use of non-deadly force could not have been given because the victim died from the beating, and that the state post-conviction court based its decision on this conclusion. This finding misstated the state post-conviction court's conclusion and was contrary to Florida law at the time of Lowery's trial. See Cooper, 573 So.2d at 76 (whether force is deadly is a jury question); Garramone, 636 So.2d at 870-71 (death of victim does not necessarily dictate deadly force instruction as opposed to non-deadly force instruction). In any event, under § 2254(d), deference is given to the state court's adjudication of the claim, which was that Lowery was not prejudiced by any deficient performance by his counsel because, in light of the overwhelming evidence that deadly force was used, the outcome of the proceeding would not have been different had the instruction been given. Accordingly, the district court's apparent error is of no consequence. See Bonanni Ship Supply, Inc. v. United States, 959 F.2d 1558, 1561 (11th Cir. 1992) (We "may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.").

D. Alternate Jurors

Lowery argues that the inadvertent substitution of jurors was a structural error, requiring a presumption of prejudice. We have recognized that, with three exceptions not applicable in the instant case, prejudice is not presumed but must be shown in order to establish ineffective assistance of counsel based on failure to challenge structural error. See Purvis v. Crosby, 451 F.3d 734, 740-43 (11th Cir.), cert. denied, __ U.S. __, 127 S. Ct. 587 (2006). In Florida, "[s]eldom, if ever, will excusal of a juror constitute reversible error for the parties are not entitled to have any particular jurors serve. They are entitled only to have qualified jurors." Piccott v. State, 116 So. 2d 626, 627 (Fla. 1960). The Supreme Court has held that, "[a]lthough a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." Powers v. Ohio, 499 U.S. 400, 404, 111 S.Ct. 1364, 1367 (1991) (quotation and citation omitted) (second alteration in original).

In Florida, a qualified juror is a male or female who is at least 18 years old, is a United States citizen, is a legal resident of Florida and the county of the place of

the trial, and possesses appropriate identification or has executed a substitute affidavit. Fla. Stat. § 40.01 (2006). "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Busby v. State, 894 So.2d 88, 95 (Fla. 2004) (per curiam), cert. denied, 545 U.S. 1150, 125 S. Ct. 2976 (2005).

Even assuming Snowden's performance was deficient, Lowery must still demonstrate prejudice resulting from her failure to object to the alleged structural error. See Purvis, 451 F.3d at 743. Lowery argues that he was prejudiced because Snowden ignored his objection to one of the alternate jurors, and the other alternate was black, which could have somehow altered the jury dynamics. Both allegations are speculative and conclusory, and Lowery has not pointed to any specific evidence that the alternate jurors were unqualified or not competent to serve.[7] See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (noting that a petitioner is not even entitled to an evidentiary hearing as to federal habeas corpus relief when the "claims

[7]To the extent that Lowery argues that the black alternate should not have been chosen, striking a juror on the basis of race would have been improper and likely subject to a challenge under Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986) (forbidding the use of peremptory challenges to jurors by the government based "solely on account of their race or on the assumption that black jurors as a group will be unable impartially" to deliberate).

are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible") (quotations and citation omitted).

For Lowery's trial, the alternates were qualified in the same manner as the rest of the jurors. Because the alternate jurors were qualified and Lowery has made only conclusory allegations regarding how they might have affected deliberation of his case, he has failed to show that there is a reasonable probability that the outcome of his trial would have been different had Snowden objected to the substitution of two regular jurors with alternates prior to deliberation. Accordingly, the state court's finding that he suffered no prejudice, and thus no ineffective assistance, was not contrary to, or an unreasonable application of clearly established federal law and the district court was right to deny his petition as to this issue.

III. CONCLUSION

Lowery appeals the district court's denial of his pro se 28 U.S.C. § 2254 petition based on ineffective assistance of counsel with respect to (1) the presentation of a PTSD defense, (2) the introduction of evidence of an eye injury, (3) a jury instruction on the use of non-deadly force, and (4) the replacement of regular jurors by alternates. Because none of the state post-conviction court's rulings as to these four issues were contrary to, or in unreasonable application of

clearly established federal law, the district court properly denied Lowery's § 2254 petition. We AFFIRM.

ATTACHMENT J-10
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-11
SECOND CIRCUIT COURT OF APPEALS

DOES NOT APPLY

ATTACHMENT J-12
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-13
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-14
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-15
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-16
SECOND CIRCUIT COURT OF APPEALS

RESERVED

ATTACHMENT J-17
SECOND CIRCUIT COURT OF APPEALS

DOES NOT APPLY

ATTACHMENT J-18
SECOND CIRCUIT COURT OF APPEALS

DOES NOT APPLY

ATTACHMENT J-19

SECOND CIRCUIT COURT OF APPEALS

DOES NOT APPLY

SECTION K - REPRESENTATIONS, CERTIFICATIONS, AND OTHER STATEMENTS OF OFFERORS OR QUOTERS

K.1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (see Section L.1)

PROVISION NUMBER	CLAUSE TITLE	DATE
3-60	Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions	JAN 2003
3-15	Place of Performance	JAN 2003

K.2 JP3 3-5 TAXPAYER IDENTIFICATION (JAN 2003)

(a) Definitions
"Common parent," as used in this provision, means that corporate entity that owns or controls an affiliated group of corporations that files its federal income tax returns on a consolidated basis, and of which the offeror is a member.
"Taxpayer Identification (TIN)," as used in this provision, means the number required by the Internal Revenue Service (IRS) to be used by the offeror in reporting income tax and other returns. The TIN may be either a social security number or an employer identification number.

(b) All offerors shall submit the information required in paragraphs (d) through (f) of this provision to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d), reporting requirements of 26 U.S.C. 6041, 6041A and 6050M, and implementing regulations issued by the IRS. If the resulting contract is subject to the payment reporting requirements, the failure or refusal by the offeror to furnish the information may result in a 31 percent reduction of payments otherwise due under the contract.

(c) The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the offeror's relationship with the Government (31 U.S.C. 7701(c)(3). If the resulting contract is subject to payment recording requirements, the TIN provided hereunder may be matched with IRS records to verify the accuracy of the offeror's TIN.

(d) *Taxpayer Identification Number (TIN):*

_____

[ ] TIN has been applied for.

[ ] TIN is not required, because:_____

_____

[ ] Offeror is a nonresident alien, foreign corporation or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States;

[ ] Offeror is an agency or instrumentality of a foreign Government;

[ ] Offeror is an agency or instrumentality of the federal Government.

(e) *Type of organization:*

[ ] sole proprietorship;

[ ] partnership;

[ ] corporate entity (not tax-exempt);

[ ] corporate entity (tax-exempt);

[ ] Government entity (federal, sate or local);

[ ] foreign Government;

[ ] international organization per-26 CFR 1.6049-4;

[ ] other _____.

(f) *Common parent*

[ ] Offeror is not owned or controlled by a common parent as defined in paragraph (a) of this provision.

Name and TIN of common parent

Name _____

TIN _____

K.3 JP3 3-15 PLACE OF PERFORMANCE (JAN 2003)

If the judiciary intends or the offeror proposes, in the performance of any contract resulting from this solicitation, to use one or more facilities located at addresses different from the offeror's address as indicated in this offer, the offeror shall include in its offer a statement referencing this provision and identifying those facilities by street address, city, country, state, and ZIP code, and the name and address of the operators of those facilities if other than the offeror.

K.4 JP3 3-20 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (JAN 2003)

(a) (1) The offeror certifies, to the best of its knowledge and belief, that:

(i) the offeror and/or any of its principals:

(A) are ___ are not ___ presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal agency;

(B) have ___ have not ___, within the three-year period preceding this

offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(C) are ___ are not ___ presently indicted for, or otherwise criminally or civilly charged by a Governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision; and

ii. The offeror ___ has ___ has not ___, within a three-year period preceding this offer, had one or more contracts terminated for default by any federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

(3) This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Section 1001, Title 18, United States Code.

(b) The offeror shall provide immediate written notice to the contracting officer if, at any time prior to contract award, the offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists shall not necessarily result in withholding of an award under this solicitation. However, the certification shall be considered in connection with a determination of the offeror's responsibility. Failure of the offeror to furnish a certification or provide such additional information as requested by the contracting officer may render the offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the offeror knowingly rendered an erroneous certification, in addition to other remedies available to the judiciary, the contracting officer may terminate the contract resulting from this solicitation for default.

K.5 JP3 3-30 CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (JAN 2003)

(a) The offeror certifies that:

(1) the prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement, with any other offeror or with any competitor relating to:

(A) those prices;

(B) the intention to submit an offer; or

(C) the methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and shall not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or contract award unless otherwise required by law; and

(3) no attempt has been made or shall be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory:

(1) is the person in the offeror's organization responsible for determining the prices in this offer, and that the signatory has not participated, and shall not participate, in any action contrary to paragraphs((a)(1) through (a)(3) of this provision; or

(2) (i) has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and shall not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision _____ *(insert full name of person(s) in the offeror's organization responsible for determining the prices in this offer, and the title of his or her position in the offeror's organization)*;

(ii) as an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision; have not participated, and shall not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) as an agent, has not personally participated, and shall not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies paragraph (a)(2) of this provision, the offeror shall furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

K.6 JP3 3-130 AUTHORIZED NEGOTIATORS (JAN 2003)

The offeror represents that the following persons are authorized to negotiate on its behalf with the judiciary in connection with this solicitation *(offeror lists names, titles, and telephone numbers of the authorized negotiators)*.

Name: _____
Titles: _____
Telephone: _____
Fax: _____
Email: _____

[End Section K]

SECTION L - INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS

L.1 JP3 B-1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (AUG 2004)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the contracting officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this address: http://www.uscourts.gov/procurement/clauses.htm

PROVISION NUMBER	CLAUSE TITLE	DATE
3-10	Contractor Identification Number - Data Universal Numbering System (DUNS) Number	JAN 2003
3-80	Submission of Offers	JAN 2003
3-85	Explanation to Prospective Offerors	AUG 2004
3-90	Late Submission, Modifications and Withdrawal of Offers	JAN 2003
3-95	Preparation of Offers	JAN 2003
3-100	Instructions to Offerors	JAN 2003
3-125	Acknowledgment of Solicitation Amendments	JAN 2003
7-60	Judiciary Furnished Property or Services	JAN 2003

L.2 JP3 3-210 PROTESTS (AUG 2004)

(a) The protestor has a choice of protest forums. It is the policy of the judiciary to encourage parties first to seek resolution of disputes with the contracting officer. If the dispute cannot be resolved with the contracting officer, then it is the policy of the judiciary to encourage parties to seek a judiciary resolution of disputes with the Administrative Office of the United States Courts. However, if a party files a formal protest with an external forum on a solicitation on which it has filed a protest with the judiciary, the judiciary protest will be dismissed.

(b) Judiciary protests will be considered only if submitted in accordance with the following time limits and procedures:

(1) any protest shall be filed in writing with the contracting officer designated in the solicitation for resolution of the protest. It shall identify the solicitation or contract protested and set forth a complete statement of the alleged defects or grounds that make the solicitation terms or the award or proposed award defective. Mere statement of intent to file a protest is not a protest.

(2) a protest shall be filed not later than ten (10) calendar days after the basis of the protest is known, or should have been known. A protest based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of offers, shall be filed prior to the closing date for receipt of offers. The judiciary, in its discretion, may consider the merits of any protest which is not timely filed. The office hours of the Administrative Office are 8:30 a.m. to 5:00 p.m., eastern time. Time for filing a document expires at 5:00 p.m., eastern time, on the last day on which such filing may be made.

(3) the protest shall include the following information:

(i) name, address, and fax and telephone numbers of the protester or its representative;

(ii) solicitation or contract number;

(iii) detailed statement of the legal and factual grounds for the protest, to include a description of resulting alleged prejudice to the protester;

(iv) copies of relevant documents;

(v) request for a ruling by the judiciary;

(vi) statement as to the form of relief requested;

(vii) all information establishing that the protester is an interested party for the purpose of filing a protest; and

(viii) all information establishing the timeliness of the protest.

(c) Protests that are filed directly with the judiciary, and copies of any protests that are filed with an external forum, will be served on the contracting officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from:

Vernelle P. Cleveland
Administrative Office of the
U.S. Courts
1 Columbus Circle, NE Ste. 3-250
Washington, DC 20544
202-502-1326

(d) The copy of any protest shall be received in the office designated above within one day of filing a protest with an external forum.

L.3 JP3 4-1 TYPE OF CONTRACT (JAN 2003)

The judiciary plans to award an Firm-Fixed Price type of contract with reimbursable elements under this solicitation, and all offers shall be submitted on this basis. Alternate offers based on other contract types shall not be considered.

L.4 INQUIRIES

The individual responsible for supplying additional information and answering inquiries concerning this Solicitation is the Contracting Officer. All questions pertaining to this solicitation shall be submitted in writing to the Contracting Officer. Answers to questions shall be provided to all Offerors being solicited, giving due regard to the proper protection of proprietary information. In order to accomplish this, all questions should be received by the Contracting Officer NO LATER THAN FIFTEEN CALENDAR DAYS from date of issuance of the solicitation.

All correspondence relating to the solicitation shall be submitted to:

Vernelle Cleveland, Contract Specialist
Administrative Office of the
U.S. Courts
1 Columbus Circle NE, Ste 3-250
Washington, DC 20544
202-502-1326
202-502-1066 (fax)
Vernelle_Cleveland@ao.uscourts.gov

L.5 FORMAT AND INSTRUCTIONS FOR PROPOSALS

L.5.1 Proposal Instructions

The Offeror's proposal shall provide all of the information required below. Failure to provide all information required may lead to rejection of the proposal.

Price and Technical Proposals shall be submitted in a paper and an electronic format. Electronic submissions must be on a storage device capable of being used in either a standard 3.5" disk drive, or a standard CD-ROM drive. Submitted material must be viewable using Microsoft Office bundled software. Offers shall follow the guidelines below:

L.5.1.1 Electronic Price and Technical Proposals shall be on separate disks or CD-ROMs. Offerors shall submit one (1) copy of the price proposal electronically and one (1) copy of the technical proposal electronically.

L.5.1.2 Paper Price and Technical proposals shall be separately bound. Offerors shall submit one (1) paper copy of the price proposal and six (6) paper copies of the technical proposal.

L.5.2 Proposal Format

The Offeror's proposal shall consist of two parts: Volume I: Price Proposal and Volume II: Technical Proposal. Pages in each proposal volume are to be consecutively numbered using the volume number followed by standard Arabic numbers.

The following is a summary of the required volume parts and sections required:

L.5.2.1 CONTENTS: VOLUME I—PRICE PROPOSAL

The price proposal shall contain the following:

- A Cover Letter stating any assumptions, conditions and/or exceptions taken to terms and conditions set forth in this RFP. The cover letter shall include a concise statement of what is being proposed. The statement should be complete, not more than two pages, and should clearly indicate reasons why a contract should be awarded to the offeror, with appropriate summary of highlights and references to the body of the proposal. This letter shall outline and explain any deviations, exceptions, or conditional assumptions taken to the requirements of this solicitation. Further, any deviations, exceptions, or conditional assumptions must be sufficiently supported, justified and explained in order to permit proposal evaluation. To the extent that there is any inconsistency between the terms and conditions of the solicitation and those proposed by the offeror, which inconsistency has not been clearly disclosed to the Government by the offeror, the Government's terms and conditions shall control in the event that a contract is awarded.

- Part 1—SF33 form, Blocks 12 through 18 completed and signed by the Offeror
- Part 2—Completed Section B Rate Table
- Part 3—Provide information required in Section G.1, JP3 Clause 7-10
- Part 4—Completed Section K, Representations and Certifications.

L.5.2.2 CONTENTS: VOLUME II--TECHNICAL PROPOSAL

The Technical Proposal shall be used to determine the technical excellence of the proposal. The proposal will be evaluated based on the minimum requirements set forth in Section C and the extent to which the proposal meets and exceeds these minimum requirements.

The technical proposal must not exceed 35 pages - each page shall be 8 ½ x 11 inches, double spaced, 12 point font, with one inch margins. These limits extend to all introductory comments, overviews, text, illustrations, graphics, appendices and other pertinent information. Graphics and appendices may be single spaced. The page limitation does not apply to sample opinions attached.

The technical proposal must demonstrate an ability to meet or exceed all technical requirements set forth in Section C of the solicitation. General statements that the Offeror can or will comply with the requirements, that standard procedures will be used, that well known techniques will be used, or paraphrases of the RFP's Statement of Work/Specification in whole or in part, will not constitute compliance. Failure to conform to any of the requirements of the RFP may form the basis for finding the proposal technically unacceptable.

The technical proposal shall be formatted as follows:

- Part 1—Technical Excellence.

Offeror shall provide a concise, detailed and thorough discussion of its ability to meet the minimum requirements set forth in Section C and the extent to which the proposal meets and exceeds these minimum requirements. Discussion shall include the following:

1. Sample slip opinion booklet. The offeror shall provide a sample slip opinion using text provided at Attachment J-9 in the format and according to the specifications of the RFP. A sample opinion is provided as Attachment J-4 which may not be exactly representative of Circuit.

2. Offeror shall describe the technology it will use to meet the requirements herein and provide the above sample slip opinion booklet.

3. Offeror shall describe its labor resources including the total number of employees and the total number of employees who will directly perform labor on this contract. Offeror shall describe the pool of available labor resources should there be a strike or other labor issue.

4. Offer shall describe the process the text will go through once received from the court for publication as a slip opinion. The description shall be a detailed, step by step process demonstrating how a slip opinion will be published including quality assurance.

5. Describe how the offeror will maintain subscriber lists.

6. Describe how the delivery schedule will meet or exceed the minimum requirements in Section F.

- Part 2--Past Experience and Past Performance.
  Offeror shall provide at least three references of current, ongoing or previous contracts/projects/delivery orders performed within five years of proposal submission that are similar in size, scope, and complexity to that described in the Statement of Work. Past Experience references should demonstrate the offeror's ability to perform the Statement of Work described in Section C.

  The following information is required for each reference:

  Name and Description of project

  1. Narrative demonstrating similarities with this Statement of Work (including size, scope, complexity)
  2. Name of Contracting Officer or Point of Contact and phone number
  3. Contract Number/Project Number/Delivery Order Number
  4. Offeror's role (prime or subcontractor)
  5. Awarded price/value of contract/delivery order
  6. Percentage of work completed in offeror's role.
  7. Discussion on how the reference contract relates to the Statement of Work.

  (NOTE: Past Experience references will be used to evaluate Past Performance. References will be contacted and asked questions in the attached Past Performance Questionnaire, Attachment J-8)

  Failure to provide at least three references may disqualify an offer from consideration for award or may lower the rating for past experience and lead to a neutral rating of past performance.

[End Section L]

SECTION M - EVALUATION AND AWARD

M.1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (See Article L.1)

PROVISION NUMBER	CLAUSE TITLE	DATE
2-85A	Evaluation Inclusive of Options	JAN 2003
3-70	Determination of Responsibility	JAN 2003

M.2 Basis for Award

Award will be made to the responsive, responsible offeror whose offer(s), conforming to the solicitation, represents the best overall value to the Government, given the outcome of the Government's evaluation of each offeror's technical proposal and offered price.

The Government intends to make a single award under this solicitation. In order to be considered for award, a proposal must encompass the entire effort specified in the Statement of Work.

M.3 Evaluation Factors

In selecting the offer that presents the best overall value to the Government, two factors will be considered:

(1) Technical Excellence and
(2) Price

Relative weight. Technical Excellence is significantly more important than Price. Price is not a numerically weighted factor. The importance of price in the evaluation will increase with the degree of technical equality of the proposals or when the price is so significantly high as to diminish the value of technical superiority to the Government.

Technical Excellence.

All offers shall be evaluated to determine technical excellence relative to the minimum technical requirements of this solicitation, as set forth in Section C. This determination will be based on the extent to which the offer exceeds the minimum technical requirements of this solicitation; the extent to which the offer demonstrates a sound technical approach to accomplish the work; whether the technology proposed meets or exceeds the requirements; whether the offer demonstrates it has

an adequate labor pool; the ability to meet or exceed the delivery schedules; and the risks of nonperformance associated with its approach. Subfactor A is more important than subfactors B and C combined. Subfactors B and C are of equal importance.

A. Technical Excellence
B. Past Performance
C. Past Experience

Price.

The price evaluation will be based upon the rates offered by each offeror for the estimated quantities given in the RFP for the firm period and each option year. An offeror's total estimated price will be determined by multiplying the offered rates by the estimated quantity for the firm period and each option year under the contract. The totals for each contract period will be added together to determine the total contract price of each offer.

M.4 JP3 3-70 DETERMINATION OF RESPONSIBILITY (JAN 2003)

A determination of responsibility shall be made on the apparent successful offeror(s) prior to contract award. If a prospective Contractor is found non-responsible, that offeror shall be rejected and shall receive no further consideration for award.

[End Section M]