

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Calhoun County

Honorable Kristi F. Curtis, Circuit Court Judge

RECEIVED

Jun 13 2022

S.C. SUPREME COURT

HERMAN HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001415

APPENDIX

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1 Hughes, Sr., had been violent toward her, and this type
2 of watching violence often leaves a child more
3 vulnerable at times than even direct violence to
4 themselves.

5 Q. Was there any evidence in the materials
6 that you reviewed of any genetic predisposition to
7 alcohol abuse or history of alcohol -- alcoholism in
8 the family?

9 A. Well, there is a history of alcoholism within
10 his nuclear family. There is, also, in -- in terms of
11 he has two uncles that drink heavily as Woodrow Hughes
12 said to me. He acknowledge that he was an alcoholic.
13 He was drunk at the time that I interviewed him. His
14 brother, Wilson, and Woodrow have numerous arrests for
15 alcohol. His youngest uncle, Kenneth, is currently
16 incarcerated for a drug charge, and there are
17 indications of grandparents as well having a history of
18 alcohol abuse.

19 Q. Was there anything, Dr. Woods -- we've sort of
20 been talking about what your Axis One diagnosis was.
21 We've talked about your Axis Two diagnosis. We've
22 talked about Axis Three, the soc- -- the psychosocial
23 environmental factors, and on Axis Four, and we hit a
24 little bit on Axis Five, but now what I'd like to do is
25 sort of try and move from the general to the specific.

1 We've been talking about Mr. Hughes in general, and now
2 could we maybe talk about his involvement in this
3 particular offense---

4 A. Sure.

5 Q. ---which has resulted in his convictions and
6 death sentence? And first, let me ask you, have you
7 reached any opinions about Mr. Hughes' involvement in
8 this offense?

9 A. Yes.

10 Q. And can you tell me what those are?

11 A. I can tell you some. In terms of Mr. Hughes'
12 issue of competency, I think it's difficult to -- for me
13 to reach a conclusion that Mr. Hughes was incompetent at
14 the time of trial, although I believe that there are
15 strong suggestions that Mr. Hughes, No. 1, was unable to
16 rationally assist in the preparation of his defense;
17 No. 2, that Mr. Hughes, except on the most simplistic
18 level, truly understood what the possibility of charges
19 against him could -- could render in terms of
20 sentencing. Given his neurological impairments I find
21 it very hard to believe that he would have been able to
22 follow the ballistics information or to be able to
23 provide any information on the psychological testimony,
24 but I certainly can draw a specific conclusion as to his
25 incompetence. Mr. Hughes' neurological impairments and

1 the psychiatric manifestations of those impairments are
2 lifelong, so there's no question in my mind that he was
3 certainly guilty at the time but that he was, also,
4 mentally ill.

5 Q. You mean that he was -- well, as I understand
6 what you're saying is you don't -- in your opinion he
7 did not meet the criteria under Mcnaghten to be not
8 guilty by reason of insanity?

9 A. That's correct.

10 Q. Okay, but before sort of addressing, I guess,
11 the technical legal issues about does he qualify for a
12 guilty but mentally ill verdict or does -- what
13 statutory mitigating circumstances are relevant, could
14 you just talk about how in your opinion his mental
15 impairments affected his participation and involvement
16 in the offense?

17 A. Yes.

18 Q. One thing, for example, I know you've talked
19 about is his neurological impairment making it difficult
20 for him to sort of plan and initiate actions, but---

21 A. Well, I -- I think that the frontal lobe
22 impairments particularly make it very difficult for
23 Mr. Hughes to not only -- for Herman to not only plan
24 an action but, except in the most simplistic level,
25 to carry it out. He described himself, his emotions at

1 the time of going into this, in a way that's much, much
2 different than one would normally think and certainly
3 the way that the literature describes people that have a
4 conduct disorder and that he described himself as -- as
5 hyper and extremely anxious. He recalls hearing one
6 shot but does not recall hearing all of the shots, and
7 he had been drinking significantly at that time, which
8 is a -- another component to his mental -- mental
9 difficulty.

10 Q. Now, the record indicates that there were
11 essentially in the big picture three people involved---

12 A. That's correct.

13 Q. ---in this, so it's Henry Daniel Owens, Jr.,
14 who sold them or gave them the gun---

15 A. Correct.

16 Q. ---and remained behind, and Mr. Pierce, who
17 was nineteen, and then Mr. Hughes, who was sixteen?

18 A. That's correct.

19 Q. And let me ask you this. In the weeks or the
20 period, I guess, leading up to this event, was there any
21 change, and, I guess, actually it would be the -- the
22 years, I guess, in the few years leading up to this, was
23 there any sort of change in Herman's life that might
24 have had an effect on how this happened?

25 A. Yes. Mr. Hughes' grandfather suffered a

1 stroke while in surgery and became paralyzed, and over
2 the next few years suffered a number of debilitating
3 results of that stroke, including paralysis, including
4 amputation. Mr. Hughes described his relationship with
5 his grandfather as one of extreme closeness. He talked
6 about how his grandfather would take him to the barber
7 shop and how he would sit while his grandfather would
8 talk with his friends and how his -- how he would follow
9 his grandfather around even at times when he, his
10 grandfather, had just gone out on his own, how he would
11 get on his bike and -- and ride, would then try to find
12 his grandfather, and it appeared as though his
13 grandfather was really the central figure in his life.
14 If I can -- he talked about his grandfather couldn't do
15 the things he used to do, and his description was that
16 "It hurt my heart. I stopped caring about things no
17 more." He described him as the closest person to him.
18 "We used to ride our bikes. Him getting sick affected
19 me. Couldn't ride his bike. Couldn't follow him no
20 more -- didn't -- on to the barber shop." He described
21 the kinds of things that he and his grandfather did and
22 was able to acknowledge that this had a significant
23 impact on his life.

24 Q. Was there any, or in your opinion is there
25 any, significant fact that just sort of came during his

1 adolescence?

2 A. Yes. I -- I think there were really three
3 factors. First of all, when you look at Mr. Hughes'
4 behavior to that point, one more -- one more time
5 -- when you look at this period in Mr. Hughes'
6 life---

7 THE COURT: You'll need to speak up.

8 THE WITNESS: Okay.

9 THE COURT: You'll need to speak up.

10 THE WITNESS: I'm sorry. Thank you. When
11 -- okay -- when you look at this period in Mr. Hughes'
12 life, you see three converging factors. No. 1,
13 education. Herman Hughes is not the first brain-
14 impaired youngster to start to have behavioral problems
15 at this time in their life. This is a common time where
16 you find children that are developmentally disabled,
17 have brain impairments, start to act out behaviorally.
18 Why? Because the curriculum changes. When you look at
19 the educational curriculum developmentally, up until the
20 fifth grade, it's a rote curriculum. It is a curriculum
21 that is designed to look at issues of plus and minus,
22 how many spelling words children here recognize. It's a
23 much different curriculum. They are learning words.
24 They are learning numbers, and that is a much different
25 approach. It doesn't require a lot of frontal brain

1 stuff to do that. Once you get to, and -- and I think
2 it's important to note, that even in those instances
3 Mr. Hughes failed the first grade, if I recall properly,
4 he failed the second grade, so even in that area he was
5 found deficient, but what happens by the time you get to
6 junior high school is that the curriculum changes so it
7 goes from a rote learning perspective to a conceptual
8 perspective, social studies. You start to look at
9 abstract concepts, how things work, how they fit
10 together, and this is really the way that the
11 educational system is built, so the educational system
12 is designed to follow how a child develops, and a
13 child's brain develops so that they can do the rote
14 stuff but not the abstract stuff, and then when you
15 start to do the abstract stuff, that's when we give it
16 to them, and it's very consistent with the -- in -- in
17 English common law there's a rule of seven's when you
18 look at competency where up to the age of seven it was
19 assumed that the child was not competent. Seven to
20 fourteen, there was a question about that, and that was
21 really based upon the developmental steps that reflected
22 in our educational system, so it's not just Herman that
23 you see have these kinds of behavioral disruptions by
24 the time they get to that level in school. Secondly --
25 boy, this is really bad -- hang with me, folks --

1 environment---

2 Q. It's a good thing we don't have a neuro-
3 psychologist here to see this writing.

4 A. Yeah. Issues of environment, often when you
5 have children that may be organically impaired, you have
6 a supportive environment. In this case we certainly
7 didn't have a supportive environment, and, once again,
8 look at this history. We don't have necessarily a
9 supportive environment, but in those early years we do
10 see that he has one figure that he's close to that
11 provides some support for him, and that coincides with
12 that period in his educational system where he's doing
13 the -- the simpler things. Around the same period of
14 time that we see this process of education change, we,
15 also, see the breakdown of the one social system that
16 was most important to him, certainly the one that he saw
17 as being more significant, and, the last one real
18 quickly, hormones. Things checked, adolescence, then
19 you become more impulsive. They act out more. Much of
20 it is -- is hormonal. We're talking about degrees of
21 testosterone, the ways in which adolescents change just
22 from a medical point of view, and all three of these
23 factors were occurring at the same time. This isn't a
24 breakdown, but the ability to -- to limit this were
25 being impaired by the breakdown of the educational and

1 environmental systems, which weren't great to start
2 with.

3 Q. So, Dr. Woods, as I under- -- does alcohol act
4 as a -- on the frontal lobe to the brain?

5 A. Yes. Alcohol acts directly on the frontal
6 lobe of the brain. The frontal lobe is where the
7 greatest percentage of alcohol is functioning. Well,
8 I wouldn't say functions, works. Alcohol acts as a
9 -- as a disinhibiting, at least initially acts as
10 a disinhibiting, chemical where it often impairs
11 judgment.

12 Q. So, in this case would it be fair to say that
13 there were three different factors affecting Mr.
14 Hughes', Herman's, frontal lobe at the time of the
15 offense? He was sixteen, so they weren't probably fully
16 developed?

17 A. Well, not only were they not probably fully
18 developed, but they were clearly damaged.

19 Q. But, I mean, even a normal---

20 A. Right.

21 Q. ---sixteen-year-old's frontal lobe's wouldn't
22 be fully developed?

23 A. Right.

24 Q. Which, I guess, is part of why sixteen-year-
25 old's do a lot of stupid things?

1 A. I hope so.

2 Q. Second would have been the fact that in a --
3 even beyond a normal sixteen-year-old he has impairment
4 or damage to the frontal lobe?

5 A. That's correct.

6 Q. They don't work like a normal, even sixteen-
7 year-old, frontal lobe?

8 A. That's correct.

9 Q. And then, third, you have alcohol?

10 A. That's correct.

11 Q. Which is essentially an additional frontal
12 lobe---

13 A. That's correct, specific.

14 Q. So that's really triple frontal lobe whammy, I
15 guess?

16 A. That's correct.

17 Q. In your opinion did that have anything to do
18 with this involvement and this offense?

19 A. Given Herman's history, it certainly appears
20 to me that it could have been that which tipped him over
21 in terms of his behavior. Herman had behavior
22 disruptions in the school in that last year period,
23 maybe year and a half. They were certainly nothing of
24 the quality and degree that we saw. There was nothing
25 in Mr. Hughes' history that would suggest this would

1 occur.

2 Q. Now, I would like to talk with you a little
3 bit about some of the legal issues. We've already
4 talked about his involvement as it stands, but let's get
5 specific to several legal issues. As I understand, what
6 you've said so far, to sort of clear that out of the way
7 so we can get to the remaining issues, is that you have
8 questions about his competency, but you can't -- don't
9 feel like you can testify today in your opinion he was
10 not competent?

11 A. That's correct.

12 Q. And you've, also, said that you do not think
13 that he met the South Carolina standard for not guilty
14 by reason of insanity at the time?

15 A. That's correct.

16 Q. Under the criminal responsibility. At my
17 request did you review the South Carolina standards of
18 guilty but mentally ill?

19 A. Yes, I did.

20 Q. Which just states that a defendant is guilty
21 but mentally ill if at the time of the commission of
22 the act he had the capacity to distinguish right from
23 wrong or recognize his act as being wrong but because
24 of mental disease or defect lacks sufficient capacity
25 to conform his conduct to the requirements of the

1 law?

2 A. That's correct.

3 Q. And in your opinion would that be applicable
4 on this case?

5 A. Yes.

6 Q. And can you elaborate?

7 A. I think there are a number of factors. First
8 of all, I do think that Herman understood right from
9 wrong. I do think he understood the nature and quality
10 of the fact that a gun could be lethal. I, also,
11 believe in his description of what occurred, that he was
12 overwhelmed, that in a situation where another person
13 might not be overwhelmed or might be able to act in a
14 more consistent, even in a more consistent, criminal
15 fashion, he was not. He describes himself as being
16 anxious and hyper, which is inconsistent with a person
17 that, say, would have a conduct disorder where they
18 would be -- they would be anxious. That's one of the
19 things about people that have conduct disorders. The
20 literature has shown that often they do not have that
21 kind of response. He describes to me the gun -- the
22 keys being thrown and him just -- hearing the gun go off
23 and hearing one shot, not hearing all of the shots.
24 These are all consistent, particularly that startle,
25 because I asked him, "Were the keys thrown at you, or

1 did you -- did -- there was -- was there something about
2 just throwing the keys?" He -- he said no. He couldn't
3 articulate what it was because he had asked for the
4 keys. He couldn't articulate what it was that -- that
5 then made him shoot, and yet when you look at his
6 neurological impairments, and you look at his frontal
7 lobe, and particularly when you look at Dr. Kraus'
8 findings of his hyperflexia, this is a kind of startle
9 response that would not occur with a normal person.

10 Q. Well, you're not saying that this was an
11 accident?

12 A. No, I'm not saying that it was an accident. I
13 am saying though that someone without the neurological
14 impairments that Mr. Hughes had would be able to control
15 their behavior more effectively.

16 Q. And when he talks about the gun being --
17 going off, and I had been over some of those with
18 Dr. Beyer, it's not as if he's attempting to avoid
19 responsibility?

20 A. No.

21 Q. It's just that he has limits on how he could
22 articulate what was going on?

23 A. That's correct.

24 Q. Now, the final thing that I'd like to talk to
25 you about is the concept of mitigation and mitigating

1 circumstances, and did you find any mitigating
2 circumstances in this case?

3 A. Well, I certainly think his brain impairment,
4 his -- his neurological impairment is a mitigating
5 circumstance. I think that corroborates, is consistent
6 with, the fact that he was -- he was more than a kid.
7 Chronologically he was a kid, but every record that we
8 have reflects the fact that he was not sixteen. His
9 psychological testing, the educational testing, reflects
10 someone that was much younger, that was much younger in
11 their thought, that was much younger in their ability to
12 act, and I think that's very, very significant on
13 mitigation perspective.

14 Q. And let me ask you this. Did you -- do you
15 have any opinions regarding Mr. Hughes' adap- --
16 Herman's adaptability to confinement?

17 A. It is my opinion that structure, given his
18 limitations, are the best -- would be the best way,
19 you know, to -- his life is very simple. When you
20 talk about even today, from day to day, you find that
21 Herman still lives a very simple life, even simpler
22 than other inmates that have developed hobbies or
23 habits, and I think that really reflects his cognitive
24 deficit.

25 Q. But, as I understand what you're saying is

1 that the structure of confinement is often therapeutic
2 for people?

3 A. That's correct.

4 Q. And the information that you have reviewed
5 indicates that he has made a successful adjustment to
6 incarceration?

7 A. That's correct.

8 Q. One second. If you could please answer any
9 questions that the attorney general's office might have,
10 we'd greatly appreciate it.

11 A. Sure.

12 CROSS-EXAMINATION BY MR. ZELENKA:

13 Q. Dr. Woods, we meet again.

14 A. Yes, Dr. -- Mr. Zelenka, how are you
15 doing?

16 Q. Approximately how many times have you
17 testified for a death row inmate in South Carolina?

18 A. I think four or five.

19 Q. Four or five times?

20 A. Five.

21 Q. And those aren't all the evaluations you've
22 done for individuals in South Carolina. Isn't that
23 correct? Or is it?

24 A. I'm sorry. Those are or are not?

25 Q. That's my question to you. Are there others

1 on death row you've, also, evaluated?

2 A. I believe so, yes.

3 Q. Yet you do not come from South Carolina.
4 You're coming here all the way from California. Isn't
5 that correct?

6 A. That's correct.

7 Q. Are you frequently testifying on behalf of
8 death row inmates in other states, other than just South
9 Carolina?

10 A. I have testified for the -- in capital cases
11 or on the defense in other states, yes.

12 Q. Approximately how many times have you done
13 that in other cases, other than in South Carolina
14 cases?

15 A. I'd say maybe twelve, fifteen times.

16 Q. In this case you met with the defendant two
17 times?

18 A. That's correct.

19 Q. When did you have meetings with the defendant?

20 A. It was August 17th and 18th of this year.

21 Q. Approximately how -- that would be two and a
22 half hours each time for about five hours?

23 A. Yes, it was about five hours. I think it was
24 a bit longer the first day than it was the second.

25 Q. And when did you come up with your diagnosis,

1 which you have given here today? When did you come to
2 your final conclusions on each of those axes?

3 A. Well, Axis Four was fairly clear right from
4 the start in terms of the -- Axis five was after
5 reviewing Dr. Evans' materials. I think it has probably
6 been a -- a month or so that I've felt firm about the
7 diagnosis.

8 Q. In -- but -- but Dr. Kraus didn't do his
9 report until September 30th. Isn't that correct?

10 A. Dr. Kraus, that's correct.

11 Q. But you're relying to a great degree on the
12 report that you haven't seen, but you have conceded here
13 today you had already come up with your diagnosis. Is
14 that not, also, correct?

15 A. No, it's not correct.

16 Q. Well, if neurological--

17 A. Well, if I could, if I may---

18 Q. Please.

19 A. If I may finish. Dr. Kraus' report was really
20 only confirmatory and, in fact, added to information
21 that I already had. It was really Dr. Evans' report
22 that was most consistent with -- with my findings.

23 Q. But at the time before you had seen Dr. Kraus'
24 report, you said you reviewed the Department of Mental
25 Health's evaluations, which reveal a neuro-examination

1 that did not have the same results as Dr. Kraus' report.
2 Isn't that correct?

3 A. That's absolutely correct.

4 Q. Pardon me.

5 A. That's absolutely correct.

6 Q. Did you review the Hall Institute report---

7 A. Sure.

8 Q. ---on the neurologicals that were done?

9 A. Yes, I did.

10 Q. And those neurological reports did not find
11 the clonus, did not find the hyperreflexivity, did not
12 find any of those things at the time of that evaluation.
13 Isn't that correct?

14 A. No, that's not correct. They didn't find
15 the clonus, and they did not find the hyperactivity.
16 They didn't look for the Gabellar response. They
17 did not look for the Gabellar reflex. They did not
18 look for the snouting reflex, so in -- I think their
19 neurological evaluation was very consistent with
20 their other examination in that it was not complete.

21 Q. I want to show you a document and ask if that
22 refreshes your recollection.

23 THE COURT: And, Mr. Zelenka, for the record
24 what specifically is -- is being shown?

25 MR. ZELENKA: I'm giving him Hall Institute

1 records that I received from the Center for Capital
2 Litigation.

3 THE COURT: All right.

4 MR. ZELENKA: Identified as Hall Institute
5 records.

6 THE WITNESS: Yes, I was very familiar
7 and -- and somewhat disappointed actually in this
8 evaluation.

9 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

10 Q. The evaluation shows, however, that he does
11 not have neurological deficits?

12 A. No.

13 Q. Based upon the testing that they did. Isn't
14 that correct?

15 A. No, sir. If you -- if I can show you, and let
16 -- I'm sorry. I've missed -- I'm not speaking
17 correctly. The evaluation doesn't show anything, other
18 than -- first of all, it doesn't show what reflexes they
19 checked. It doesn't show how he checked them. It
20 doesn't show whether they did -- you know, when they
21 talk about reflexes in terms of symmetrical equal, you
22 have no idea whether they did ankle reflexes, whether
23 they did wrist reflexes, whether they did arm reflexes,
24 whether they did bicep reflexes. I don't know what they
25 did, and that's a real problem with this evaluation is

1 that it's not clear what they did.

2 Q. Okay. Dr. Woods, when doctors are doing a
3 consult, and they're unclear about the -- the full
4 results of the records, isn't it a reasonable practice
5 within your area of expertise to contact the doctor and
6 find out those explanations rather than just discarding
7 the entire evaluation as you appear to have done in this
8 case?

9 A. Well, actually I didn't. We had someone else
10 do it.

11 Q. But you didn't check to see what this
12 particular doctor found, did you?

13 A. No, I didn't. We had someone else do -- do a
14 thorough examination.

15 Q. And that doctor was Dr. Kraus. Isn't that
16 correct?

17 A. That's correct.

18 Q. But Dr. Kraus didn't do his evaluation,
19 Dr. Woods, until after you had already come up with
20 your diagnosis. Isn't that, also, correct?

21 A. I would imagine. I didn't talk to Dr. Kraus
22 before that time, but if he did it on September 30th, if
23 he did it on September 30th, it was after I had come up
24 with my diagnosis.

25 Q. So, the only opinion you had was the opinion

1 that showed no neurological deficits from the Hall
2 Institute?

3 A. No, sir.

4 Q. Isn't that correct?

5 A. That's not correct. A neurological
6 examination doesn't in no way imply that there are no
7 neurological deficits. My opinion would have been the
8 same whether Dr. Kraus did his examination and found a
9 totally normal neurological examination because the
10 neurological impairments that are most significant for
11 Mr. Hughes are related to the neuropsychological
12 testing, No. 1; No. 2, are related to the
13 psychodiagnostic testing that was done when he was in
14 the second grade and again when he was in -- in the --
15 in the, I think, the sixth grade, so the neu- -- you're
16 putting much too much emphasis, and I don't believe if
17 we go back on the record, look at the record, that I put
18 that type of emphasis on Dr. Kraus' report. I did say
19 that Dr. Kraus' report reflected abnormal reflexes that
20 were consistent with the neurological --
21 neuropsychological testing.

22 Q. Let me, also, ask you to refer to the same
23 examination materials, page 2, of this particular
24 document, Physical and Neurological Examination,
25 Neurological Examination.

1 A. Yes.

2 Q. Okay. Again, on that written report which you
3 had and you reviewed and you considered, it says, "No
4 abnormal neurological signs," correct?

5 A. That's correct.

6 Q. And, once again, it explains that they are
7 seeing full range of movements in all extremities,
8 strength and tone were good against resistance, and tone
9 was good in palpation, cerebral functions, tandem gait,
10 coordination was good, normal heel to chin, finger to
11 nose test, Romberg sign was absent, patient is normal
12 bilateral pin prick survey, normal vibration sense,
13 normal joint position test, reflexes were symmetrical
14 and equal, no clonus noted; in summary, no abnormal
15 neurological signs?

16 A. That's correct. That's what it says.

17 Q. And that's the material you reviewed and
18 considered at the time you gave your diagnosis?

19 A. That's correct.

20 Q. Dr. Kraus, also, didn't agree with the
21 conclusion that this was congenital syphilis which
22 exists with the defendant. Is that not also
23 correct?

24 A. No, it's not correct.

25 MR. ZELENKA: The Court's indulgence one

1 minute.

2 THE COURT: Certainly.

3 CROSS-EXAMINATION RESUMES BY MR. ZELENSKA:

4 Q. Let me ask you to review -- is this the same
5 document you saw?

6 A. I will have to review it.

7 Q. I ask you if that refreshes your recollection,
8 particular with respect to paragraph four.

9 A. Yes, this is the same copy document.

10 Q. Okay, and isn't it true that the materials
11 that you relied upon by Dr. Kraus advised you that "We
12 would need to be able to demonstrate records precedent
13 to 1995 revealing positive testing for syphilis before
14 entertaining a firm diagnosis of congenital syphilis
15 versus a prior disease"?

16 A. Well, first of all, he wasn't advising me.
17 This was -- this was not to me, so I need to make that
18 clear. Secondly, that was what he suggested in addition
19 to CFS -- CSF assay and to look for appropriate titers
20 of syphilis, which were done.

21 Q. Pardon me.

22 A. To look for appropriate titers, syphilitic
23 titers.

24 Q. And you're saying that was done before
25 1995?

1 A. No, no. No, he's not saying that needed to be
2 done before 1995. He was saying that that -- there were
3 three issues here. He's saying, first of all, it would
4 be helpful to look for history of syphilis before 1995
5 and that there's no central nervous system evaluation up
6 to 1995. Then he says, "Suffice it to say, to look for
7 serum titers would be very important," and serum titers
8 were completed, so there is no history before 1995, but
9 there are serum titers that are consistent with a
10 chronic picture of congenital syphilis.

11 Q. Okay, but prior to his entry in the Job Corps
12 he had never been found to have syphilis. Isn't that
13 correct?

14 A. Well, I'm not sure he had ever been tested to
15 have syphilis.

16 Q. Okay. Was he found to have syphilis at the
17 time of his birth?

18 A. I haven't seen the RPR records.

19 Q. Do you know of any records which exist that
20 reveal that Herman Hughes at the time of his birth
21 suffered from congenital syphilis at that time based
22 upon any records?

23 A. I know of any -- I don't know of any records
24 that reflect that.

25 Q. Okay, and the first time you're aware of any

1 records supporting the possibility of syphilis was the
2 Job corps test?

3 A. That's correct.

4 Q. Okay. What was the RPR on the Job Corps
5 test?

6 A. I don't recall what the RPR was.

7 Q. Is that significant or insignificant?

8 A. What the RPR was?

9 Q. Yes.

10 A. It depends upon what the level was. Then
11 you might want to do an MHTP.

12 Q. Okay. If the RPR was showing a ratio of
13 1:8 at that time, would that be significant or
14 insignificant?

15 A. That would significant. That would be
16 treatable.

17 Q. Okay, and if it was showing that in the
18 sixth, when he was taking that testing initially for the
19 Job Corps, is the same ratio, is that significant or
20 insignificant?

21 A. Well, I thought you were talking about the
22 RPR.

23 Q. I am.

24 A. Okay.

25 Q. But if that RPR -- let me ask you this. I

1 was confusing. If the RPR that was done at the Job
2 Corps is consistent with the RPR that was done at the
3 Hall Institute in 1995, what impact does that have on
4 whether you believe that congenital syphilis existed or
5 not?

6 A. Well, first of all, it would reflect that the
7 RPR has not gone down in spite of being treated. That's
8 No. 1. No. 2, it's a very short time between the first
9 RPR and the second RPR, so it really -- and you find
10 RPR's are different, and titers are different, in
11 neurosyphilis, so that would be more consistent with the
12 congenital syphilis.

13 Q. Why is that?

14 A. Because long-time RPR's, particularly when you
15 find syphilitic viruses that are within white blood
16 cells, are not as responsive to treatment.

17 Q. If you took his RPR today after treatment,
18 what would it be?

19 A. I don't know.

20 Q. Would it go up, down, or be the same?

21 A. It all -- it all depends. I really don't
22 know.

23 Q. It could be the same. Isn't that correct?

24 A. It could be, yes.

25 Q. And it could be the same, even if it was

1 acquired syphilis. Isn't that correct?

2 A. The RPR?

3 Q. Yes.

4 A. Yes. I need to point out though that the RPR
5 is not the test that you would do to look for acquired
6 syphilis. You do titers, not just RPR.

7 Q. Would that change?

8 A. The titers?

9 Q. Yes.

10 A. What you would see is a -- is a chronic low
11 level of titers, and -- and they probably would not
12 change.

13 Q. Would it change if it was acquired?

14 A. It could, yes.

15 Q. Could have remained the same?

16 A. It probably would not be as high as one to
17 eight.

18 Q. But, other than those records from 1993,
19 there's no evidence at all that he suffered from
20 congenital syphilis, is there, Dr. Woods?

21 A. That's, you know, that's the only information
22 that we have. I might note, however, Mr. -- that -- no,
23 that's---

24 Q. Okay. Another thing, with respect to -- I
25 believe you've got Applicant's Exhibit 3 and Exhibit 4

1 up there.

2 A. Yes.

3 Q. You indicated to the Court that that revealed,
4 and I believe it's on -- with respect to the Bender
5 Gestalt test?

6 A. Yes.

7 Q. The number of errors with respect to Exhibit 3
8 was twelve, which indicates that visual-motor perception
9 is what on Exhibit 3?

10 A. Five years five months to five years eleven
11 months.

12 Q. And why on direct examination did you not
13 include that other six-month span?

14 A. Actually I hadn't read it, sir. I just looked
15 at it. I just saw five years five months.

16 Q. Okay, and -- and if you'll look at Exhibit 4
17 on that, there's, also, another time frame on that, is
18 there not, that you didn't advise?

19 A. Well, there's -- there probably is since I
20 missed the first one. There's probably another one.
21 Let's see. Seven years six months to seven years eleven
22 months.

23 Q. So, why did you not include that other six
24 months, that higher age range?

25 A. Well, I -- I -- I'm sorry that I didn't. It

1 was just a mistake on my part although I might note
2 that, including the age range, still leaves him six
3 years behind on Exhibit 4 and, including the age range,
4 still leaves him close to three years behind, so I don't
5 think it -- I don't think it changes the -- my point
6 that I was trying to make was that not only was he
7 behind at the age of three by two and a half to three
8 years, but he was -- he was behind by the age of
9 thirteen by six -- five and a half to six years, given
10 even the age range. The age range---

11 Q. You didn't mean age three. You meant---

12 A. Years. I'm sorry. The age range really just
13 reflects months. It doesn't even reflect years.

14 Q. Okay. No, you did still choose in your
15 response to go with the lower and not give the full
16 information---

17 A. I missed it.

18 Q. ---or choose the higher.

19 A. I missed it---

20 Q. Isn't that correct?

21 A. ---and I'm sorry.

22 Q. Well, you missed it on both. Isn't that
23 correct?

24 A. I missed the four months on both. That's
25 correct.

1 Q. All right, sir. Now, your opinion, as I
2 understand it, is that he does not suffer from a conduct
3 disorder?

4 A. I didn't -- I didn't make an opinion as to
5 whether he suffered from a conduct disorder.

6 Q. Okay, so -- so you just came up with a
7 different diagnosis. You haven't ruled out conduct
8 disorder. Is that correct, as I understand it?

9 A. I have ruled out conduct disorder, but,
10 as I sit here, I would probably rule out conduct
11 disorder.

12 Q. As an expert on the DSM4, what is the criteria
13 for a conduct disorder by history?

14 A. I would not say that I was an expert on the
15 DSM4, but as someone who uses it in my daily practice, a
16 conduct disorder is a disorder of conduct, either
17 socialized or unsocialized that requires repeated acts
18 of either fighting, stealing, truancy, bullying others,
19 forced sexual behavior, etc., that typically occurred
20 before the age of fifteen.

21 Q. And are you disputing that there is within
22 Herman Hughes' history, his school history alone,
23 sufficient data to support that he suffers or has
24 conduct disorder by history?

25 A. Well, you -- you changed your verb there, and

1 I think it's very interesting. It's important to note
2 that conduct disorder is a mental disorder, so you're
3 right. If I were to find it, it would be that he
4 suffers from it; however, yes, I am. Absolutely he does
5 not meet it, including the school records.

6 Q. Okay. He had been truant. That's -- that's
7 some of the criteria, correct?

8 A. Well---

9 Q. Or did you not see that in his records?

10 A. ---I don't see, and keep -- and we have to
11 keep in mind, sir, that it says, "frequently." It
12 does not mention a, you know, when you look at
13 conduct disorder, it talks about a pattern of those
14 behaviors.

15 Q. So you're disputing that -- that approxi-
16 mately fifty-one disciplinary incidents is not
17 frequent?

18 A. No, wait, wait, wait. No, no. We're -- we're
19 mixing apples and oranges here, Mr. Zelenka. You know,
20 we started out talking about truancy, okay. Suddenly he
21 was not -- he has not a pattern of truancy. When you
22 look at the great majority of those incidents, they are
23 things like being disrespectful. They are things like
24 not taking your detention during lunch. They are things
25 like talking back to the teacher. There are obviously

1 others that are more serious, but there's no -- there's
2 no record of those fifty-one being the type of serious
3 conduct disorders: stealing, cheating, lying, bullying,
4 threatening, a pattern of those behaviors that would be
5 consistent with a conduct disorder.

6 Q. Okay. You did see in the data Dr. Frierson's
7 report where he revealed that he had spoken to the
8 assistant principal from John Ford Middle School?

9 A. Yes.

10 Q. And he indicated to him that he had destroyed
11 school property, started physical fights, and had been
12 truant; he's bullied and intimidated others; he's used a
13 weapon that could cause serious physical harm to others;
14 he, also, lies; he's stayed out at night despite
15 parental prohibition. Do you have any evidence to the
16 contrary that that exists?

17 A. I don't have any evidence that supports that,
18 sir.

19 Q. This---

20 A. No, no.

21 Q. This isn't evidence?

22 A. That's not evidence. No, no. That's not
23 evidence. When you go through those fifty-one school
24 records, they are -- I -- I, you know, what I prefer to
25 see were the school records that reflect and go with

1 that behavior. I thought that I had gone through them
2 pretty thoroughly. I may have missed some.

3 Q. Okay. Did you review the trial transcript
4 where some of those incidents were revealed---

5 A. Yes.

6 Q. ---at the time of the trial? You don't
7 dispute their existence, do you?

8 A. I don't dispute.

9 Q. The existence of those matters, which were set
10 forth at the time of the trial, do you?

11 A. No.

12 Q. Are you familiar with the term "irresistible
13 impulse"?

14 A. Yes.

15 Q. What is that?

16 A. The term used to, also, be a metaphor by the
17 policeman at the shoulder. If you were to commit an
18 act, and you would have committed that act even if there
19 were a policeman at your shoulder, it was considered to
20 be an irresistible impulse legally. Neurologically, it
21 means an inability to stop an action that may -- that
22 may already be occurring. There are a number. You can
23 have irresistible impulses secondary to command
24 hallucinations. It's a kind of a catch-all.

25 Q. Okay. Do you have any evidence that Herman

1 Hughes suffered under an irresistible impulse at the
2 time he committed this crime, or do you have an opinion
3 whether he suffered under an irresistible impulse at the
4 time he committed this crime?

5 A. I -- I don't -- I would not -- I would not
6 call it an irresistible impulse.

7 Q. Okay. Then---

8 MR. ZELENKA: Your Honor, I would -- I would
9 move to strike his previous testimony with respect to
10 guilty but mentally ill because in the opinion of the
11 South Carolina Supreme Court in State versus James
12 Wilson the South Carolina Supreme Court equated
13 irresistible impulse with our statutory definition of
14 guilty but mentally ill, that under McNaghten he
15 understands the difference between right from wrong but
16 suffers under a mental disease or defect and as a result
17 of that disease or defect, he lacked suffi- -- he lacked
18 sufficient capacity to conform his conduct with the
19 requirements of law.

20 He stated on direct that he had reviewed
21 South Carolina law, but now he has conceded that his
22 opinion is different than it originally would have
23 been.

24 THE COURT: Yes, sir.

25 MR. BLUME: Well, I think -- I mean, I don't

1 know that it's fair to ask the doctor to be familiar
2 with all of the different things the State Supreme Court
3 has said about it.

4 He was provided with the statutory language.
5 As I understand, we can maybe clear this up through a
6 brief voir dire.

7 EXAMINATION BY MR. BLUME:

8 Q. You read the statutory language---

9 A. That's correct.

10 Q. ---for guilty but mentally ill, and it's your
11 opinion that he meets that?

12 A. That's correct.

13 Q. And, as I understand, what you're really
14 saying is you haven't thought about it necessarily in
15 terms of an irresistible impulse?

16 MR. ZELENKA: Your Honor, that's -- he's
17 putting words into this witness' mouth.

18 MR. BLUME: He said, "I don't know if I would
19 call it an irresistible impulse."

20 THE COURT: Well---

21 MR. BLUME: So I think the question is has he
22 reviewed the statutory language.

23 THE COURT: He said, "I would not call this an
24 irresistible impulse" is what I have written down. We
25 can go back to the -- I've been taking as detailed

1 notes as I can, but I'll be glad to go back and listen
2 to what specifically he said.

3 MR. BLUME: I think a motion to strike
4 would be inappropriate, anyway. He has read the
5 statutory language. The Wilson opinion is a little
6 more nuance than that, in any event, and it seems to
7 me it would be a matter -- and his opinion stands --
8 if he wants to cross-examine, it would be a matter
9 to be handled by briefing on what the Wilson opinion
10 means exactly.

11 THE COURT: And it could be handled, also,
12 by way of a motion at the appropriate time and give
13 the Court an opportunity to review the -- the case
14 law in that area very closely. We'll continue. Thank
15 you, sir.

16 MR. ZELENKA: Thank you.

17 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

18 Q. Dr. Woods, you testified that -- that one
19 of -- I guess it's one of the trauma that the defendant
20 has gone through or at least major impact of the
21 environment on your -- your chart was his grandfather's
22 illness?

23 A. Yes.

24 Q. And his grandfather was one of the closest
25 individuals to him?

1 A. Yes.

2 Q. All right, sir. You aren't saying that
3 Herman Hughes didn't have friends and acquaintances,
4 are you?

5 A. No, I'm not saying that he didn't have some
6 friends and acquaintances. I wouldn't -- I wouldn't
7 characterize their relationship as similar to his
8 grandfather, but I'm certainly not -- I'm certainly not
9 inferring that.

10 Q. Okay. Did you inquire of Mr. Hughes during
11 the five hours that you spent with him, what other --
12 the other social relationships he had?

13 A. Yes.

14 Q. What did he tell you?

15 A. He told me that he had friends that he grew
16 up with, a couple of guys that he grew up with. He
17 told me that he had girlfriends. He described himself
18 as basically a loner with very -- with not a lot of
19 social connections, but then there were people, one
20 particular kid, in his neighborhood that he had grown
21 up with.

22 Q. Okay, so he was having socialization at that
23 time of his life. Isn't that correct?

24 A. I'm not sure what you mean by socialization.
25 Do you mean did he -- was he just sitting at home by

1 himself? No, but I certainly don't see him as being an
2 active social person. He -- there were people in his
3 community and in his family. The person that he really
4 describes as someone that -- actually now that I recall,
5 a young -- a young girl about his age who lived behind
6 where his grandmother was.

7 Q. So when his grandfather died or got ill,
8 Herman had other social contacts, other friends, that he
9 relied upon. Isn't that correct?

10 A. Well, I'm -- I'm assuming that you're not
11 trying to relate a bunch of kids and their relationship
12 to the quality of his grandfather's relationship.
13 Certainly there were other youngsters in the
14 neighborhood, but in terms of providing direction and
15 stability, you know, I'm -- I'm -- I'm -- I'm assuming
16 that you don't mean that they were of the same quality
17 relationship.

18 Q. Did his grandmother ever provide any of that
19 information for Herman as he was growing up?

20 A. You mean stability?

21 Q. Yes.

22 A. I think that his grandmother attempted to
23 provide stability for Herman. I think his grandmother
24 had specific and heated issues with his mother that
25 often prevented both of them from being an effective

1 advocate for Herman.

2 Q. But she was trying to look out for his
3 interests throughout. Isn't that correct?

4 A. I'm not clear about that.

5 Q. Why do you say that?

6 A. Well, one of the things that I thought was
7 very interesting was that in several of the
8 documentations of meetings for special education,
9 particularly in his young years, it was noted that
10 his grandmother had been invited to attend and, for
11 whatever reason -- it's not clear according to the note
12 -- that she, in fact, did attend, so, and there are
13 conflicting stories even to the point of why Herman
14 left the Job Corps between his mother and his
15 grandmother, so I certainly believe that there were
16 conflicted interests. It seems as though his
17 grandmother was certainly as concerned about her son
18 as she was about her grandson, but the bottom line is
19 that it appears that regardless, I'm sure that she meant
20 well, but the ability to provide was -- was something
21 that's very different.

22 Q. Okay, and how about her mother's interest, his
23 mother's interest?

24 A. I think his mother was interested, was
25 overwhelmed. She was very young when he was born. She

1 had other children that had difficulties, including the
2 -- the death of a daughter, and -- and a younger son
3 that, also, had significant problems. She was -- she
4 was -- it was as Sly Stone said, it was babies having
5 babies.

6 Q. What interaction did Herman have with his
7 father after he got expelled from school?

8 A. I am not familiar with interaction he had
9 with his father after he was expelled from school,
10 Mr. Zelenka.

11 Q. Let me show you a psychological evaluation
12 and ask you if you are familiar with this. Does it
13 refresh your recollection?

14 A. Yes. I -- I -- I recall some---

15 Q. Let me---

16 A. Sure.

17 Q. ---just move a little bit closer to the point.
18 It appears to be page 2, the second paragraph, the last
19 line.

20 A. Uh-huh (affirmative response).

21 Q. It appears he had a locational situation with
22 his father. Is that not correct?

23 A. Well, I'm not sure that's what it said. Let
24 me read it specifically. He -- what the sentence says
25 is that after he was expelled, Herman worked briefly

1 with his father as a painter. My understanding of his
2 father's job is that he travels across the southeast
3 corridor working as a painter, so I'm not clear what
4 that really entailed.

5 Q. Well, this information that you reviewed
6 entailed that he was working with his father as a
7 painter briefly.

8 A. That's what it says, yes.

9 Q. No more, no less, after he was expelled,
10 correct?

11 A. Yes.

12 Q. Okay. How did Herman describe his
13 relationship with his father to you?

14 A. He said that he felt as though his father and
15 he were close, that his father wasn't around very much.
16 His father had a temper.

17 Q. Okay, but in describing that he was close with
18 his father does indicate that there was another adult
19 who he looked up to and who he was close to, other than
20 just his grandfather. Is that not correct?

21 A. Wow! No, it doesn't at all. I mean, there's
22 -- I don't -- I don't know how I would get all of that
23 from the statement of him being close to someone who,
24 first of all, was hardly ever there; second of all, who
25 clearly had abu- -- he had an abusive relationship with

1 his mother, and I -- I might note that not once did Mr.
2 Hughes ever tell me about the types of excursions or
3 interventions with his father that his grandfather --
4 that he did with his grandfather.

5 Q. Did you ask him?

6 A. Yes.

7 Q. Did you ask him whether he had painted with
8 his father?

9 A. I did not ask him whether he had painted with
10 his father.

11 Q. So he wasn't revealing everything to you two
12 months ago about his relationship with his father that
13 he was at least revealing to folks in 1995. Isn't that
14 correct?

15 A. Well, no. He wasn't revealing to me as he
16 revealed to people in 1995 that he painted briefly with
17 his father.

18 Q. As I understand your testimony, you had no
19 opinion as to whether he was competent or not competent
20 to stand trial in 1995, correct?

21 A. That's correct, sir.

22 Q. But you do have an opinion that he met the
23 South Carolina standards for sanity under McNaghten and
24 under the state statutory law, correct?

25 A. Under McNaghten, not under McNaghten?

1 Q. He met the standards for sanity as defined
2 under South Carolina law?

3 A. That's correct.

4 Q. Did he describe to you the facts of the
5 crime?

6 A. Yes.

7 Q. What did he tell you?

8 A. He told me that he had met with Kelsey earlier
9 that day, that they had gone to the video parlor, that
10 Mr. Pierce had played the video games, that he had not,
11 but he was there, that they then went back to Mr.
12 Pierce's uncle's house, I guess, Mr. Daniels. Is that
13 correct?

14 Q. Owens?

15 A. Owens, and that they started drinking, that
16 Mr. Owens went to -- Mr. Pierce and Mr. Owens went to --
17 Mr. Pierce and Mr. Owens were talking. Mr. Owens went
18 to his car apparently and brought out a gun; that Mr.
19 Pierce then -- as I said, they had been drinking, and he
20 went -- went over to the -- I guess it was across the
21 tracks to the video parlor, and that Mr. Pierce stayed
22 outside, that he went in.

23 Q. Did he say what the purpose was that they
24 crossed the tracks?

25 A. He said that Mr. Pierce was talking to him

1 about committing a robbery.

2 Q. And he was aware of it before they left
3 Mr. Owens' house?

4 A. I -- it was not -- it's not clear to me
5 that he was aware of it before he left Mr. Owens'
6 house, but he was aware of it by the time that they
7 got to---

8 Q. Was he aware that there was a gun?

9 A. He was aware that there was a gun.

10 Q. Okay. How did he tell you about that?

11 A. That Mr. Owens went into his truck and got
12 the gun, and Mr. Pierce had it, and then when they got
13 in front of the establishment, Mr. Pierce gave him the
14 gun.

15 Q. Okay. Why did he say Pierce gave him the
16 gun?

17 A. Because Mr. Pierce was wanting him to commit
18 the robbery.

19 Q. Did he say why Mr. Pierce wanted him to commit
20 the robbery rather than Mr. Pierce himself?

21 A. No, he did not.

22 Q. Okay. Then what -- what did he tell you
23 happened next?

24 A. He went into the -- he went into the parlor.
25 He asked for some change, I believe, and when the cash

1 register was opened, he said, "Give me the money and
2 give me the keys," to -- "Give me, then give me the car
3 keys." He was standing back, and they threw the car
4 keys to him, and it was -- he described himself as being
5 very anxious, very hyper, and they didn't throw the keys
6 at him or any- -- they threw the car keys to him, and he
7 said, "Then I heard a shot," and several minutes later,
8 or several seconds later probably, Mr. Pierce came in.
9 That was his description to me, and they left, got in
10 the car.

11 Q. Okay, so he's telling you in August that there
12 was one shot?

13 A. No. He was saying, or he just recalled one
14 shot at that moment. I tried to make it very clear to
15 him that I didn't want to get information that he is
16 aware of but to try to put himself in that moment and
17 what he recalled.

18 Q. So -- so, in August of 1999 he recalls just
19 one shot?

20 A. No, no. He knew that there were more
21 shots, but he was saying at that moment he knew --
22 at that immediate moment he only recalled the one
23 shot.

24 Q. Okay, and have you become aware that he
25 told his attorney back in 1995 that he heard two

1 shots?

2 A. Yes. He told me he heard two shots.

3 Q. He told you there were two shots?

4 A. Right, but the difference between what he
5 recalled and what he knows now.

6 Q. Well, what he should know now and what you
7 should know now based upon this record is that there
8 are actually more than just two shots. Isn't that
9 correct?

10 A. That's correct.

11 Q. How many shots were there?

12 A. I think there were three. There may have been
13 four, but I think there were at least three.

14 Q. Okay. Kelly was shot twice. Isn't that
15 correct?

16 A. Yes.

17 Q. Ken was shot three times. Is that not, also,
18 correct?

19 A. I knew that there were more than three, but
20 I'm -- I'm not sure---

21 Q. So there are five -- five wounds. He right
22 now is saying one shot?

23 A. Well---

24 Q. He told his lawyer back in 1995 at one time
25 there were two shots, and then at another time he told

1 them he recalled a third shot?

2 A. No, no. I'm telling you what he said he
3 heard. I'm not telling you that he said -- I'm trying
4 to make this clear -- that he only said that there was
5 one shot.

6 Q. Okay, but, as I understand it, he never told
7 you why he shot?

8 A. That's correct.

9 Q. At no time did you ever inquire of him, "Why
10 did you do the shooting?"

11 A. Yes, I did.

12 Q. Okay. What did he tell you?

13 A. What he said was, "I was scared. It scared --
14 it scared me when he threw the keys.. I remember the gun
15 going off. I don't remember pulling the trigger. I
16 only remember -- I don't remember shooting the second
17 time. I don't remember some of the shots."

18 Q. Say that last part again. He doesn't
19 remember---

20 A. "I -- I don't -- I don't remember some of the
21 shots."

22 Q. Okay. What did you say just before that
23 that he said?

24 A. "I don't remember shooting the second
25 time."

1 Q. Okay. What does the term "malingering" mean
2 to you?

3 A. Malingering is the production of psychological
4 symptoms for a secondary gain.

5 Q. Okay. Is there -- are you aware of a phrase
6 that I have called "criminal amnesia"?

7 A. Uh-huh (affirmative response).

8 Q. Okay. What does that phrase mean to
9 you?

10 A. It's the assumption that a person doesn't
11 remember something with the intent of somehow it
12 creating a bettering their position in a criminal
13 situation.

14 Q. Okay. How do you -- is it important to you as
15 a psychiatrist to look for signs of criminal amnesia
16 when you know that forensic evidence is not consistent
17 with information you're receiving?

18 A. Sure.

19 Q. Why is that important?

20 A. Because you want to, No. 1, rule out
21 malingering. No. 2, you want to look for other possible
22 reasons for amnesia. No. 3, you want to determine why
23 it's not -- why it's not consistent.

24 Q. And on this case you got information that's
25 not consistent with his current memory compared to his

1 previous memory in 1995. Isn't that correct?

2 A. No, it's not correct.

3 Q. Let's assume that he told his lawyer that he
4 shot three times and that he recalled shooting three
5 times---

6 A. Yes.

7 Q. ---at some time, yet later he only tells you
8 that he shot one time---

9 A. No, that's not---

10 Q. ---and that he only shot the girl?

11 A. No, that's not what I -- that's not what I
12 said.

13 Q. He only recalled shooting one time?

14 A. Let me read this so I can be very specific
15 again.

16 Q. Okay.

17 A. He didn't say anything about remembering
18 shooting. He said, "I remember the gun going off. I
19 don't remember pulling the trigger. I only remember --
20 I don't remember the second time. I don't remember some
21 of the shots."

22 Q. "I don't remember some of the shots"?

23 A. Right.

24 Q. Let me ask you. Is he saying that he
25 remembers -- he doesn't remember pulling the trigger

1 the first time, but he does remember something after
2 that, shooting?

3 A. That could well be, but I -- it's -- it's hard
4 for me to speculate.

5 Q. Okay. Did he ever tell you that Kelsey Pierce
6 entered the store and shot either of the victims, Ken
7 Pressley or Kelly Hoffman?

8 A. I don't recall him telling me that.

9 Q. So the only information you got from the
10 defendant was he was the sole shooter, correct?

11 A. Yes.

12 Q. Did you -- did he ever advise you that Kelsey
13 Pierce and he had a discussion about doing anything,
14 other than robbing the place?

15 A. No.

16 Q. So the shooting, as far as you know, was
17 never Kelsey Pierce's idea upon the information that
18 you received from -- from Herman Hughes. Is that
19 correct?

20 A. My understanding was that the shooting was
21 never part of any plan.

22 Q. Did he ever describe to you -- and -- and you
23 were in court when Dr. Beyer was examined -- describe to
24 you any misunderstanding he -- he may have had as to
25 whether Kelly Hoffman could identify him or not, who was

1 the female victim?

2 A. He told me that he did not -- that he did
3 not believe that Kelly Hoffman could identify him,
4 that he knew her, but he did not believe that she knew
5 him.

6 Q. But now you've learned that he may have told
7 his attorney something different more contemporaneous
8 to the incident, that he thought Kelly could identify
9 him based upon a social situation at a friend's house?

10 A. I was aware of the social situation before,
11 and I haven't had a chance to review the deposition,
12 but I didn't -- I did hear what you said in court,
13 yes.

14 Q. Okay, but recently Hughes has never presented
15 that information to you as a reason as to why he shot
16 Kelly. Is that correct?

17 A. That's correct.

18 Q. Okay. In making an analysis on culpability --
19 excuse me -- criminal mental capacity, are reasons why
20 people shoot others relevant to make that determination
21 as to whether an individual even knows the difference
22 between right and wrong or has the capacity to conform
23 their conduct?

24 A. Well, those are two different issues. It
25 really depends. You can have a person that may shoot

1 someone else, and it -- and still believe that it is
2 right. It's really -- it's very specific. You can't
3 make a generalization about that.

4 Q. So, the fact that someone may be trying to
5 shoot a witness, who they fear could identify them, so
6 that they cannot be caught for a crime that they know is
7 wrong, that's irrelevant?

8 A. No. That's not the question that you asked.
9 That's a much different question.

10 Q. How is that question different?

11 A. It's different because in the first question
12 you asked a general right from wrong, conform behavior,
13 and could have -- could, in fact, someone shoot another
14 person and that still be part of right or wrong or
15 conform behavior. If a person thought that someone that
16 they were shooting was the right thing to do, and
17 someone interfered with that right thing to do, they
18 could, in fact, be found in, you know, potentially NGI,
19 so it's a totally different question. Now, if you're
20 becoming more specific in terms of someone shooting the
21 witness, that obviously is someone shooting a witness.
22 That's not a question of where the knowing right or
23 wrong, so they -- they are different questions.

24 Q. Okay. What if somebody remembered or advised
25 you as a psychiatrist that they could remember shooting

1 the person that survived but couldn't recall shooting
2 the person who died? Is that important?

3 A. It could be.

4 Q. Then why would that be important?

5 A. It would depend upon the sequence, No. 1. It
6 would depend upon the sequence. It would depend upon
7 their mental state at that time.

8 Q. It could, also, depend upon whether they're
9 malingering or not. Isn't that correct?

10 A. Could be.

11 Q. Because if they were of the opinion that
12 they recalled shooting the survivor, but somebody else
13 must have shot the other person, they might think that
14 they were less culpable for the particular crime and
15 possibly could not face the death penalty. Isn't that
16 correct?

17 A. There is that potential.

18 Q. That is a secondary gain?

19 A. I'm sorry.

20 Q. Go ahead.

21 A. There is that potential. I think in this
22 particular case it's a bit -- I would not state that
23 given one of the issues that made me consent is that
24 Mr. Hughes had issues with competency, was that he was
25 -- he told me that, aside from believing that he was

1 going to get off, that he did not realize that an eye
2 witness -- an eye witness would be specifically useful
3 in -- in the trial, so that seems to me a little bit
4 inconsistent with the idea that you would kill a
5 witness.

6 Q. Okay. Did you review the -- the notes of Dr.
7 Frierson concerning his competency evaluation, the
8 responses that Mr. Hughes gave to those?

9 A. Yes, I did.

10 Q. Those seem very consistent with competency,
11 don't they?

12 A. I'm not sure what you mean consistent. They
13 are limited in their scope and within their limitations.
14 Yes, they're consistent.

15 Q. It reveals he understands the purpose of the
16 trial?

17 A. Yes.

18 Q. The role of each of the parties that were
19 involved in the trial, correct?

20 A. Yes.

21 Q. What his attorney was supposed to be able to
22 try to do on his behalf. Isn't that correct?

23 A. Well, in terms of Dr. Frierson's notes that's
24 correct. As I say, they're incomplete. Mr. Hughes
25 told me on a number of occasions -- well, not a number

1 but on several occasions -- that he thought that he
2 was going to, as he put it, go home, that he was going
3 to be set free. That certainly doesn't -- certainly is
4 not consistent with someone that competently understands
5 the evidence that was against him. It's, also,
6 interesting to me that when talking with Mr. Hughes, he
7 had no idea what happened to the co-defendants. He
8 didn't know what happened in their trial. He didn't
9 know whether they were convicted. He didn't know what
10 had happened.

11 Q. Which co-defendant are you talking about?

12 A. Mr. Owens, and I believe Mr. Pierce as well.

13 Q. So you're saying in August he had no knowledge
14 of that?

15 A. That was my understanding, yes.

16 Q. He had never expressed that to you? Did
17 you inquire of his current lawyers as to whether that
18 was correct information or not that he was revealing to
19 you?

20 A. No, I did not.

21 Q. Did you do any malingering tests for the
22 defendant?

23 A. I did not do any malingering tests. Dr. Evans
24 through his neuropsychological testing ruled out
25 malingering for me.

1 Q. Don't you usually do a -- a brief malingering
2 test?

3 A. Yeah, and you know me pretty well, don't
4 you? I didn't because of the quality of tests that had
5 already been done.

6 Q. Well, what -- what kind of tests do you
7 usually give for malingering in the other five times
8 you've testified?

9 A. I don't think I've done it in every situation,
10 but I often give them what's called a Rey's Fifteen-Item
11 Memory Test.

12 Q. Okay, and yet you didn't do it in -- in this
13 situation?

14 A. That's correct.

15 Q. Why didn't you do it in this situation?

16 A. Because I had testing from the time he was in
17 the second grade.

18 Q. But did you ever test him about -- he -- he
19 definitely had a secondary gain in these circumstances.
20 Is that not correct?

21 A. That's correct, but the Rey's Fifteen-Item
22 Memory Test is not a test of secondary gain. It's a
23 test of organic impairment that people that malingers
24 often try to show that they are organic. In this
25 particular case it was already clear that he was

1 organically impaired.

2 Q. Before you made that diagnosis. Is that
3 correct? It was already clear to you before you made
4 your diagnosis that he was organically impaired?

5 A. No, but the psychological records from the
6 sixth grade -- the second grade, the sixth grade, made
7 that pretty clear.

8 Q. What other tests are there for malingering?

9 A. There are a number. There are no specific
10 tests for malingering. There are a number of tests that
11 are used to determine malingering. There's the Portland
12 Digit Recognition Test. There's -- there's a number of
13 them.

14 Q. But you chose not to do it?

15 A. Well, no, that's not correct. The testing
16 that was done, both as a child and Dr. Evans' test,
17 ruled out malingering.

18 Q. When he gave his test?

19 A. Correct.

20 Q. But not when you did your analysis, correct?

21 A. That's correct.

22 Q. And malingering can, because of his faking or
23 not, here may be suggesting some memory deficits
24 concerning the event itself, you chose not to delve into
25 that area. Isn't that correct?

1 A. I'm not sure what area you're telling me I
2 chose not to delve into.

3 Q. I have no further questions.

4 THE COURT: Yes, sir.

5 REDIRECT EXAMINATION BY MR. BLUME:

6 Q. You mentioned that one of the tests that
7 is done is the Rey's Fifteen-Item?

8 A. That's correct.

9 Q. And that is the test that Jim Evans
10 did---

11 A. That's correct.

12 Q. ---to determine malingerling, so the test was
13 done in this case?

14 A. That's correct.

15 Q. Now, I want to go over a few -- a few things,
16 so I will start in the order in which they went over
17 them, and it won't take long. On the question of
18 neurological impairment, as I understand it, your
19 determination that Mr. Hughes has brain damage is based
20 on the totality of the circumstances?

21 A. That's correct.

22 Q. And it starts with the psychometric testing
23 done when he was a child and goes on to the present?

24 A. That's correct.

25 Q. And you discussed the various components of

1 that, and I won't go back over it, but there was some
2 discussion of what was done at the Hall Institute. You
3 have reviewed those records. Did they do any
4 neuropsychological testing whatsoever?

5 A. No, they did not.

6 Q. Even any screening?

7 A. No screening tests.

8 Q. Okay. In your opinion is there any question
9 in your mind that Mr. Hughes has a damaged brain?

10 A. Absolutely not.

11 Q. Let me ask you this. There was some
12 discussion about the syphilis, and I understand what
13 you're saying with the congenital syphilis was that the
14 etiology -- in other words, the cause -- of the brain
15 damage in anyone is very difficult?

16 A. That's correct.

17 Q. But one of the leading factors in this case,
18 which could have caused it, is the congenital exposure
19 or essentially the exposure to syphilis when his mother
20 was pregnant?

21 A. That's correct.

22 Q. And based upon that you reviewed some
23 documents, one of which was an affidavit from his
24 mother, which is, as I understand it, is admitted
25 without objection.

1 THE COURT: Is that correct?

2 MR. ZELENKA: That's correct.

3 THE COURT: All right.

4 (Applicant's Exhibit No. 5 admitted into evidence.)

5 REDIRECT EXAMINATION RESUMES BY MR. BLUME:

6 Q. Indicating that she had syphilis during her
7 pregnancy?

8 A. That's correct.

9 THE COURT: What's that marked as? I'm sorry.

10 MR. BLUME: I'm sorry. It's Applicant's
11 Exhibit 5.

12 THE COURT: 5. All right. Thank you.

13 REDIRECT EXAMINATION RESUMES BY MR. BLUME:

14 Q. And another item, which you reviewed, without
15 objection is an affidavit from the woman employed by the
16 Department of Health and Environmental Control, which
17 indicates that the county health department records
18 where she was -- where she went during this time have
19 been destroyed?

20 A. That's correct.

21 THE COURT: Is that now 6?

22 MR. BLUME: Applicant's Exhibit 6.

23 THE COURT: Okay.

24 (Applicant's Exhibit No. 6 admitted into evidence.)

25 REDIRECT EXAMINATION RESUMES BY MR. BLUME:

1 Q. And, as I understand it, Mr. Hughes' birth
2 records don't indicate that he was tested?

3 A. That's correct.

4 Q. So, and then on that same point we have, in
5 fact, he was tested, and he tested reactive, I guess.
6 That's the RPR test?

7 A. Yes.

8 Q. That indicates he had been exposed to
9 syphilis?

10 A. That's correct.

11 Q. And that was in 1993 in the Job Corps?

12 A. That's correct.

13 Q. And then again at Hall?

14 A. That's correct.

15 Q. In 1995?

16 A. Yes.

17 Q. Several years apart, and in '93 when he was
18 tested at the Job Corps, his titer level was 1.8?

19 A. That's one -- one to eight.

20 Q. One to eight?

21 A. Right.

22 Q. And the same in '95?

23 A. That's correct.

24 Q. Now, as I understand it, what significance of
25 this, one of them, the RPR just means have you been

1 exposed to syphilis?

2 A. It's -- it's -- it's actually have you been
3 exposed to the -- to what's called the treponema virus,
4 one of which is syphilis.

5 Q. And that is different from the titer level
6 which tells you something about essentially how
7 infected---

8 A. That's correct.

9 Q. In general terms?

10 A. That's correct.

11 Q. And one to eight or 1:8 is a low level?

12 A. That's correct.

13 Q. As I understand what you were attempting to
14 say is the fact that it was 1:8 in '93 and 1:8 in '95
15 even though it was treated in '93 is an indication that
16 this is some long-standing chronic level?

17 A. That's correct.

18 Q. And you would expect if he had been treated in
19 '93, that it would have gone down?

20 A. If it -- if it had been acute and acquired,
21 that's correct.

22 Q. Which is often the case?

23 A. Yes.

24 Q. But people with -- who have been exposed to
25 syphilis in utero often show this sort of---

1 A. That's absolutely correct.

2 Q. But again it's impossible to tell exactly what
3 caused neurological impairment?

4 A. Well, Mr. Blume, there's no way that given
5 this particular history that we can tell what caused it,
6 but there's no question that it's there, and there's no
7 question that it's been there---

8 Q. And certainly it is not a healthy thing for
9 any fetus---

10 A. No, it isn't.

11 Q. ---to have a mother that has syphilis---

12 A. That's correct.

13 Q. ---when you're in the womb, and you certainly
14 would have expected it would have enhanced---

15 A. That's correct.

16 Q. ---his brain or his development in any way?

17 A. Yes.

18 Q. Now, there were some questions about conduct
19 disorder, and I don't really want to go through. I just
20 want to ask you sort of two questions about it. As I
21 understand the definition of conduct disorder from the
22 DSM4, it talks about a repetitive and persistent pattern
23 of behavior. Is that---

24 A. That's correct.

25 Q. So, for example, a single incident of truancy

1 or something like that wouldn't necessarily count in the
2 category?

3 A. That's correct.

4 Q. In addition, as I understand, the DSM4, in
5 addition to looking at did a specific action happen, did
6 someone do it, it, also -- one of the things that, as I
7 understand, DSM4 cautions about is that you want to know
8 why it happened?

9 A. Exactly.

10 Q. And if there's some environmental factor which
11 goes into it, which is relevant?

12 A. That's correct.

13 Q. And, also, too, if -- if there is some other,
14 for example, medical condition which, also, causes the
15 behavior, that's a factor which---

16 A. You have to take that -- you have to take that
17 -- I'm sorry -- I didn't mean to -- you have to take
18 those into consideration. If it's---

19 Q. Now, on the question -- there's been a good
20 deal of discussion today about what Herman has said
21 happens -- has happened and happened in this event, but
22 one thing, as I understand it, what you're saying is
23 it's difficult for Mr. Hughes in some way to say what
24 exactly he recalls happening versus what he's heard and
25 other people have said happened?

1 A. That's correct.

2 Q. And one of the things that you were trying to
3 get at is to differentiate between those two?

4 A. That's correct.

5 Q. In your experience as a forensic psychiatrist
6 is it uncommon for people, especially limited -- people
7 with limited skills be able to really articulate exactly
8 what happened?

9 A. Well, I think, particularly with the type
10 of skill limitations and cognitive limitations that
11 Mr. Hughes has, yes.

12 Q. And based upon your clinical experience
13 and judgment, was it your opinion that Mr. Hughes
14 was attempting to avoid responsibility for what
15 happened?

16 A. No.

17 Q. He did admit being -- knowing there was a
18 robbery---

19 A. Right.

20 Q. ---going to happen, going in the store with
21 the gun?

22 A. Right.

23 Q. He did not deny shooting?

24 A. That's correct.

25 Q. Is that recollection of events in your

1 experience consistent with criminal amnesia?

2 A. No, it's not.

3 Q. Is criminal amnesia usually when someone
4 says, "Oh, I blacked out. I don't know what happened"?

5 A. Well, it certainly is consistent with not
6 remembering being there or not remembering what
7 occurred, not remembering why you were there. It's
8 inconsistent with amnesia.

9 Q. And in this case Mr. Hughes did none of those
10 things?

11 A. That's correct.

12 Q. In your opinion is he malingering?

13 A. No.

14 Q. Was he malingering when he was eight years
15 old, and they gave him an IQ test, and it said it was
16 80---

17 A. No.

18 Q. ---o you think? What about in 1991 when he
19 was thirteen?

20 A. No.

21 Q. And they had the mistakes on the Bender?

22 A. No.

23 Q. In your opinion was he malingering then?

24 A. No.

25 Q. What about in 1995? The Hall Institute didn't

1 note any malingering on the psychological test?

2 A. No, they did not.

3 Q. Thank you.

4 THE COURT: Anything further?

5 MR. ZELENKA: Nothing, Your Honor.

6 THE COURT: All right. You may step down.

7 MR. BLUME: I would ask that Dr. Woods be
8 excused.

9 THE COURT: Any objection?

10 MR. ZELENKA: No objection.

11 THE COURT: All right. You're free to leave,
12 sir.

13 THE WITNESS: Thank you, Your Honor.

14 MR. BLUME: Thank you, Your Honor.

15 THE COURT: Yes, sir.

16

17 THE COURT: All right. I think it's late
18 in the evening, so I doubt if you will be calling
19 another witness at this time, but we do have -- we
20 do have some motions, and maybe we can get through
21 some of those before we call it an evening.

22 MS. WILKINS: We have a few things,
23 Your Honor. One thing, if Mr. Zelenka's ready to
24 start---

25

1 MR. ZELENKA: I can get -- which -- which
2 one?

3 MS. WILKINS: We're going to start with the
4 pro hac vice. Just to put it on the record, you already
5 mentioned that -- I'll pass up the pro hac vice motion,
6 the order for you to sign, and we've discussed that with
7 Mr. Hughes and gotten his consent for it.

8 THE COURT: Very good. All right.

9 MS. WILKINS: Two other motions, and we have
10 some points of disagreement, some points of agreement
11 on.

12 The first is our notice of intent to rely
13 upon depositions and affidavits. As I understand,
14 there's about -- I'm not going to remember the number
15 about the affidavits, but Mr. Zelenka in the attorney
16 general's office had consented to rely on all but
17 three, essentially two psychiatrists, Dr. Harold Morgan
18 and Dr. John Dewitt -- Dr. Harold Morgan's affidavit,
19 Dr. John Dewitt's affidavit, and then an affidavit
20 by Kelsey Pierce, and I want to make clear something,
21 I think, there may have been a misapprehension
22 about.

23 We are certainly not contending, as may have
24 been suggested in his pleading, that he doesn't have
25 the right to call these witnesses. He is more than free

1 to call these witnesses, and that's not a problem at
2 all.

3 Basically what we've done is we've given him
4 the direct exam in advance, admittedly, the Pierce exam
5 one day -- last Friday; the other two, Dewitt a week,
6 and the other was one of the thirty-one pages I tried to
7 fax Wednesday. It ultimately didn't get to him till
8 Thursday.

9 He suggests in the alternative that these be
10 done by deposition. We would say he's certainly free to
11 call these witnesses, but we're willing to have
12 depositions if -- if that's what he'd like, hold the
13 record open and just do it that way.

14 Dr. Morgan and Dr. Dewitt especially are
15 pretty minor really. They just make a few minor points
16 about their expertise in child psychology, some points
17 like that.

18 The statute does contemplate your allowing
19 them in, if you wish though.

20 THE COURT: It's two psychiatrists, and then
21 who's the other?

22 MS. WILKINS: Kelsey Pierce was the co-
23 defendant.

24 THE COURT: All right. Okay. Now I see
25 that.

1 MR. ZELENKA: Mr. Pierce took the Fifth
2 during the first trial.

3 THE COURT: All right. Let me hear
4 from you. I'm looking at this as well, your
5 response.

6 MR. ZELENKA: Judge, Your Honor, it's
7 our position that simply the law does not contem-
8 plate this -- what I would suggest is a one-sided
9 presentation.

10 Admittedly, Section 17-27-90, I believe,
11 allows for affidavits, depositions, and other testimony
12 to be taken, but in this situation I don't think it
13 contemplates affidavits coming in over the objection
14 of the other side.

15 I think the rules of evidence are plain as
16 those rules of depositions that, you know, the
17 plaintiffs and a party asks non-leading questions to
18 test the credibility, reveal the credibility to the
19 Court, and then the -- the other side is allowed to
20 cross-examine those individuals concerning the
21 credibility. That's not what these affidavits are
22 doing.

23 These affidavits are just putting in final
24 conclusions without any basis for that, without any
25 understanding what information revealed those

1 conclusions, and then just saying, "Well, State, if you
2 want to call this individual and get them there to
3 testify, you can do so."

4 The test of credibility is one that, I
5 think, the law is clear on how evidence should be
6 presented.

7 I've cited the rules, both the civil rules
8 and the rules of evidence in our matter, before Your
9 Honor, and in those witnesses, particularly a witness,
10 Kelsey Pierce, who refused to take the witness stand
11 at the time of the first trial is making certain
12 statements there that are inconsistent with testimony
13 that was presented at trial albeit asserting that
14 another witness committed perjury at the time of
15 trial.

16 I think it's inherent that that information
17 before it's accepted into evidence takes the test of
18 credibility, we see him raise his right hand, we hear
19 the oath being taken, as most notaries are responsible
20 to do, and allows you as a finder of fact to make that
21 determination.

22 To me, the depositions may, in fact, be
23 different because depositions allow for there to be a
24 confrontation or allow the State the opportunity to do
25 so.

1 I don't think that burden rests on a Thursday
2 or Friday afternoon before a trial is to begin to make
3 that determination as to whether we accept or should
4 require an individual to come in and testify, and under
5 these situations we would assert that it's inherent
6 before that affidavit be presented, which strikes at the
7 heart of the criminal justice process by asserting that
8 witnesses, who identify what occurred in the particular
9 event, that that individual present themselves to you,
10 allow for them to take the witness stand, should they
11 choose to do so, to take the Fifth, if they choose to
12 do so.

13 That's a matter for, I think, this courtroom
14 and this Court to decide, not a matter between the
15 defendant, his counsel, and that individual on a
16 one-by-one basis, and that's what they're trying to
17 do in this situation---

18 MS. WILKINS: I would object to that---

19 MR. ZELENKA: ---particularly with
20 Mr. Pierce.

21 MS. WILKINS: ---suggesting what we're trying
22 to do. We have kept it completely open for him to
23 call him, and, I might add, some of what he said was
24 factually inaccurate.

25 He had notice of Mr. Pierce's statement, not

1 full notice. About a week and a half to two weeks ago
2 we gave him a declaration of Mr. Pierce's statement that
3 Henry Daniel Owens committed perjury at Herman Hughes'
4 trial. He had that.

5 Admittedly, that wasn't a sworn statement, but
6 he certainly had notice of that.

7 THE COURT: But---

8 MS. WILKINS: I don't mind having a
9 deposition. I don't mind any of that, but he certainly
10 had notice of that.

11 THE COURT: We're definitely going to have to
12 do a deposition under this. Clearly there's been prior
13 orders that indicated that if there's any amendment,
14 there would be time for the discovery, and this, it
15 simply didn't allow for it under these circumstances,
16 and it's most appropriate that depositions be taken of
17 these individuals---

18 MS. WILKINS: That's fine.

19 THE COURT: ---de bene esse. We'll just --
20 we'll handle it in that fashion.

21 MR. BLUME: That's fine, Your Honor. I think
22 what Ms. Wilkins was trying to correct was, as you will
23 remember, in the hearing we did indicate that we were
24 going to proceed in this way with a number of witnesses,
25 in part to see if there were some issues which could be

1 streamlined---

2 THE COURT: I understand.

3 MR. BLUME: ---and not handled---

4 THE COURT: I recall.

5 MR. BLUME: ---and, you know, so we're --

6 we're completely fine with the procedure.

7 MS. WILKINS: Yeah, I mean, we don't -- we're
8 not trying to deny him any opportunity to cross-
9 examination. This was for judicial economy to expedite
10 the proceedings basically.

11 THE COURT: I understand, and there's been
12 great co-operation on the part of both the applicant
13 and -- and Mr. Zelenka's office as well in trying to
14 work through that, as evidenced by only disagreeing
15 to these -- these three and requiring the -- the
16 deposition.

17 MS. WILKINS: True enough, and, as I
18 understand, just to have it on the record, we don't
19 disagree about any of the depositions being entered
20 with the understanding that we're not offering Phil
21 Newsom's deposition and subject to the objections you've
22 made.

23 MR. ZELENKA: Yeah, subject to the objections
24 and not letting them come in as stipulated facts.

25 THE COURT: All right. All right. Very

1 good.

2 MS. WILKINS: And the second matter is, and I
3 think we mentioned this on the conference call as well,
4 the question of the juror's proffered testimony and the
5 question of whether that amounts to impeaching the
6 jury's verdict.

7 Our position on the matter is that one of the
8 allegations in our PCR application, and I believe it was
9 actually in both the second and the third amended
10 application -- at this point I don't remember whether it
11 was in the first amended application -- was that trial
12 counsel conducted an inadequate voir dire.

13 What these aff- -- not affidavits -- I'm sorry
14 -- what this testimony would go to show would not be
15 what the jurors were thinking at the time necessarily as
16 such for importance for that purpose but to show that
17 the trial lawyer conducted an inadequate voir dire such
18 that the jurors didn't fully understand what their
19 duties were, and that's the purpose for which we're
20 offering that is simply to show prejudice under
21 Strickland.

22 THE COURT: Yes, sir.

23 MR. ZELENKA: Your Honor, we had filed a --
24 on October 8, 1999, a response in opposition to the
25 admission of juror testimony. Have you seen a copy

1 of that?

2 THE COURT: Yes, I have.

3 MR. ZELENKA: I think that under 606B,
4 which we're fully relying upon, first off, we don't
5 know what these jurors are going to say. This is,
6 once again, one of those situations. I had some
7 indication that they were going to talk about how
8 they thought the instructions that were given at
9 the conclusion of the trial allowed them to make
10 a determination.

11 That's my assumption based upon what
12 their motion was, which was at the time they were
13 jurors at the applicant's trial they believed that
14 in the event they found the applicant guilty and
15 found one aggravating circumstance to be present
16 beyond a reasonable doubt, a death sentence was
17 mandatory.

18 THE COURT: And I had read that, and I
19 had that same impression, that it would deal with
20 what -- exactly what they were charged.

21 MR. ZELENKA: Yes.

22 THE COURT: We---

23 MR. ZELENKA: And under that circumstance,
24 I think, 606B clearly goes to it. I think the --
25 the case law that I cited from other jurisdictions,

1 which has specifically addressed it, this is a
2 deliberative determination, and it's, also, asking
3 -- putting the jurors in the juror system basically
4 on trial again to come back and years later and say,
5 "Well, what did you think was going to happen or should
6 have happened or may have happened?" and -- and that's
7 clearly what 606B is trying to prevent, not allowing
8 that, testing both the memories as well as some
9 subsequent credibility of jurors, which impacts greatly
10 on the justice system, both in the criminal cases as
11 well as civil cases, when jurors would be put through
12 that type of -- I can't say harassment because under
13 these circumstances it would be legal, but to some
14 extent it would be legal harassment if this -- this
15 is come to allow that -- that we inject ourselves into
16 those jury deliberations to the extent that we're asking
17 them, "What did you think?"

18 I understand they're citing a Law Review
19 article where an individual was allowed post hoc jury
20 deliberations, the ability to ask some leading questions
21 of a juror and to make determinations based upon that,
22 but, again, when the jurors came out of that jury room
23 with the jury instructions that were given, and I've
24 noted the parts of the record, both in the written
25 instructions as well as the oral instructions, the

1 jurors were told something totally contradictory to
2 what that proffer asserts, and I think under these
3 circumstances, which may not be unique, if you take
4 this step, that this should not be allowed, and 606B
5 is directly to prevent it.

6 THE COURT: And the Court will make the
7 assumption that the jurors listened to that jury charge
8 and applied it and would be more concerned with hearing
9 from a jury if there had been any threats against their
10 lives or anything of that nature but not of how they
11 might have interpreted or applied the law.

12 We assume at -- at that level, if they have
13 heard it, it has been charged to them correctly, that it
14 was, also, applied correctly, so is that the angle, is
15 that the focus or---

16 MS. WILKINS: The memo does bring that up. I
17 think we're primarily interested in it -- the memo does
18 say that. I will acknowledge that. The memo certainly
19 says that.

20 Our primary focus is not really to say the
21 jurors misunderstood the instructions. Our focus is to
22 say that trial counsel during voir dire -- part of
23 capital voir dire in a case inevitably -- mitigation and
24 aggravation are big words to the ordinary person -- and
25 part of the job of competent defense counsel is to make

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1 sure the jurors seated on the jury actually understand
2 that because, though jurors are presumed to follow
3 instructions, instructions are confusing, and empirical
4 studies have supported that jurors are very confused
5 about instructions in capital cases, and so what we're
6 going to show is ineffectiveness and prejudice through
7 the juror testimony. That's the primary focus of what
8 we'd like to do there, and, I might add, there's some
9 precedent for that in the Hunter case.

10 It was a slightly different situation because
11 it involved some coercions by other jurors, but it
12 certainly got to why somebody came to the conclusion
13 they came to.

14 THE COURT: And that's exactly, I believe, why
15 -- what Rule 606 is -- is designed to exclude, to get
16 behind their thought processes of -- let me take -- I'll
17 be glad to take another look at this this evening, as
18 well as read the case that I hope I'll be able to pull
19 and rule first thing in the morning before we start back
20 with testimony.

21 Is there anything further?

22 MR. BLUME: No, Your Honor. As I understand
23 it, just -- there's no objection to the Pierce trial
24 being made a part of the record.

25 MR. ZELENKA: Correct, yes. That's in my

1 written response.

2 MR. BLUME: Okay.

3 MR. ZELENSKA: No objection to the Pierce---

4 MR. BLUME: And I had brought a---

5 MR. ZELENSKA: ---trial being made part of the
6 record or the guilty plea of Henry Daniel Owens.

7 THE COURT: All right.

8 MR. BLUME: So we will just lodge those with
9 the court reporter to be made part of the record.

10 THE COURT: Very good. All right. Thank
11 you.

12 MR. BLUME: What time in the morning, Your
13 Honor?

14 THE COURT: How early would you like to start
15 tomorrow morning?

16 MR. ZELENSKA: It's your witnesses that you've
17 got to get here.

18 MR. BLUME: 9:30, is that agreeable?

19 THE COURT: 9:30 will be fine. All right.
20 See you back here at 9:30. If there's anything that you
21 need to see me about prior to, I'll be here a bit
22 earlier.

23 MR. BLUME: Thank you, Your Honor.

24 MS. WILKINS: Thank you.

25 (Applicant's Exhibit Nos. 7 and 8 admitted into evidence.)

1 (WHEREUPON, THE HEARING IS RECESSED FOR THE DAY.)

2
3 (WHEREUPON, THE HEARING RESUMES ON OCTOBER 12, 1999.)

4 MR. BLUME: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. BLUME: You remember this af- -- yesterday
7 afternoon we moved the admission of Sheri Johnson pro
8 hac vice. It was without objection, and Professor
9 Johnson is here, and she will call the applicant's first
10 witness for the morning.

11 THE COURT: All right. Welcome, Ms.
12 Johnson.

13 MR. BLUME: The applicant will call---

14 MS. JOHNSON: Muna Ndulo.

15 MUNA NDULO, BEING DULY
16 SWORN, TESTIFIES AS FOLLOWS:

17 THE CLERK: Would you state your name and
18 spell your last name?

19 THE WITNESS: My name is Muna, M-u-n-a,
20 and the second name is N-d-u-l-o.

21 THE COURT: Thank you, sir. Yes, ma'am.
22 DIRECT EXAMINATION BY MS. JOHNSON:

23 Q. Professor Ndulo, would you summarize your
24 edu- -- would you summarize your education for the
25 Court?

1 A. I did my first law degree at the University
2 of Zambia. I graduated 1970. Then I did an LL.M. at
3 Harvard Law School, graduated 1971, and then I did a
4 Doctor of Philosophy in Law at Oxford University,
5 Trinity College, graduated in 1977, and I'm, also, a
6 member of the Zambian Bar.

7 Q. And how are you presently employed?

8 A. Presently I am a Visiting Professor of Law
9 at Cornell Law School.

10 Q. And how long have you been employed
11 there?

12 A. I've been teaching at Cornell since 1996,
13 January 1996, but I had been at Cornell, also, between
14 1984 and 1985.

15 Q. And what are your areas of expertise?

16 A. My areas of expertise are International Human
17 Rights Law. I, also, teach Trade and Investment Law,
18 and I teach Comparative Law as well.

19 Q. And in what areas have you written?

20 A. I have published in the areas of United
21 Nations law, peacekeeping, human rights, and trade and
22 comparative law as well.

23 Q. And approximately how many books and articles
24 have you written related -- relating to international
25 law?

1 A. Relating to international law I have published
2 two books and up to twelve articles.

3 Q. And what other principal academic positions
4 have you held?

5 A. I was Professor of Law at the University of
6 Zambia and then at Cornell now, but I -- I was, also,
7 Dean of the Faculty of Law from 1977 to 1982 at the
8 University of Zambia. I've, also, taught at Bayreuth
9 University in Germany, Graz University in Austria, and,
10 also, at the Institute of International Development in
11 Italy.

12 Q. And have you had a position as External
13 Examiner for other law schools?

14 A. Yes, I've done that. I have examined in
15 several commonwealth law schools, in Sierra and in
16 Kenya, Ethiopia, Lasotho, and several others.

17 Q. Can you briefly describe your United Nations
18 related activities?

19 A. I joined the United Nations in 1986, and
20 I remained there for ten years. During that ten years
21 I worked for the United Nations Commission on Inter-
22 national Trade Law. My principal work there involved
23 developing conventions, international conventions,
24 elaborating conventions, and we -- I worked as secretary
25 to many working groups that elaborated U.N. conventions.

1 Also, between 1992 and 1994 I was a candidate to
2 peacekeeping operations in South Africa. I was Senior
3 Political Advisor to the Undersecretary General for
4 South Africa. That is the period during the transition
5 to democratic rule in South Africa. I've, also, served
6 as -- more recently, I was in East Timor. I was Chief
7 Legal Advisor to the U.N. mission in East Timor, which
8 organized the referendum to implement the right to (one
9 word inaudible) determination for the people of East
10 Timor. Just completed that assignment on the 30th of
11 August, this year.

12 Q. And have you had other positions related to
13 international law?

14 A. Yes. I'm Vice President of the Associa- --
15 the Association of International Lawyers, Africa, and
16 then, also, I'm an editor on the international yearbook
17 of international law for Africa, too.

18 Q. Are there any other professional associations
19 that are relevant to international law?

20 A. Yes. In particular, human rights law. I'm
21 an advisor on the Human Rights Watch Council of
22 Advisors. I, also, work as an -- as an advisor on
23 AFRONET. It's a -- another NGO, which deals with
24 human rights issues.

25 MS. JOHNSON: Your Honor, I offer Professor

1 Ndulo as an expert in international and comparative
2 law.

3 THE COURT: Yes, sir.

4 MR. ZELENKA: Your Honor, at this time
5 I would move that -- to strike Mr. Ndulo's testimony.

6 The issues before this Court are whether a
7 South Carolina conviction complied with South Carolina
8 law.

9 This Court has jurisdiction pursuant to
10 17-27-10 to determine whether his conviction was a
11 violation of the United States Constitution, the South
12 Carolina Constitution, or state laws.

13 The issue as to whether this Court has
14 jurisdiction to determine the propriety or the existence
15 of international treaties, I believe, is beyond the
16 scope of the Court of Common Pleas in South Carolina.

17 As I understand, his testimony will go towards
18 that area. He has not expressed any expertise or
19 understanding of United States law or South Carolina
20 law.

21 That would be my first objection to whether
22 we even need to qualify him as an expert in an area
23 that I deem to be irrelevant.

24 Second, I would assert that whether there's
25 no need for this Court to take testimony from an

1 individual on the existence of law. That is a matter
2 for this Court to decide. It's not a matter for a
3 witness to give his interpretation of the law to the
4 Court.

5 That's similar in a tort case by putting
6 up experts to define the law of negligence to the
7 judge.

8 You are the finder of fact, but you're,
9 also, the finder of law, and I would submit that it
10 would be inappropriate for there to be an expert in
11 a case to tell you what the law is. That is for you
12 to tell us what the law is and for us to argue
13 essentially what the law is, but if they want to put
14 in the existence of treaties themselves, we don't have
15 any objection to this Court taking judicial notice of
16 treaties.

17 As far as another lawyer interpreting what
18 that law should be to you, I think that's a job for the
19 lawyers and the advocates in this particular case, and
20 there's no need for there to be an expert to present
21 that testimony.

22 We don't disagree on -- on those
23 qualifications that he has, but we would question
24 whether this Court should go any further into that
25 matter.

1 THE COURT: All right. Yes, sir. Yes,
2 ma'am. Response?

3 MS. JOHNSON: I have two things. First
4 of all, with respect to the question of whether
5 international law is relevant to and -- and admissible
6 in South Carolina courts, the United States Supreme
7 Court has said since 1900 that both customary
8 international law and the law of treaties are part of
9 the common law of the United States that must be applied
10 by state courts and by federal courts as well, so it
11 would seem to me that as -- as federal law, this Court
12 is obligated to -- to consider those facts in reaching
13 a decision; and indeed, as Your Honor probably knows,
14 the Court re- -- has recently granted certiorari in
15 the Domingos case to determine whether or not or --
16 and in what ways treaties and customary international
17 law do affect this issue of the -- of the execution
18 of people for offenses committed before the age of
19 eighteen.

20 With respect to the second question, which is
21 the need for expert testimony, of course, if we were
22 offering an expert on -- on some aspect of South
23 Carolina law or even some aspect of federal law, that
24 would be inappropriate. That's not foreign law, and,
25 therefore, it's not necessary for this Court to have

1 any additional information, but what our expert proposes
2 to talk about is international law, which is another
3 form of law.

4 I'm actually not going to ask him to speak
5 about the effect of international law on South Carolina
6 law, which, again, would probably be an issue that this
7 Court has expertise on, but merely what the content of
8 international law is, which is a foreign body of law,
9 which American courts and judges generally do not have
10 familiarity with, and which an expert might be helpful
11 in explaining.

12 THE COURT: Anything further? Response?

13 MR. ZELENKA: Nothing further, Your Honor.
14 I mean, we're sitting here in a post-conviction relief
15 setting. I think that's a little different than a
16 setting -- the -- the statutes do not require the Court
17 of Common Pleas to establish international law. It
18 doesn't have the right to enforce it or not enforce
19 it.

20 That's for another forum to do, and I would
21 submit that that's what makes this irrelevant for these
22 proceedings.

23 THE COURT: All right.

24 MR. BLUME: Your Honor, if I could add just
25 one point.

1 THE COURT: Yes, sir.

2 MR. BLUME: I'm sorry to jump in here,
3 but, in addition to the things that Professor Johnson
4 said, which I agree with, there, also, is in the
5 application for post-conviction relief a state
6 constitutional challenge to the execution of a
7 sixteen-year-old, which has never been addressed by
8 the State Supreme Court, and if you look at our
9 state constitution, we have a cruel or unusual
10 punishment clause, which is essentially equivalent
11 to the Eighth Amendment clause, but one of the things
12 our State Supreme Court has said in construing what
13 that constitutional provisions mean and in determining
14 what the norms are, one thing that a court can consider
15 is international custom law, international law, and
16 that at least is relevant.

17 It's not binding in determining what the state
18 constitution means, but it is informative, so in that
19 regard, for an additional reason, at least some context
20 for the international treaties, how juveniles are
21 treated under international law, is relevant not only to
22 the treaty claim currently pending before the Supreme
23 Court in Domingos versus Nevada, which is in this case
24 but, also, our state constitutional challenge to
25 execution of sixteen-year-olds.

1 THE COURT: All right, but in essence
2 Mr. Zelenka's correct. He is going to be educating
3 the Court as to the law when you could just supply
4 the Court with any international law that you would
5 like for it to consider. Is that correct?

6 MS. JOHNSON: Not entirely, Your Honor.
7 With re- -- certainly the treaties we -- we're going
8 to introduce the treaties through him, and -- and,
9 in fact, we wouldn't have to use him to introduce
10 that treaty, but there are, also, other comments on
11 the treaties. That, too, could be introduced simply
12 without that testimony, but with respect to customary
13 law you really need an expert because there's not
14 any body that declares solely what customary law
15 is; particularly, jus cogens law is something
16 that develops over time and is the subject of expert
17 opinion.

18 THE COURT: I can't imagine though in
19 considering the -- the state constitution, which are
20 the factors that -- that I would be considering, that
21 -- that it would be envisioned that I would have to
22 have some knowledge of the customary law.

23 I -- I can understand the possibility of the
24 international covenants, the -- the treaties, but I find
25 it difficult that we would have to bring in at -- at

1 this level, even with this argument that's being made,
2 any law that is not written or could not be supplied to
3 the Court in that fashion.

4 In other words, what I could be getting from
5 this expert is an interpretation of the law, and --
6 and I don't know. I don't know that.

7 It appears that's what I would be getting
8 is a -- an interpretation of the law, and I believe
9 that's something that -- that the Court would need
10 to do.

11 MS. JOHNSON: Well, with respect to the
12 treaties, I think that that's correct although it's
13 certainly an efficient way to lay out what the treaty
14 law is.

15 Also, I think their expert opinion on what
16 the -- what the effect of a -- a reservation to a
17 treaty, which is what is present here, is not simply
18 contained in the treaty.

19 It is a matter of expertise from international
20 law, but with respect to the -- the second part, I
21 think customary law could be relevant to the Court's
22 determination of the South Carolina provision.

23 There's -- in a way, the South Carolina
24 Supreme Court has not given us much guidance about
25 what constitutes reasons to depart from the Supreme

1 Court law, but certainly it could be, but the more
2 important reason for hearing it is that it is an
3 independent basis that it violates international
4 law.

5 You can violate that either by violating
6 a treaty or by violating customary international
7 law.

8 THE COURT: All right. Mr. Zelenka, I see
9 you're wanting to stand.

10 MR. ZELENKA: I mean, I find her comments
11 interesting, but, again, the critical point is whether
12 he is going to present something other than the law to
13 you, and I think that is a matter that -- that that can
14 be presented through a more appropriate source, and
15 that's to present the documents themselves, and then
16 it's up to -- to the judge to interpret that based
17 upon our arguments, but it's not up to a witness to
18 then basically argue the law to the judge, which is
19 what I understand you're asking to do.

20 Further, the -- the South Carolina Supreme
21 Court in State versus Conyers, a 1997 decision,
22 recognized that under the Eighth Amendment to the
23 federal constitution, relying on Stanford versus
24 Kentucky, that the death sentence to an individual
25 who is under the age of eighteen, as a matter of

1 South Carolina law, did not violate the federal
2 constitution.

3 It, also, did a proportionality analysis
4 of that individual and found that under the facts and
5 circumstances of that case it did not violate the
6 constitution.

7 Approximately now twelve years ago the first
8 time I became involved in -- in looking at international
9 law was the case that Mr. Blume was representing James
10 Terry Roche in.

11 That case went up to Fourth Circuit Court of
12 Appeals, and in that Fourth Circuit Court of Appeals
13 decision, although it wasn't the same treaty that
14 they're discussing now, that conviction, that death
15 sentence, was upheld.

16 Mr. Roche was then executed under those
17 circumstances, and that was a case that Mr. Blume
18 was involved in back in 1985 and 1986.

19 The issues, again, that are before this
20 Court are purely one of legal nature. They're aren't
21 one of -- of factual nature.

22 There is a recent decision, also, out
23 of the -- it's not recent, but it's out of the Fifth
24 Circuit Court of Appeals, Celestine versus Butler, and
25 I think that -- this is fairly probative. It's cited

1 at 823 Fed2d 74, 79 through 80, particularly.

2 In that case Fifth Circuit Court of Appeals
3 rejected a very similar argument that's being presented
4 here, and it said, "How these issues are being
5 determined is settled under American constitutional
6 law by the single argument as advanced proving that
7 the United States in these international agreements
8 agreed to provide additional factors for decision or
9 to modify the decisional factors required by the United
10 States Constitution as interpreted by the Supreme
11 Court. This argument is ingenuous, but its content
12 is wholly lacking," and -- and what we're looking at
13 here, as I understand it, is, if you're looking at
14 the ineffective assistance of counsel situation as
15 to whether Phil Newsom when he initially tried the
16 case was acting as a reasonable lawyer, not as an
17 extraordinary lawyer, in making a determination or
18 not presenting or failing to present issues of
19 international law to Judge Cottingham at the time
20 of the -- the original trial.

21 It is clearly under the -- basically the
22 breadth of the law of South Carolina that existed back
23 then and exists up to today, there has been no showing
24 that counsel could not have been reasonable in failing
25 to do that, and you have to look at it under the

1 circumstances of that particular time when this
2 particular case was tried.

3 If they want to -- the Court's indulgence one
4 moment.

5 And again, looking at Rule 702, Testimony by
6 Experts, "If scientific, technical, or other specialized
7 knowledge will assist the trier of fact to understand
8 the evidence or determine a fact in issue, a witness
9 qualified as an expert by knowledge skill, experience,
10 training, or education may testify thereto in the form
11 of an opinion or otherwise."

12 This is a matter of law. It's not a matter
13 of fact, and for that reason we would ask that he
14 not be allowed to testify on those issues in this
15 matter.

16 THE COURT: All right.

17 MR. BLUME: Your Honor, can I make a few quick
18 comments---

19 THE COURT: Certainly.

20 MR. BLUME: ---just to -- I mean, and then
21 maybe propose a solution on this so we don't spend all
22 morning on it talking about this.

23 Just to clarify a few things, part of the
24 whole issue of the treatment of sixteen-year-olds is it
25 evolving and does it change.

1 It doesn't change over the state constitution
2 or the federal constitution, so one thing, you know,
3 regardless of what happened in Conyers -- and that's
4 really not an accurate recitation of it -- Conyers did
5 not deal with a state constitutional challenge to the
6 execution of sixteen-year-olds in South Carolina, but
7 the law is moving in this area, and that's an important
8 thing to look at.

9 The Florida Supreme Court in the last month
10 has held that the execution of a sixteen-year-old
11 violates the Florida Constitution, so certainly it seems
12 to me this is an issue which is relevant and one which
13 the Court can consider.

14 There, also, in addition, the fifth circuit
15 case that he mentions is interesting, but the -- the
16 difficulty with it is the United States Supreme Court
17 currently has a case before it, Domingos versus Nevada,
18 which raises the issues of the treaty and the effects
19 of the treaty on federal courts and this supremacy
20 clause.

21 In the Roche case that he mentioned it's
22 true that is what the fourth circuit held, but the
23 Interamerican Commission on Human Rights found that
24 it was a violation of international human rights law to
25 actually execute Mr. Roche, and there have been other

1 cases since then, which is relevant again to the
2 assessment of not only the international claim but the
3 state constitutional challenge;

4 And then, regardless of the ineffective
5 assistance of counsel claim, which he mentioned, there
6 is a substantive claim in the application, which
7 says that it would violate international law and
8 the state constitution to execute someone who is
9 sixteen.

10 If that is upheld by the State Supreme Court
11 or some other court, regardless of what counsel should
12 have done, this death sentence would be void outside of
13 the context of ineffective assistance.

14 I mean, they're not going to say, "Yes, you
15 can't execute sixteen-year-olds, but we're going to let
16 you execute this one last one. Because his lawyer
17 didn't object, we're going to let you have one last
18 cruel and unusual punishment before the law goes into
19 effect."

20 I mean, that's absurd, but, I mean, the bottom
21 line is is that regardless of professor's -- professor's
22 testimony, it's surely relevant. It's something the
23 Court can consider. It's not binding on you.

24 No one is going to say that what he says ties
25 your hands, and you have to follow it, but certainly in

1 this area it's hard to see how anyone is prejudiced from
2 hearing what one of the leading people in the world and
3 with specialized knowledge on this field can say. I
4 can't possibly see the harm in it.

5 THE COURT: All right. What, besides the
6 treaty, is being offered?

7 MS. JOHNSON: I will offer the treaty, but
8 also to---

9 THE COURT: Customary norms?

10 MS. JOHNSON: ---customary norms and juis
11 gogens norms, which are norms that cannot be violated
12 even despite the---

13 THE COURT: All right. In -- in regards to
14 the treaties, just submit the treaties. Just -- just
15 simply -- I have this. Is this it?

16 MS. JOHNSON: That's one of the treaties I
17 would have him refer -- well, I would actually have
18 him refer to the other treaties with respect to only
19 the development of the customary law and the juis
20 gogens.

21 I was only planning to introduce the
22 International Civil and Political Rights Treaty because
23 that's the only one to which the United States is a
24 signatory and has ratified.

25 THE COURT: All right. Simply introduce

1 that. I'll allow you for the record so that you can
2 -- you can have it on -- on the record as well and
3 to supply and -- and again, I -- I would think that
4 he can give this information of customary norms in
5 a -- in a pretty succinct -- it shouldn't be too very
6 long since now he's not going to go very far into the
7 treaties.

8 Now, I know they're going to tie together,
9 but -- but if we can get you to shorten his testimony
10 to some degree and still get the information that you
11 desire.

12 I do find, and I am going to find, over
13 objection that he is an expert in the area, and I
14 understand that the -- the question of the relevance
15 remains.

16 MS. JOHNSON: Do you not want me to introduce
17 the treaty through him? You just want me to---

18 THE COURT: You -- you may introduce it
19 through him. I don't want him reading it or
20 interpreting it to the Court. Simply go into then
21 the customary norms.

22 MS. JOHNSON: The customary laws. Thank you,
23 Your Honor.

24 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

25 Q. Professor Ndulo, are there any treaties that

1 prohibit the execution of juveniles?

2 A. Yes, there are.

3 Q. Any treaties that -- to which the United
4 States is a signatory and has ratified?

5 A. Yes. The International Covenant on Civil
6 and Political Rights Convention has been ratified
7 by the United States.

8 Q. Let me show you this copy. Would you
9 look it over? Is this a copy of the international
10 covenant?

11 A. Yes, it is.

12 Q. And it has been ratified by the United
13 States?

14 A. Yes, it has.

15 MS. JOHNSON: Your Honor, I'd like to
16 introduce this treaty into evidence.

17 THE COURT: All right.

18 MR. ZELENKA: Your Honor, I would object.
19 It doesn't include the reservations, the Bush
20 Administration reservations. At least I do not see
21 them in here.

22 MS. JOHNSON: I was going to have him testify
23 about those reservations because they're not part of the
24 treaty document itself.

25 Of course, he would have the option of

1 introducing the reservations himself if he wished to do
2 so.

3 MR. ZELENKA: Well, the reservations were part
4 of the document that was passed by Congress, and we're
5 dealing with United States law in this court, as I
6 understand it.

7 MS. JOHNSON: Yes, but what I'm introducing
8 at this point is the treaty as it was written, and I
9 actually had him testify that the United States ratified
10 it.

11 I was going to ask him to testify as to the
12 limitation that they made as well.

13 THE COURT: Do you have -- since you are going
14 to have him testify to it, why not -- why not attach it
15 and submit it in full? It'll be submitted at that point
16 without objection. Do you have it?

17 MS. JOHNSON: I do have it. I'm going to have
18 to dig it out, Your Honor.

19 MR. BLUME: Why don't we just---

20 MS. JOHNSON: Could I do that afterwards?

21 THE COURT: Certainly.

22 MS. JOHNSON: Okay.

23 MR. ZELENKA: Well, I'm -- I'm objecting that
24 this is the treaty is -- is what my objection is as a
25 matter of law.

1 MS. JOHNSON: But you are willing to accede
2 to its admission with the reservation---

3 MR. ZELENKA: With all of the---

4 MS. JOHNSON: ---attached?

5 MR. ZELENKA: With all of the conditions
6 passed by the United States Congress.

7 THE COURT: All right.

8 MS. JOHNSON: And we will supply those.

9 THE COURT: Understand that those will be
10 supplied, and then it will be entered into evidence
11 without objection.

12 (Applicant's Exhibit No. 9 marked.)

13 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

14 Q. And was there a reservation made by the
15 United States Government to this treaty when
16 it---

17 A. Yes.

18 Q. ---by the Senate?

19 A. Yes. When the United States acceded to
20 the treaty, they made reservations, yes.

21 Q. And what was the reservation in this
22 case?

23 MR. ZELENKA: Object. Calls for hearsay.
24 The document will speak for itself.

25 THE COURT: It'll speak. We -- we need not

1 go into that. Sustained.

2 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

3 Q. Could you briefly explain the other source
4 of international law, other than treaties?

5 A. The other sources of international law are
6 customary law.

7 Q. And what is customary law?

8 A. Customary law is a norm of international
9 law that evolves from general practice of states and
10 states following the practice out of legal obligation
11 to do so.

12 Q. If a rule has achieved the status of customary
13 law, whom does it bind?

14 A. If a rule---

15 MR. ZELENKA: Object. Calls for a legal
16 opinion.

17 MS. JOHNSON: Your Honor, I understood
18 that this was the subject on which you were going to
19 accept his testimony regarding the effects of customary
20 law.

21 THE COURT: I was going to -- to accept his
22 testimony regarding customary law, what was customary
23 law.

24 MS. JOHNSON: And you don't wish to hear whom
25 customary law binds?

1 THE COURT: I'm -- I -- I -- I understand
2 the objection. I'm going to allow him response. I
3 -- the response is going to be his indication that it
4 binds here.

5 The decision would be made by the Court
6 whether or not it does.

7 MS. JOHNSON: He's actually -- well, he's
8 not going to testify, Your Honor, as to whether it
9 binds who.

10 He's going to testify generally when customary
11 law binds.

12 THE COURT: All right. Very good. We'll
13 continue.

14 THE WITNESS: When a norm has been accepted
15 as a customary norm -- norm, it binds all states.

16 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

17 Q. Are there any exceptions to that?

18 A. No, there are no exceptions to it, except
19 where a state has consistently shown objection to --
20 to the custom.

21 Q. If a state has consistently objected to a
22 custom, are there some circumstances in which customary
23 law is still binding?

24 A. Yes. It depends on the customary law
25 norm. If the customary law norm is jus cogens,

1 that is, if it's an absolute norm, then it's binding
2 on every state. No state can deviate from an absolute
3 norm.

4 Q. Turning to specifics, is there both a
5 general practice that avoids execution for offenses
6 committed before the age of eighteen and a consensus
7 that this practice follows from legal obligation?

8 A. Yes, there is.

9 Q. How many countries have actually executed
10 child offenders since 1990?

11 A. There are a few countries. I think it should
12 be around five or so.

13 Q. And do all of those countries now permit the
14 practice?

15 A. Yeah, about five countries, Nigeria, I would
16 think, Saudi Arabia, Iran, and a few others, but the
17 majority of states do not permit the execution of
18 juveniles.

19 Q. We have introduced the International Covenant
20 on Political and Civil Rights that bars the execution
21 of offenders before the age of eighteen. How many
22 countries---

23 MR. ZELENKA: Object, Your Honor.

24 MS. JOHNSON: ---are a party---

25 MR. ZELENKA: That's---

1 THE COURT: Yes. Let me hear the objection.

2 MS. JOHNSON: I can just ask him how many
3 -- how many countries are a party to the International
4 Covenant on Political and Civil Rights?

5 THE WITNESS: This is a very widely observed
6 covenant. It's well over a hundred and thirty-eight,
7 and the most recent entrant to the convention is China,
8 which joined this last year.

9 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

10 Q. In -- does anything in the history of the
11 international covenant suggest that the prohibition
12 was an innovation?

13 A. The -- the prohibition against execution
14 of juveniles is believed to have been the customary
15 norm that was codified in the civil and political
16 rights convention, and this is stated so by the Human
17 Rights Commis- -- Committee, which is the highest
18 organ of the -- the convention in terms of interpreting
19 the -- the convention. They did this in General Comment
20 No. 24.

21 Q. Are there any other treaties, other than
22 the international covenant, that forbid the use of
23 the death penalty for offenders under the age of
24 eighteen?

25 A. Yes. There's the -- the International

1 Convention on the Child, Rights of the Child. You,
2 also, have the American Convention on Human Rights.
3 They -- those two forbid the execution of juveniles.

4 Q. About how many treaties, how many countries,
5 signed the Convention on the Rights of the Child?

6 A. Practically every state. I think only the
7 United States and Somalia are not parties to the
8 Convention on the Rights of the Child.

9 Q. Have any of the signatory countries lodged
10 a reservation against the provision that forbids
11 the use of death -- the death penalty on child
12 offenders?

13 A. No, none.

14 Q. You mentioned, also, the American Convention
15 on Human Rights. What does that provide?

16 A. The -- in Article 4 they forbid the execution
17 of juveniles.

18 Q. How many countries, in addition to signing
19 one of these treaties, also, have prescribed the death
20 penalty for juveniles by their own domestic law?

21 A. The majority of the countries in the world
22 have done so. I'm not exactly sure of the exact number,
23 but the majority of the states have done so.

24 Q. In your opinion is the prohibition against
25 the execution of persons for crimes committed before

1 the age of eighteen a part of international customary
2 law?

3 MR. ZELENKA: Object. Calls for a legal
4 opinion.

5 MS. JOHNSON: Your Honor, this is the subject
6 on which he is an expert.

7 I can -- I can instead elicit information
8 from him about what number is frequently considered to
9 be a sufficient number---

10 THE COURT: All right. Yes.

11 MS. JOHNSON: ---if you'd rather hear that
12 testimony.

13 THE COURT: Yes, ma'am.

14 DIRECT EXAMINATION RESUMES BY MS. JOHNSON:

15 Q. How many -- how much agreement do we nor- --
16 would you expect to have before something achieves the
17 status of a customary norm?

18 A. What they say is that it has to be generally
19 accepted in the world, and the norm relating to juvenile
20 executions is -- I think one such norm -- and it
21 actually goes further and say that it's an absolute norm
22 and say juis gogens norm, and this is stated in the
23 General Comment 24 that I referred to.

24 Q. When you say that it -- juis gogens that
25 -- what -- would you repeat what that means?

1 A. Juis gogens, spelled j-u-i-s g-o-g-e-n --
2 gogens -- s -- means a norm that in international
3 law has been observed as an absolute norm, and when
4 a norm has been determined as an absolute norm, it
5 means that no state can deviate from that norm. You
6 cannot make reservations to it, and you have to obey
7 the norm, and there are a number of such norms; for
8 instance, the prohibition against labor is such norm;
9 discrimination is such norm; and the -- the use of
10 torture is such norm.

11 Q. If this were not a juis gogens norm, would
12 you believe that the United States was exempt from
13 it?

14 A. If it wasn't juis gogens in terms of the --
15 the -- the treaty, that is a -- a problem that if you
16 look at Article 4, it talks of, also, rights where --
17 which you cannot delegate from, and that is mentioned as
18 one of those rights that you cannot delegate from, and
19 that would mean that a state that joins a treaty has to
20 obey that norm, and I think the state has a right not to
21 join the treaty if they do not wish to -- to obey any of
22 the provisions relating to the treaty.

23 Q. That relates to the treaty claim, but with
24 respect to customary law you stated that customary
25 law binds either if it's a juis gogens norm or does

1 it bind -- if it's not juis gogens, does it bind
2 everyone?

3 A. Yes, it does, unless the state has shown
4 consistent objection to the custom.

5 Q. And has the United States shown consistent
6 objection to this custom?

7 A. Not to my knowledge, no. In fact, if you look
8 at the trouble repertoires, which are the records used
9 to prepare the -- the record of the preparations for the
10 Civil and Political Rights Convention, there is no
11 objection to that that was raised, no.

12 Q. Would your reasoning about customary law and
13 about juis gogens norms also apply to the death penalty
14 as a whole?

15 A. No. I think the death penalty as a whole is
16 not prohibited by international law, and this is
17 confirmed by the fact that after the Civil and Political
18 Rights Convention, you have the second protocol, which
19 is on the prohibition of death -- death penalty, so
20 there are -- there is a subsequent protocol, which deals
21 with the death penalty, and that has to be acceded to
22 (one word inaudible). I think what the Civil and
23 Political Rights Convention does is to say that the
24 death penalty should be used in extreme circumstances.

25 Q. There is in your mind no doubt that there

1 -- that execution, the prohibition against execution
2 of juveniles though is a juis gogens norm?

3 MR. ZELENKA: Object.

4 THE COURT: Sustained.

5 MS. JOHNSON: Thank you.

6 THE COURT: Cross.

7 CROSS-EXAMINATION BY MR. ZELENKA:

8 Q. Mr. Ndulo, is the United States -- have they
9 signed off on the International Convention of Rights of
10 Children?

11 A. Sir?

12 Q. Did the United States agree, are they a
13 signatory, to the International Convention of Rights of
14 Children?

15 A. They are signatories, but they have not
16 acceded to the convention.

17 Q. Okay. The American Convention for Human
18 Rights, what's the United States' status with
19 that?

20 A. They've not acceded to it, but they are
21 signatories to it, too.

22 Q. Are you familiar with the James Terry Roche
23 case?

24 A. Perhaps I was, you know -- I've seen it,
25 yes.

1 Q. Okay, yet despite the fact that an
2 international court found that the death penalty was not
3 appropriate for Mr. Roche, he was executed. Is that not
4 correct?

5 A. Yes, it's correct.

6 Q. How are you defining child?

7 A. The -- the child in the context of the --
8 the Convention on the -- on the Child is defined as,
9 you know, one as age eighteen and below, and if you
10 -- in -- in the context of the Civil and Political
11 Rights Convention you have to look at the trouble
12 repertoires. It was quite clear that the age that
13 was being referred to was eighteen or so.

14 Q. Okay, so what you're talking about is
15 eighteen, seventeen, sixteen, fifteen, fourteen-year-
16 olds?

17 A. Eighteen years and below is what I'm talking
18 about.

19 Q. Okay. The -- the United States reservation
20 to this international treaty was directly related
21 to juvenile executions. Is that -- is that not
22 correct?

23 A. Well, the United States entered reservations,
24 but, as I pointed out, it is General Comment No. 24,
25 which says that, first of all, the treaty does not

1 provide for reservations; and, secondly, that you cannot
2 make reservations to fundamental clauses of the treaty,
3 and general comments actually specifically mentions the
4 execution of juveniles.

5 Q. Okay, but the United States during the Bush
6 Administration particularly stated with respect to
7 Article 6, it says, "Article 6 limits the circumstances
8 for which capital punishment may be imposed. Article 6
9 specifically prohibits the imposition of the death
10 sentence for crimes committed by persons below eighteen
11 years of age and pregnant women. The administration
12 accepted the obligations with respect to pregnant women;
13 however, it proposed a reservation clarifying that the
14 United States does not accept the prohibition on
15 executing people for crimes committed while sixteen
16 or seventeen. The execution of people for crimes
17 committed while they were under the age of sixteen has
18 been ruled unconstitutional by the Supreme Court. The
19 reservation proposed by the Bush Administration is
20 significantly narrower than that proposed by the Carter
21 Administration." That was basically what happened. Is
22 that not correct?

23 A. Well, that's what happened, but you have to
24 take into account 1994. The general comment
25 specifically dealt with a U. S. reservation. It was

1 actually directed at addressing that issue and mentioned
2 that the reservations are severable insofar as they are
3 not allowed by the treaty.

4 Q. Okay. How many states expressed opposition
5 to the United States reservation?

6 A. A number of states did. The -- I think,
7 Germany; a number of European states expressed objection
8 to this. Germany is one of them. I think, Germany,
9 France, and a few others.

10 Q. Okay. How many states or members of that
11 particular treaty?

12 A. Which treaty? The Civil and Political
13 Rights---

14 Q. Yes.

15 A. ---Convention? Well, way over a hundred
16 and thirty-eight. I think it's very widely observed
17 now.

18 Q. Okay, and only six or seven states objected
19 to the United States' reservations. Is that correct?

20 A. Yes, but the fact that others did not object
21 doesn't mean that they were in agreement because we have
22 general comment, as I pointed out, which the -- here
23 we're talking about the Human Rights Committee, which is
24 the committee that's charged with interpreting the
25 convention, and it's composed of eighteen leading

1 experts on international law, and they met to consider
2 the U.S. objections---

3 Q. Okay.

4 A. ---and issued General Comment 24.

5 Q. Is your recollection that -- that Belgium,
6 Denmark, Finland, France, Italy, Netherlands, Norway,
7 Portugal, and Spain and Sweden all objected to the
8 reservations of that---

9 A. Some of those did. I'm not sure that
10 all -- I mean, I -- I would have to look at my
11 notes.

12 Q. Okay. Do those, also, not indicate that their
13 objection did not constitute an obstacle to their entry
14 into the covenant?

15 A. I don't see the, you know, the -- that the
16 meaning of a treaty is related to what state is party to
17 it says because the interpretation in '94 was quite
18 clear that you cannot make reservations with respect to,
19 one, jus cogens; two, customary norms; and then Article
20 4 relates to non-delegable rights, so that's very clear,
21 and the -- the -- the -- the committee met after the
22 U. S.'s reservations, so it's actually a forecast on the
23 U. S. reservation.

24 Q. Okay, but what I'm asking you is factually
25 what ones did make -- some did make an objection. Is

1 that not correct?

2 A. It's -- it's customary that -- because you'd
3 have to actually, first of all, determine when those
4 states entered, acceded to the treaty. What usually
5 happens in treaty accession is that you make an
6 objection when you are entering that, you know, you
7 object to another state, but you'd have to look at the
8 dates when they acceded the treaty, and some of the
9 states might not have objected because they had already
10 entered the treaty.

11 Q. Okay, but when Germany objected, September
12 29, 1993---

13 A. Uh-huh (affirmative response).

14 Q. ---they lodged the following objection --
15 isn't that -- isn't this correct -- "The government
16 of the Federal Republic of Germany objects to the
17 United States reservation, referring to Article 6,
18 Paragraph 5, of the covenant, which prohibits capital
19 punishment for a crime committed by persons below
20 eighteen years of age. The reservation referring
21 to this provision is incompatible with the text, as
22 well as the object and purpose of Article 6, which is
23 made clear by paragraph 2 of the article, laying down
24 the minimum standard for the protection of the right
25 to life"?

1 A. Uh-huh (affirmative response).

2 Q. If no objection was needed, why would they
3 do that?

4 A. What the Germans were doing is that they
5 were giving notice to the U. S. that they would not
6 observe the U.N. -- the U. S. reservation, and, as I
7 say, after -- that German objection was before General
8 Comment 24 -- after that, states don't need to because
9 the -- Human Rights Committee has clarified the
10 position.

11 Q. Okay. No further questions.

12 THE COURT: Redirect.

13 MS. JOHNSON: Just one question, Your
14 Honor.

15 REDIRECT EXAMINATION BY MS. JOHNSON:

16 Q. Does the fact that the United States signed
17 the American Convention and the Convention on the Rights
18 of the Child bear on the issue of persistent objection
19 even though they did not ratify it?

20 A. I think the -- the procedure is that
21 when the convention is adopted, there is a period
22 during which states are asked to sign, and signing
23 the convention is an indication that you support
24 the convention, so it would be unusual that you
25 sign it, and you are objecting to the convention,

1 but it -- it -- it's not accession to the convention
2 because it means that you are still to follow the
3 constitutional steps that implement the convention
4 because there are different ways of acceding to the
5 convention in different jurisdictions, but certainly
6 you don't sign a convention unless you support the
7 convention.

8 Q. Thank you.

9 THE COURT: Anything further? All right.
10 You may step down, sir.

11 THE WITNESS: Thank you, Your Honor.

12 MR. BLUME: We would ask that he be excused.

13 THE COURT: Any objection to this witness
14 being excused?

15 MR. ZELENKA: No objection.

16 THE COURT: All right. You're free to leave.

17 THE WITNESS: Thank you, Your Honor.

18
19 MR. BLUME: Your Honor, we had two witnesses
20 coming from Columbia who were supposed to be here now.
21 Maybe I can just look. They were supposed to be here at
22 10:30. I might need to check.

23 THE COURT: We'll take this opportunity to
24 take about a ten-minute break. See you back in here in
25 ten minutes.

1 (Applicant's Exhibit No. 9 admitted into evidence.)

2 (WHEREUPON, RECESS IS TAKEN.)

3

4 MR. BLUME: The applicant would call Martin
5 Banks.

6 THE COURT: All right.

7 MARTIN BANKS, BEING DULY
8 SWORN, TESTIFIES AS FOLLOWS:

9 THE CLERK: State your name and spell your
10 last.

11 THE WITNESS: My name is Martin Banks.

12 DIRECT EXAMINATION BY MR. BLUME:

13 Q. Mr. Banks, how are you currently
14 employed?

15 A. I'm the Public Defender for Calhoun
16 County.

17 Q. And what year did you -- so you're a
18 lawyer?

19 A. Yes.

20 Q. What year did you graduate from law
21 school?

22 A. I graduated in 1992.

23 Q. And did you go to Calhoun County after you
24 graduated from law school?

25 A. Yes, straight there. That was my first

1 job.

2 Q. Okay, your first job as the public -- was as
3 a public defender?

4 A. That's right.

5 Q. And in the course of your employment as a
6 public defender in Calhoun County, were you ever
7 appointed by the Court to represent a young man named
8 Herman Hughes?

9 A. I was.

10 Q. And in -- do you remember in what context you
11 were appointed to represent him?

12 A. Yeah. He was a -- a juvenile appointment.
13 He had committed some act as a juvenile and was --
14 I was appointed as his public defender, which is
15 the routine in Calhoun County. Public defenders are
16 appointed to all juvenile cases, something we're working
17 on.

18 Q. Okay. Was this one of the first juvenile
19 cases you had handled?

20 A. Yes.

21 Q. And do you remember what you did? Was -- did
22 the State ever file a motion to have Mr. Hughes waived
23 up to General Sessions Court?

24 A. Yes, they -- they did.

25 Q. Okay, and do you remember what you did in

1 order to prepare for that hearing?

2 A. Yes. Usually -- it's typical, in fact; it's
3 almost without exception, that when I'm appointed to a
4 juvenile case in Calhoun County, the -- the solicitor
5 appoints me with very little notice. In other words,
6 I probably in this case had about two days' notice.
7 My schedule was relatively flexible back then because
8 I didn't have much of a -- other matters to attend to,
9 so, it was a waiver hearing, and I understood what a
10 waiver hearing was, but the statute was relatively new
11 to me, and, of course, he was housed in Columbia, and so
12 he was not easily accessible, but I talked -- I suppose
13 I talked to some of the family members. I believe I
14 recognized, I guess it was, his father back there, and I
15 was prepared to present a defense as to why he should
16 not be treated as an adult.

17 Q. Uh-huh (affirmative response), so do you
18 remember, did you obtain any records? Did you obtain
19 like his school records?

20 A. No.

21 Q. DSS records?

22 A. Did not.

23 Q. Did you have him evaluated by any type of
24 mental health professional?

25 A. No.

1 Q. Of any kind?

2 A. No.

3 Q. And did you interview any of his teachers?

4 A. No.

5 Q. Do -- to your evalu- -- recollection in this
6 case was an evaluation of Mr. Hughes for purpose of the
7 waiver hearing conducted by anyone, by you?

8 A. No.

9 Q. Or by the State?

10 A. No. In fact, I -- I was operating from an
11 assumption that that would be something that the State
12 would be interested in and would be something they
13 would do.

14 Q. What do you mean by -- so when you showed
15 up at the hearing, you just assumed---

16 A. Well, yeah.

17 Q. ---something would have---

18 A. And the reason why I assumed that is because
19 in the past, and I -- I think without exception in the
20 past, and almost without exception to -- to date, the
21 State would, whether it was DSS, DJJ, or the solicitor
22 himself, they'd hand me a, a, you know, pre-evaluation
23 report and all these other reports usually the day I
24 appear in court, and I expected to see one of those as
25 I'd always had in the past.

1 Q. But there was not one in this case?

2 A. No.

3 Q. And, in fact, no evaluation was done by any
4 state agency?

5 A. No.

6 Q. And do you recall if that was a basis when --
7 at the hearing for a continuance motion on your part
8 or---

9 A. Yes.

10 Q. ---that the action be deferred?

11 A. Yes. I made a con- -- a motion for
12 continuance when I realized that I had very little to
13 go on.

14 Q. And was that motion denied?

15 A. Yes.

16 Q. And what happened at the conclusion of the
17 waiver hearing?

18 A. He was waived up as a -- to be treated as an
19 adult.

20 Q. And just sort of one -- you're the part-time
21 public defender in Calhoun County?

22 A. That's right.

23 Q. And one of the things there, I assume, you do
24 is you try cases in Calhoun County?

25 A. Yes. ,

1 Q. And you have seen cases tried---

2 A. Many.

3 Q. ---in Calhoun County? On average, based on
4 your experience as a public defender, what is the racial
5 composition of a typical Calhoun County jury?

6 MR. ZELENKA: Object. Irrelevant.

7 THE COURT: What's the relevance?

8 MR. BLUME: Well, it is relevant, Your Honor.
9 I mean, one of the things that Mr. Newsom talked about
10 in his deposition, and we'll certainly -- there will be
11 testimony about this afternoon, and one of the claims in
12 the application has to do with the matter in which the
13 voir dire was handled, and there was an, from our
14 perspective, an extraordinary dilution in the number of
15 African Americans in the pool.

16 Mr. Banks, I think, will testify, if permitted
17 to sort of make a proffer, that the average Calhoun
18 County jury is about half and half.

19 This particular jury had only one African
20 American, and the pool was sort of diluted through
21 the way in which the general and individual voir dire
22 was handled.

23 That's the -- that is the -- the only
24 question.

25 MR. ZELENKA: Again, I don't see the relevancy

1 because there wasn't a particular juror -- well, he may
2 be including that within the jurors that he saw, but the
3 record will speak for itself about what the pool was and
4 the jurors in Calhoun County in this particular case.
5 That's the only relevant matter.

6 THE COURT: And I don't know really whether
7 we've established enough that he's---

8 MR. BLUME: Do you want me to lay a better
9 foundation?

10 THE COURT: Laying the foundation to give
11 his opinion as to the -- to the makeup, and, again,
12 it appeared to me that he was here talking primarily
13 though and testifying about the facts regarding the
14 waiver.

15 MR. BLUME: He was.

16 THE COURT: All right.

17 MR. BLUME: I just was -- that was one
18 question really. I'll be happy---

19 THE COURT: I'm going to---

20 MR. BLUME: ---to try and go back and
21 establish---

22 THE COURT: If you -- lay the foundation, if
23 you would please.

24 DIRECT EXAMINATION RESUMES BY MR. BLUME:

25 Q. Mr. Banks, you've been the public defender

1 since 1992?

2 A. That's correct.

3 Q. And are you the only public defender---

4 A. Yes.

5 Q. ---in Calhoun County? And in your experience
6 as public defender, do you have the opportunity to
7 either as a participant or as an observer see the
8 majority of the felony trials in the General Sessions
9 Court in Calhoun County?

10 A. Yes. When -- when I'm -- as public defender
11 I'm basically chained to the courthouse during General
12 Sessions terms weeks, so I -- I do. I see just about
13 everything that goes on.

14 Q. So if there's a General Sessions term in
15 Calhoun County over the last four years, you have been
16 present in the courtroom?

17 A. Almost -- almost all of the time.

18 Q. And in -- when you -- well, let me ask the
19 foundation for his ability to say what a -- the typical
20 jury is. He's there present every General Sessions term
21 for the last seven years.

22 THE COURT: All right. Objection remains?

23 MR. ZELENKA: Yes. I don't see how it's
24 relevant to anything before this Court.

25 THE COURT: All right. I'm going to overrule

1 and allow the question.

2 THE WITNESS: And the question is?

3 DIRECT EXAMINATION RESUMES BY MR. BLUME:

4 Q. The question is on the average, based on your
5 experience, what is the racial composition of a typical
6 Calhoun County jury?

7 A. I've seen it both ways, but on average it's a
8 -- it's just a hair under fifty per cent.

9 Q. So five or six African Americans is sort of
10 the---

11 A. Yeah.

12 Q. ---what you normally see?

13 A. Yes.

14 Q. Sometimes more, sometimes less?

15 A. That's right.

16 Q. That's sort of the average. Thank you.

17 THE COURT: Cross.

18 MR. ZELENKA: I've just got a few questions
19 for Mr. Banks.

20 CROSS-EXAMINATION BY MR. ZELENKA:

21 Q. The -- you, also, participated in the
22 detention hearing for the defendant?

23 A. The detention hearing? Maybe you can refresh
24 my memory. I---

25 Q. Okay. Let me provide you---

1 A. Yeah, yeah, I guess I did. Yes, I did.

2 Q. Okay, and the detention hearing -- let me just
3 provide you the document---

4 A. All right.

5 Q. ---and see if this refreshes your
6 recollection. It's a bad copy

7 A. All right.

8 Q. Just let me know when you're---

9 A. Yeah, I -- that -- that may have been held
10 the same day, was it not? Yeah, I -- I'm -- I was
11 there.

12 MR. ZELENKA: The Court's indulgence.

13 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

14 Q. Let me provide you a copy of the transfer
15 order.

16 A. Okay. All right. I'm ready.

17 Q. Okay. Do you recall the detention hearing?

18 A. Vaguely, yeah. Those are usually uneventful
19 with charges like this, but---

20 Q. Okay, but at the detention hearing testimony
21 was presented by a---

22 A. An officer.

23 Q. ---an officer and a juvenile---

24 A. Counselor.

25 Q. ---Department of Juvenile Justice counselor?

1 A. Yeah. Uh-huh (affirmative response).

2 Q. Ollie Ziegler. Isn't that correct?

3 A. That's right.

4 Q. Subsequent to that detention hearing, which,
5 according to this, was held on March 21st?

6 A. Yeah.

7 Q. 1994?

8 A. That's right.

9 Q. Is that correct?

10 A. Uh-huh (affirmative response).

11 Q. It wasn't until April 8, 1994, that the
12 transfer hearing was held. Is that correct?

13 A. That's right.

14 Q. And during the transfer hearing, in addition
15 to the officer's testimony---

16 MR. ZELENKA: ---and, Your Honor, for the
17 record the -- for some reason the record on appeal is
18 somewhat confusing, but the juvenile transfer hearing is
19 set forth beginning at page 1720 of that record through
20 1781 -- excuse me -- 1785 of the record.

21 The index may appear to be a little
22 inappropriate, and then the conclusions of the transfer
23 hearing and the motions for transfer are set forth in
24 Volume 6 of the record on appeal, I believe, beginning
25 at page 1966 through, I believe it's, 1988.

1 There's a misprint on there when it
2 says, "Transcript of transfer hearing at page 1983;"
3 that is not what is located at that part of the
4 transcript.

5 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

6 Q. Mr. Banks, when you were examining
7 Ms. Ziegler, you inquired of her concerning whether
8 she had an opinion on whether the defendant should
9 be transferred. Do you recall that?

10 A. Yeah, I suppose so, yes. That would be
11 an obvious question, I guess.

12 THE COURT: What page is that, Mr.
13 Zelenka?

14 MR. ZELENKA: That's at page 1759---

15 THE COURT: All right.

16 MR. ZELENKA: ---of the transcript.

17 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

18 Q. And you, also, inquired of her as to
19 whether an evaluation could be done, although it
20 hadn't been done yet, correct?

21 A. Right.

22 Q. At the clu- -- conclusion of that hearing,
23 in making your closing argument at page 1780, you,
24 also, ask the judge to defer consideration, seek
25 more information, and -- until you could request

1 an evaluation from the team of people at the DJJ, which
2 I assume means the Department of Juvenile Justice. Is
3 that not correct?

4 A. Yes.

5 Q. The judge, however, with that information
6 chose not to do that and did, in fact, transfer the
7 individual. Is that correct?

8 A. Yes.

9 Q. At that time in 1994 did you know that you had
10 the right to request an evaluation from the Department
11 of Juvenile Justice?

12 A. The statute was relatively new, or the
13 changes to the statute were relatively new at that
14 point, and the assumption I was operating under was
15 that it would be done by -- that it would be ordered
16 and done by DJJ.

17 Q. Okay. Was your assumption that one would
18 have already been done before the transfer hearing
19 began?

20 A. Yeah. Actually I accept- -- I expected that,
21 but it obviously didn't happen, and I still assumed that
22 they would do their normal process that they would for a
23 -- a regular juvenile client, and, of course, that was
24 not the case.

25 Q. How long did you remain on Mr. Hughes' case

1 after the transfer hearing?

2 A. I don't recall, but it wasn't much longer
3 because I think word started getting around after
4 these hearings that -- that it was probably going to
5 be a death penalty case once he got waived up, and
6 I believe they started shopping around for lawyers
7 for him because I -- I wasn't -- under the new statute
8 wasn't able to take a death penalty case at that
9 time.

10 Q. And that's because you didn't have the
11 prior---

12 A. Experience.

13 Q. ---felony experience?

14 A. That's right.

15 Q. Experience to be qualified as the -- the
16 primary lawyer in the case?

17 A. Right, or the -- even the co-chair, I believe
18 I didn't have quite enough time under my belt. I
19 believe it was two years or two and a half years.

20 Q. Did you do any investigation on the part of
21 Mr. Hughes at that time?

22 A. Up to those two hearings?

23 Q. Yes.

24 A. I had talked to at least one officer. I
25 talked to his family, but as far as school and other

1 in-depth investigation, no.

2 Q. Okay. When you spoke with his family, what
3 did you learn?

4 A. I learned what type of individual he was and
5 what problems he had had and some of the more behind-
6 the-scene facts of the case, you know, what they knew
7 and what they had talked to him about.

8 Q. Did you learn from your discussion with the
9 law enforcement officer -- do you remember which one
10 that was?

11 A. No.

12 Q. Was it Earl Rudy?

13 A. Well, it may have been Earl Rudy, yeah. Yeah.
14 He was there at the time. He's -- he's no longer
15 around. I haven't seen him in years, but, yeah, it may
16 have very well been Earl Rudy.

17 Q. Okay, and Mr. Rudy testified in the transfer
18 hearing. Is that correct?

19 A. Yes.

20 Q. As did Sheriff Jones?

21 A. Yes.

22 Q. Did you have any discussions with Sheriff
23 Jones prior to the transfer hearing?

24 A. No.

25 Q. Okay. Specifically what other information did

1 the family members provide you?

2 A. If I can recall. Again, more, just details
3 about him, you know, his age, that he's had some
4 problems in school, just in general that for the
5 most part he was a good -- a good kid. He, you know,
6 did what they wanted him to do and that he had some
7 problems, I think. There were some problems between
8 the parents, and -- and they told me what they knew
9 of the facts of the case, and, in fact, I think --
10 let me see if they mentioned -- it's hard for me to
11 distinguish what I knew prior to those hearings, then
12 what the vast majority of information that came out
13 after, you know, you know, in the papers and everything
14 else, and it's hard for me to distinguish at this point
15 what the details might have been.

16 Q. Okay. I've no further questions at this
17 time.

18 MR. BLUME: Just a few matters on redirect.

19 REDIRECT EXAMINATION BY MR. BLUME:

20 Q. Mr. Banks, as I understand from your testimony
21 on cross-examination, the time you did this waiver
22 hearing you had really no idea this was going to
23 potentially be a capital case?

24 A. None at all.

25 Q. The first knowledge you had of that came

1 afterwards?

2 A. Right.

3 Q. And do you know, was this the first waiver
4 hearing that you had done?

5 A. I believe it was the very first waiver hearing
6 I'd ever done.

7 Q. And to the best of your recollection you
8 didn't call any witnesses at this hearing?

9 A. No.

10 Q. And just so it's clear, you didn't -- what
11 -- you talked to maybe some family members of Mr.
12 Hughes, but you didn't gather any records or talk to
13 any teachers?

14 A. No.

15 Q. Or get an evaluation of any kind---

16 A. No.

17 Q. ---for this hearing?

18 A. No.

19 Q. Thank you.

20 THE COURT: Anything further?

21 MR. ZELENKA: No further questions. Thank
22 you, Your Honor.

23 THE COURT: All right. You may step down.

24 MR. BLUME: We'd ask that Mr. Banks be
25 excused.

1 THE COURT: All right. Any---

2 MR. ZELENKA: No objection.

3 THE COURT: You're free to leave, sir.

4
5 MR. BLUME: The applicant would call John Venn
6 to be examined by Ms. Wilkins.

7 THE COURT: If you will come forward please,
8 over here to this. We've got some over here for you as
9 well.

10 THE WITNESS: Oh, good. Thank you.

11 JONATHAN VENN, BEING DULY
12 SWORN, TESTIFIES AS FOLLOWS:

13 THE CLERK: State your name and spell your
14 last.

15 THE WITNESS: Jonathan Venn, V-e-n-n.

16 DIRECT EXAMINATION BY MS. WILKINS:

17 Q. Dr. Venn, could you please tell us your
18 occupation?

19 A. I'm self-em- -- I'm self-employed in the
20 private practice of psychology.

21 Q. Okay. Would you give us some information
22 about your educational background please?

23 A. I have a Ph.D. in Clinical Psychology from
24 Northwestern University.

25 Q. Okay. When was that?

1 A. 1977.

2 Q. Okay, and can you please give us the history
3 of your -- your employment history as a clinical
4 psychologist?

5 A. After getting my degree I accepted a
6 commission in the United States Naval Reserve, and I
7 was on active duty in the Navy for the next four and a
8 half years. I taught for the University of Maryland.
9 I was on the staff of the Baltimore Gas and Electric
10 Company.

11 Q. As a psychologist?

12 A. Yes, as a clinical psychologist providing
13 evaluations and therapy. I was on the staff of
14 the William S. Hall Psychiatric Institute in Columbia
15 as a forensic psychologist, and I was on the staff
16 of the South Carolina Department of Juvenile
17 Justice.

18 Q. Also as a psychologist?

19 A. Yes, as a psychologist.

20 Q. How long were you on the staff of the
21 Department of Juvenile Justice?

22 A. For eight years.

23 Q. Okay, and those years were, I believe, from
24 1989 to 1997?

25 A. Yes, ma'am.

1 Q. So you would have been on the staff in
2 1994 when Mr. Hughes was waived up from juvenile
3 court?

4 A. Yes, I was.

5 Q. Okay. Are you licensed in clinical
6 psychology?

7 A. Yes, I am.

8 Q. Okay. You're licensed in South Carolina and
9 Maryland. Is that correct?

10 A. Yes, I'm licensed in both states.

11 Q. Okay, and do you have any board certifi-
12 cations?

13 A. Yes, I do.

14 Q. Okay. What are those?

15 A. I'm board certified in clinical psychology,
16 in forensic psychology, in child psychology, and in
17 several other areas.

18 Q. Okay, and, finally, do you have any experience
19 conducting assessments for juvenile court waiver
20 evaluations, psychological assessments?

21 A. Yes, I do.

22 Q. Okay. What was your experience at DJJ in that
23 capacity?

24 A. At DJJ I did more than one hundred waiver
25 evaluations.

1 Q. Okay. How many waiver evaluations have you
2 done total? Is -- is the number the same?

3 A. Probably about a hundred and twenty.

4 Q. Okay. Have you ever testified at a juvenile
5 court waiver hearing?

6 A. Yes, I have.

7 Q. Okay. How many times?

8 A. About sixty times.

9 Q. Okay. How many times were you testifying
10 being called by the State?

11 A. I was called by the State in probably forty-
12 seven of those.

13 Q. Okay, and, finally, are you familiar with the
14 research in the area of juvenile recidivism and issues
15 that are deemed relevant to waiver hearings and to
16 psychological evaluations in such hearings?

17 A. Yes, I am.

18 Q. Okay. Finally, I'd like to show you a
19 document and if you could tell me whether it's the
20 current copy of your CV.

21 A. Yes, this is my current CV.

22 Q. Okay.

23 MS. WILKINS: I'd like to have this marked,
24 and I believe Mr. Zelenka has a copy.

25 MR. ZELENKA: I do.

1 (Applicant's Exhibit No. 10 admitted into evidence.)

2 MS. WILKINS: And at this time I would move to
3 admit that as evidence and, also, to offer Dr. Venn as
4 an expert in the area of psychological evaluations,
5 psychological waiver evaluations.

6 THE COURT: Any objection?

7 MR. ZELENKA: I don't have any objection to
8 him being qualified as an expert in psychology. I don't
9 know of any particular expertise in this narrow area
10 which they're expressing.

11 THE COURT: Do you want to question him
12 any further in that particular area you're offering
13 him?

14 MS. WILKINS: I'm offering him -- he can
15 be offered as an expert in psychology. He has specific
16 experience in conducting waiver evaluations and knows
17 the protocol for that. If an expertise in clinical
18 psychology would be deemed sufficient for that, that's
19 fine, but I -- I do believe he has specific---

20 THE COURT: I'll allow it. I find him to be
21 an expert in the area of psychology and allow that
22 testimony in that regard.

23 DIRECT EXAMINATION RESUMES BY MS. WILKINS:

24 Q. Dr. Venn, what were you asked to do in this
25 case?

1 A. I was asked to conduct a psychological
2 evaluation of Herman Hughes.

3 Q. Okay, and what did the evaluation consist
4 of?

5 A. I interviewed Mr. Hughes. I read available
6 records, including records from the Hall Institute,
7 school records, DJJ records. I administered a couple of
8 psychological tests, and I, also, spoke with his school
9 principal from John Ford Middle School.

10 Q. Okay. When you say you administered a
11 couple of psychological tests, tell me what those
12 were.

13 A. I administered the Justus Inventory and
14 the Wender Utah Rating Scale.

15 Q. Okay. I'd like to discuss some of those
16 inventories in a little bit more detail before we
17 get into your conclusions. First, if you could
18 please tell the Court what the Justus Inventory
19 is.

20 A. Well, the Justus Inventory is a series
21 of true and false questions. It was developed to
22 measure things that would be relevant in the study
23 of juvenile delinquency in the assessment of juvenile
24 delinquents.

25 Q. Okay, and did this inventory exist in

1 1994?

2 A. Yes, it did.

3 Q. And is it reasonably commonly used by
4 psychologists who are doing psychological evaluations
5 for waiver?

6 A. Yes, it is.

7 Q. So it is an accepted tool in that community?

8 A. Yes, it is.

9 Q. Okay, and second you mentioned the Wender
10 Utah Rating Scale. First, did that scale exist in
11 1994?

12 A. Yes, it did.

13 Q. Okay, and what does that assess?

14 A. The Wender is -- was developed to be a set
15 of questions that you could ask adults to identify
16 whether they had problems as a child in the areas of
17 hyperactivity, inattention, and impulsivity.

18 Q. Okay. Why in this particular case did you
19 administer that inventory for that test?

20 A. Well, I was asked to do the type of evaluation
21 for Herman that I might do in a waiver evaluation, and
22 in doing a waiver evaluation I'm looking for the factors
23 that help predict whether or not a juvenile may have
24 long-term behavior problems.

25 Q. Okay, and, finally, what -- two other things

1 -- what does a clinical interview consist of typically?
2 Just talking with a person?

3 A. In this type of evaluation, yes, I spoke with
4 him.

5 Q. Okay, and, finally, why is it important to
6 review -- you said you reviewed school records, his DJJ
7 rap sheet, some other information like that; why is it
8 important to review those records?

9 A. Well, that give me a background in what other
10 people, what knowledge other people have about him.

11 Q. Okay, and certainly the school records and
12 the rap sheet would have been available in 1994 at
13 the time a waiver hearing was held. Is that correct?

14 A. Yes, ma'am.

15 Q. Okay. Dr. Venn, could you briefly summarize
16 your conclusions, and we'll discuss them in more detail
17 after you summarize them?

18 A. Well, to begin with the tests---

19 Q. Well, first, your ultimate conclusion about
20 whether Mr. Hughes should have been retained within the
21 juvenile system.

22 A. In my opinion he should have been retained in
23 the family court.

24 Q. Okay. What are the primary bases for that
25 conclusion on your part?

1 A. I believe that he would have been
2 rehabilitated in the juvenile justice system. This
3 is a young man who -- well, this is the first time he
4 was in court. This crime was unusual for him.

5 Q. Uh-huh (affirmative response).

6 A. He was -- he had no record of serious
7 antisocial or aggressive behavior as a younger man, as a
8 young child.

9 Q. As -- in early childhood?

10 A. Yes.

11 Q. So you're saying one basis for your conclusion
12 is the lack of sort of antisocial behavior and early
13 childhood, and if I understand you correctly, the other
14 basis is lack of prior juvenile history, including
15 history of violent acts. Is that correct?

16 A. Yes, that is correct.

17 Q. Okay. Why is absence of serious behavior
18 problems in early childhood, even as opposed to in
19 adolescence, an important factor to consider?

20 A. Well, this is one thing that keeps appearing
21 in the research on predicting which children are going
22 to have long-term behavior problems. The earlier the
23 onset of their behavior problems the more likely it is
24 to continue.

25 Q. Okay. Is that because if there's an early

1 onset, it's more likely that it's a character trait
2 whereas if there's a later onset, it's more likely
3 it's in response to specific stressors or---

4 A. Yes, that's true.

5 Q. Okay, and why is lack of a prior family
6 court history, especially history of violence,
7 important?

8 A. Well, a lot of people who appear in family
9 court once don't appear again. They don't continue
10 to commit offenses.

11 Q. And this has been sort of validated by
12 research, has it not?

13 A. Yes, it has.

14 Q. Okay. Let's talk about a few other bases
15 that would be relevant in determining waiver, and one
16 I'd like to talk about is locus of control. First,
17 what is locus of control?

18 A. Well, locus of control is the psychological
19 concept who do -- it has to do with who do people blame
20 for their behavior. Do they accept responsibility, or
21 do they blame someone else?

22 Q. Okay. What would acceptance of responsibility
23 be called in that context? An internal locus of
24 control?

25 A. Yes, that's internal locus of control.

1 Q. And projection of responsibility would be
2 called an external locus of control?

3 A. Yes, that's called external locus of control.

4 Q. And what does the research tell about the
5 importance of this factor?

6 A. Well, juveniles who blame other people for
7 their actions are more likely to continue to commit
8 offenses and get in trouble.

9 Q. Okay. In your interview with Herman Hughes
10 did you make any determinations about his locus of
11 control?

12 A. Yes, I did.

13 Q. Okay. What did you determine?

14 A. He accepted responsibility for his behavior.

15 Q. Okay. In specific, in context of this
16 particular crime did he blame other people?

17 A. No. He said it was someone else's idea, but
18 he said that he went along with it, that it was his
19 decision to go along with it.

20 Q. Okay. Thank you. The next thing I'd like
21 to talk about is sophistication and maturity. One
22 of the specific findings actually that the family
23 court judge made was that Herman Hughes was a
24 sophisticated individual. If you had assessed him in
25 1994, would you have found that he was a sophisticated

1 individual?

2 A. No, I would---

3 MR. ZELENKA: Object. Calls for speculation.

4 THE COURT: What you can -- what you can
5 indicate, and I think all you can ask---

6 MS. WILKINS: Sure.

7 THE COURT: ---I'm going to sustain the
8 objection -- is in the context of his---

9 MS. WILKINS: Sure.

10 DIRECT EXAMINATION RESUMES BY MS. WILKINS:

11 Q. Based on your evaluation of Mr. Hughes, did
12 you find Mr. Hughes, even now at age twenty-two, to be a
13 sophisticated individual?

14 A. No, ma'am, he's not a sophisticated
15 individual.

16 Q. Was he a mature individual for -- for a
17 twenty-two-year-old?

18 A. Well, let me see if this will answer your
19 question. He has a low level of intellectual
20 functioning. He's -- he's not bright enough for me to
21 consider him to be a sophisticated individual.

22 Q. Okay. Thank you. You mentioned Justus
23 Inventory earlier and the fact that it evaluates for
24 certain kinds of behaviors that have been found to
25 correlate with risk factors, and would you explain how

1 the Justus assigns types to people?

2 A. Well, the Justus is a series of true and false
3 questions, and a person fills it out with a pencil, and
4 the true and false questions are added up on different
5 scales.

6 Q. Uh-huh (affirmative response).

7 A. And based upon the high scales, the highest
8 scales, you determine what a person's subtype is.

9 Q. Okay, so with Herman's primary subtype what is
10 the risk of recidivism for his primary subtype?

11 A. Herman's subtypes indicates an average risk of
12 reoffending.

13 Q. Okay. Finally, did you, also, discuss -- or
14 not finally, but did you, also, discuss with Herman his
15 behavior while at the Department of Corrections, as well
16 as his behavior in the Orangeburg County Detention
17 Center?

18 A. Yes, I did.

19 Q. Okay. Did you have an opportunity to review
20 his record at the Department of Corrections?

21 A. Yes, I did.

22 Q. And what did that indicate?

23 A. There have been no documented misbehaviors of
24 any kind at the Department of Corrections.

25 Q. Okay. Why is that important? It -- why would

1 that information be important to a juvenile waiver
2 evaluation?

3 A. Well, it's important to a waiver evaluation
4 because juveniles who act out while incarcerated are
5 more likely to continue offending.

6 Q. Okay. Obviously, Dr. Venn, these records
7 would not have existed in 1994, but does that fact
8 change your conclusion in any way?

9 A. No, it does not.

10 Q. Okay. Finally, I'd like to talk briefly
11 about the seriousness of the crime. This was a very
12 serious crime, set of crimes, and what I'm wondering
13 is doesn't the seriousness of the crime indicate that
14 this individual would, in fact, be a high risk for
15 recidivism?

16 A. Well, seriousness is hard to measure. In
17 fact, the research that's been done on juveniles who've
18 committed homicide indicates that most of them do not
19 get into trouble again.

20 Q. Okay. Now, when you evaluated Herman, you,
21 also, did find some negative factors, right?

22 A. Yes, I did.

23 Q. Okay. I'd like to briefly touch upon
24 those. First, you mentioned the WURS Inventory.
25 You -- what did you find based on your WURS Inventory?

1 A. His score on the WURS -- it's the Wender Utah
2 Rating Scale -- indicates that when he was a child, he
3 probably did have problems with hyperactivity,
4 inattention, and impulsivity.

5 Q. And why is that considered a negative
6 factor?

7 A. Well, that in -- not by itself. It's not
8 a negative factor by itself, but in combination
9 with conduct problems, children who have that
10 combination of problems do tend to keep getting in
11 trouble.

12 Q. Okay. Of course, ADHD itself can be
13 treated, right?

14 A. Yes, ma'am.

15 Q. Okay. What impact as to recidivism -- well,
16 first, do you acknowledge other negative factors would
17 be his drug and alcohol use?

18 A. Yes. Marijuana and alcohol abuse
19 specifically.

20 Q. Okay, and, finally, he did have some problems
21 in school and limited intellectual functioning?

22 A. Yes, he did.

23 Q. Okay. Given those negative factors and given
24 the positive factors, why did you give specific greater
25 weight to the positive factors? What in the research

1 made you come to that conclusion?

2 A. There's nothing really in the research
3 that -- that I know of that would lend greater weight
4 to some of those factors than others, but the fact
5 that this young man -- that it was the first time he
6 had appeared in court, the fact that he had no history
7 of aggressive behavior as -- as a child---

8 Q. You mean as a young child?

9 A. As a young child, and the fact that there
10 were stressors in his life, his behavior problems
11 in the school, and then his offense patterns coincided
12 with his grandfather's deteriorating health. Finally,
13 his grandfather had to be taken from the home and
14 placed in a nursing home at the same time that Herman
15 was getting in trouble at school, and I think there's
16 more than a coincidence to that. I think that there
17 was a cause and effect relationship that---

18 Q. So you ultimately think this young man
19 could have been rehabilitated within the juvenile
20 system?

21 A. Yes, I do.

22 Q. Okay. If you will, please answer any
23 questions Mr. -- well, the Court's indulgence for a
24 moment.

25 THE COURT: Certainly.

1 MS. WILKINS: If you will, please answer any
2 questions by Mr. Zelenka.

3 CROSS-EXAMINATION BY MR. ZELENSKA:

4 Q. Dr. Venn, are you morally opposed to the death
5 penalty?

6 A. Yes, I am.

7 Q. So then you would obviously be opposed to an
8 individual that was sixteen or seventeen years old being
9 sentenced to death, correct?

10 A. Yes, I would.

11 Q. In your report you said that individuals who
12 blame others for their problems are more likely to -- to
13 reoffend, recommit?

14 A. Yes, sir.

15 Q. Were you aware of the position that Mr. Hughes
16 was taking contemporaneous to the time of trial as to
17 who, in fact, shot Mr. Pressley?

18 A. Yes, I am.

19 Q. Who was he blaming for shooting Mr. Pressley
20 at that time?

21 A. The man named Pierce.

22 Q. Are you aware that the facts as revealed by
23 the victim in the case as to who, in fact, was the
24 individual that did that commission?

25 A. No, I am not aware.

1 Q. Okay, so you're not aware that Kelly Hoffman
2 testified that, in fact, Mr. Hughes went in and shot
3 Ken Pressley first, then shot Kelly Hoffman, then
4 shot Ken Pressley, then shot Kelly Hoffman, then
5 shot Ken Pressley again. You're not aware of those
6 facts?

7 A. I was not aware of that testimony.

8 Q. Well, that to me sounds like an individual
9 who's blaming someone else for his problems since
10 Mr. Pressley was the one that -- how do you equate
11 that factor then with your position that he could
12 be rehabilitated and likely not reoffend?

13 A. If, in fact, he does have external locus
14 of control, then that would be one more negative
15 factor.

16 Q. Okay, yet even with that information you
17 said he had an average risk to reoffend. Is that not,
18 also, correct?

19 A. That's based on his results of the Justus
20 Inventory.

21 Q. Okay. What's -- what's an average risk of
22 reoffending by an individual who is his age?

23 A. I assume that when the research was done with
24 the Justus, they took their recidivism rate of their
25 subjects and determined which scales predict average

1 risk.

2 Q. And what I'm curious about is what is the
3 average risk?

4 A. In that subject pool I don't know.

5 Q. Is it likely, unlikely that he would reoffend?
6 That's what I'm trying to ask.

7 A. I'm not sure those two can be correlated.

8 Q. So we just don't know what an average risk is.
9 We don't know that he's likely not to or likely to. Is
10 that what you're saying?

11 A. Yes.

12 Q. So basically you don't know whether he's
13 likely to -- to reoffend. Is that not, also, correct?

14 A. No. In my opinion he -- he was not likely to
15 reoffend.

16 Q. How many other individuals who have committed
17 the crime of murder, grand larceny of a vehicle, and
18 assault and battery with intent to kill on another
19 individual have you done a transfer hearing for?

20 A. There may be several. I can't remember.

21 Q. You can't remember any other murders?

22 A. There have been other murders. I thought you
23 meant that specific---

24 Q. Okay.

25 A. ---combination of crimes.

1 Q. How many murder cases have you been involved
2 in a transfer hearing on?

3 A. Maybe twenty or thirty.

4 Q. And what was the result of those hearings?

5 A. Some stayed in family court, and some went to
6 the Court of General Sessions.

7 Q. Okay. Were all those individuals who remained
8 in family court the actual triggerman in the cases?

9 A. Were all of them?

10 Q. Were any -- okay.

11 A. Oh, yes.

12 Q. Some of them were the actual triggerman?

13 A. Yes, sir.

14 Q. How old were they?

15 A. Different ages, probably fifteen, sixteen.

16 Q. Well, probably or how many of those were
17 sixteen?

18 A. I can't remember. You're asking about twenty
19 or thirty cases over a ten-year span of time.

20 Q. You just don't recall?

21 A. I don't recall.

22 Q. Okay. The law today is you wouldn't
23 even be doing this transfer hearing or making
24 that recommendation to family court. Isn't that
25 correct?

1 A. Yes, sir. That is my understanding of the
2 law.

3 Q. Because he's sixteen, he would now be treated
4 immediately as an adult if he committed the crime today.
5 Is that not correct?

6 A. Yes, sir.

7 MS. WILKINS: Objection. I don't see how
8 it's relevant what the law today is. What we're
9 alleging is that under the law in 1994 a transfer
10 hearing should have happened. Who cares what the law is
11 today?

12 THE COURT: Sustained. Sustained. We'll move
13 on.

14 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

15 Q. Dr. Venn, you were not asked to perform a
16 transfer evaluation in 1994-95, were you?

17 A. I was not.

18 Q. Were you one of the -- explain how the
19 Department of Juvenile Justice worked at that time
20 period on request for transfer hearings.

21 A. Requests for transfer hearings came in the
22 form of a court order from a family court judge.

23 Q. Okay, and upon receipt of the court order what
24 did your agency do at that time?

25 A. Upon receipt of the court order we would

1 conduct a thorough evaluation that included a
2 psychological evaluation and a social history.

3 Q. Okay. Who would make the determination within
4 the agency as to who completed that particular
5 evaluation?

6 A. Well, it could have been any psychologist. We
7 tended to do it by geographical area.

8 Q. Okay. What area did you cover at that time?

9 A. I would have -- I had seventeen counties.

10 Q. What -- was Calhoun one of those counties who
11 you always covered?

12 A. Calhoun was one that was under my supervision.
13 We had a psychologist covering that county under my
14 supervision.

15 Q. Okay, so in 1994, even if the Department of
16 Juvenile Justice would have been asked, you would have
17 most likely not been the one that completed that
18 evaluation. Is that not correct?

19 A. I likely would not have interviewed the -- the
20 gentleman, but I probably would have supervised the
21 assessment.

22 Q. Okay. Now, when you made a reference in
23 your direct examination that Herman behaved well during
24 his incarceration, you're aware of the fight that he
25 was involved in in 1994, aren't you, in the detention

1 center?

2 A. He told me about it.

3 Q. Okay, and you are, also, aware of the
4 incidents of fighting that he had in his school records?

5 A. I did not see any documentation of fights in
6 the school records, but his principal told me on the
7 phone that there had been several fights.

8 Q. Okay. Why do you discount those as -- or --
9 or did you discount those in making your determination
10 that he had exhibited no aggressive behavior in his
11 past, or did I misunderstand your statement?

12 A. Well, I had talked about aggressive behavior
13 in early childhood. The fights I'm aware of in
14 the school occurred around the age of fifteen to
15 sixteen.

16 Q. Okay, so around the age of fifteen to sixteen
17 he was having fights---

18 A. There were---

19 Q. ---drinking in excess, utilizing marijuana,
20 possessing a hand gun, shooting an individual. Is that
21 correct?

22 A. In the current offense he shot an individual.
23 The fights in school did not result in any serious
24 injuries. No charges resulted from them, and, in
25 fact, in my reading of the school records they were

1 not documented in the school records, so I did not
2 believe anyone at the time took them very seriously.

3 Q. Okay. In light of the results of the school's
4 failure to take those seriously, which -- do you think
5 the school should have taken them more seriously than
6 they took them now in hindsight?

7 A. Not necessarily. I don't know what trans-
8 pired in those fights, except I know that no one was
9 injured, no weapons were involved. Fights take place
10 in the school. It's -- it's not always a serious
11 event.

12 Q. Okay. Are you aware of the defendant's
13 possession of gun -- of guns?

14 A. I was aware that at times he was in possession
15 of a gun, yes.

16 Q. Right. Other than just this one incident,
17 isn't that correct?

18 A. Yes.

19 Q. Why did Herman tell you that he possessed
20 guns prior to this incident?

21 A. He told me that he was -- there was an
22 incident where he was protecting his brother. He,
23 also, told me that his associates, also, carried
24 guns.

25 Q. Okay. Did that reveal to you any -- any

1 likelihood for rehabilitation?

2 A. I don't know any research in that area, but
3 I can -- I would consider it a negative factor.

4 Q. That negative factor wasn't listed on your
5 report, was it?

6 A. I don't remember.

7 Q. Okay.

8 A. Perhaps not.

9 Q. Why did you not include that negative
10 factor?

11 A. No particular reason. I have -- I have
12 no research to base on that that's a negative
13 factor.

14 Q. Okay. No further questions.

15 REDIRECT EXAMINATION BY MS. WILKINS:

16 Q. Dr. Venn, I just have two further questions.
17 First, just to clarify, Justus Inventory when he
18 asked what an average risk of reoffending is, what
19 you're saying is that the juveniles who are evaluated
20 by the Justus, that of all those juveniles of that
21 database, Herman falls in the average category among
22 those juveniles. Is that correct?

23 A. I believe you could put it that way. When a
24 -- when a test like that is developed, they develop it
25 with a pool of subjects---

1 Q. Uh-huh (affirmative response).

2 A. ---and for -- for the writers of the test
3 manual to make a statement about level o risk, they had
4 followed those juveniles to determine which juveniles
5 were more likely to reoffend.

6 Q. Okay, and the test certainly wouldn't be used
7 if it didn't -- weren't considered to have some level of
8 reliability, I would assume?

9 A. That's correct.

10 Q. Okay, and, finally, my last question, just to
11 clarify another thing, as to the carrying of guns isn't
12 it true that in some communities it's fairly common for
13 juveniles to carry guns?

14 A. Yes, ma'am, that has been my experience.

15 Q. Okay, and you, also, just to reiterate, you
16 say that you're not aware of any research that that is
17 actually a negative factor?

18 A. That is true. I have seen no research to that
19 effect.

20 Q. Okay. Thank you very much.

21 MR. ZELENKA: Let me just follow up.

22 RECROSS-EXAMINATION BY MR. ZELENKA:

23 Q. On the -- on the research of juveniles who
24 commit homicide indicates they usually have good
25 outcomes, the way you testified on direct, is that

1 research, also, research involving juveniles who commit
2 murder, or is it just simply all homicides?

3 A. I believe it's murder.

4 Q. Okay, and is the -- the test is whether they
5 commit other crimes, or is it whether they reoffend and
6 commit another murder in their lives?

7 A. I've seen research of both types.

8 Q. And what is the basis of that research again,
9 the ultimate conclusion?

10 A. The juveniles who commit homicide usually do
11 not reoffend.

12 Q. What percentage do not reoffend?

13 A. Well, in one study eighty-three per cent
14 did not reoffend. Of researched of this type I'm aware
15 of about a hundred and eighty juvenile subjects who
16 have been followed, and most did not reoffend. Of
17 that a hundred and eighty, two have committed further
18 homicides.

19 Q. How many?

20 A. Two.

21 Q. Have you done any research in South Carolina?

22 A. No, sir, I have not.

23 Q. So you don't know the South Carolina history
24 on recidivism of juveniles who commit the crimes of
25 murder, do you?

1 A. No, I do not know that statistic.

2 Q. Okay.

3 MS. WILKINS: Nothing further.

4 THE COURT: All right. You may step down,
5 sir.

6 THE WITNESS: Thank you.

7 THE COURT: Do you want this witness released?

8 MR. BLUME: Your Honor, we have done a -- a
9 probably less than average job of trying to figure out
10 how long this was going to go this morning.

11 We have two more witnesses for the day, one of
12 whom will be quite lengthy, and he is here, so I guess
13 what I'm saying is we can either break for lunch now and
14 then come back and start, or we could go for a while,
15 but he -- I imagine it will be a several hour direct
16 examination.

17 THE COURT: All right. Well, we've probably
18 come to a good breaking point in that case.

19 Do you have any objection to that witness
20 being released from subpoena---

21 MR. ZELENKA: Oh, absolutely not.

22 THE COURT: ---since he's walking down the
23 stairs probably as we speak.

24 MR. ZELENKA: No, no objection.

25 THE COURT: All right.

1
2 THE COURT: Okay. We will take a -- a lunch
3 break, and I need you back here -- well, let's just make
4 it 1:00. We'll just round it up to 1:00. See you back
5 in here at 1:00.

6 (WHEREUPON, RECESS IS TAKEN FOR LUNCH.)
7

8 THE COURT: Call your next witness please.

9 MR. BLUME: Your Honor, the applicant calls
10 Joseph -- Joseph Savitz.

11 JOSEPH L. SAVITZ, III,
12 BEING DULY SWORN, TESTIFIES AS FOLLOWS:

13 THE CLERK: Please state your name and spell
14 your last.

15 THE WITNESS: Okay. Thanks. My name is
16 Joseph L. Savitz, S-a-v-i-t-z, III.

17 DIRECT EXAMINATION BY MR. BLUME:

18 Q. And, Mr. Savitz, how are you currently
19 employed?

20 A. I'm the Deputy Chief Attorney at the Office of
21 Appellate Defense.

22 Q. And so you are an attorney?

23 A. Yes.

24 Q. And you're licensed to practice law in the
25 state of South Carolina?

1 A. That's correct.

2 Q. How long have you been at the Office of
3 Appellate Defense?

4 A. Since 1985.

5 Q. And what -- did you start out as an assistant
6 appellate defender?

7 A. Yeah.

8 Q. And what does an assistant appellate defender
9 do?

10 A. An assistant appellate defender, we read trial
11 transcripts, identify issues for appeal, research them,
12 write the briefs, go argue to cases in front of the
13 Supreme Court and Court of Appeals.

14 Q. And what does a deputy do?

15 A. I do that and manage some attorneys.

16 Q. In 1996 were you assigned the death penalty
17 appeal in the case of The State versus Herman Hughes?

18 A. Yes, I was.

19 Q. And can you tell me what you did in connection
20 with that case?

21 A. The same as all of them. I read the
22 transcript, went to the clerk of court's office, looked
23 at the exhibits, identified in this case the one issue
24 that I wanted to present, researched it, wrote the
25 brief, went and argued the case.

1 Q. At my request have you reviewed certain parts
2 of the record in this case?

3 A. Yes, I have.

4 Q. And I want to talk to you about really four
5 -- four issues?

6 A. Okay.

7 Q. And the -- the first I want to talk to you
8 about is proportionality.

9 A. All right.

10 Q. From a review of the brief in this case, I
11 notice that you did not raise a proportionality issue
12 in your brief. Is that---

13 A. No, I did not.

14 Q. Do you recall today why you didn't do
15 that?

16 A. I think I have raised proportionality in
17 the past but -- but very rarely, and the reason in
18 this case was that I -- I don't really think about
19 it that much anymore because my understanding is
20 that the Court does its own proportionality review.
21 I probably could have made more of it as -- as just
22 a factual matter and for, you know, to season of
23 the case than I did, but I don't normally raise
24 proportionality.

25 Q. So in your view that's something the Court

1 does on its own?

2 A. I -- I believe by statute the Court has to,
3 you know, rule on proportionality. Whether they'd have
4 done a better job on it had I made more of his age and
5 his mental condition, I don't know.

6 Q. In your experience in handling death penalty
7 cases, I mean, is this case -- you've sort had to
8 line them up, at least as far as the defendant goes.
9 Would this be -- the defendant be on the extreme
10 end?

11 A. No, this is not an extreme case. I -- I
12 don't -- I mean, if you're asking me what I believe,
13 I don't believe this is a death penalty case.

14 Q. Why?

15 A. It's just not that aggravated. There are
16 much more aggravated. He was---

17 MR. ZELENKA: Object. It goes beyond the
18 area of his expertise. The jury found it, the judge
19 charged it, and it's irrelevant whether Mr. Savitz
20 thinks this is a death penalty case or not.

21 THE COURT: All right, sir.

22 MR. BLUME: Well, I think he is -- I mean,
23 he's handled hundreds of appeals in cases in which
24 the defendants got life, cases in which the defendants
25 got death. I mean, I think he does have certainly

1 sufficient experience to say, "Well, based on what
2 I see, this isn't an extreme in the case of
3 aggravation."

4 THE COURT: I'm -- I'm going to sustain the
5 objection for this particular question, but I'll allow
6 you to give -- to -- to -- to obtain some facts from
7 him---

8 MR. BLUME: Okay.

9 THE COURT: ---that may allow for him to reach
10 some type of conclusion.

11 MR. BLUME: Okay.

12 DIRECT EXAMINATION RESUMES BY MR. BLUME:

13 Q. Well, first of all, how many appeals have you
14 handled?

15 A. As -- thousands now, I guess.

16 Q. And have you handled a lot of murder appeals?

17 A. A lot of murder appeals, a bunch of death
18 penalty appeals, too.

19 Q. So, and in your experience you've seen a
20 substantial number of cases in which the defendants were
21 sentenced to life who committed more aggravated crimes
22 in your opinion than Mr.---

23 A. Oh, yeah.

24 Q. And, also, I think one of the things you were
25 talking about that somewhat makes this different is his

1 age and mental retardation?

2 A. Well, it's his age, his mental state, the fact
3 that he was under the domination of an older, more
4 street-wise person.

5 Q. Now, another issue, which I showed you parts
6 of the record of and asked you about, were -- had to do
7 with the trial counsel made an objection to the adequacy
8 of the waiver hearing at---

9 A. Right.

10 Q. ---at the trial itself. Did you, at my
11 request, did you review that part of the record?

12 A. Yes, I did.

13 Q. And today do you have any recollection of why
14 this claim was not raised on direct appeal?

15 A. I -- I don't even remember considering that
16 issue, to be honest with you. I have no recollection
17 of -- of ever -- I'm sure I looked at it. I'm sure
18 I looked at the order, but why I didn't raise it or
19 not, I can't -- I don't have any recollection of it.

20 Q. But to the best of your recollection you don't
21 have a strategic reason. You can't remember a strategic
22 reason that you did not raise this issue?

23 A. If -- if it was a good -- if it's a good
24 issue, there's never a strategic reason for abandoning a
25 good issue on appeal.

1 Q. Now I want to ask you about two issues. I
2 asked you to review two other parts of the record,
3 which were not raised, as I understand it, because --
4 or at least there was no -- the claims were not
5 preserved.

6 A. Okay.

7 Q. And one of those, I asked you to review
8 parts of the solicitor's closing argument in this
9 case?

10 A. Right.

11 Q. Are you aware of what I'm talking about?

12 A. Right.

13 Q. Specifically the argument on page 1651 of the
14 record?

15 A. Right.

16 Q. And---

17 THE COURT: I'm sorry. What was the page
18 again?

19 MR. BLUME: I'm sorry. 1651, Your Honor.

20 THE COURT: Okay. Yes, sir.

21 DIRECT EXAMINATION RESUMES BY MR. BLUME:

22 Q. And the part that begins at the top, it says,
23 "Let's look at life imprisonment for a minute as an
24 alternative service"---

25 A. Right.

1 Q. ---"alternative sentence"?

2 A. Yes.

3 Q. "Herman Hughes gets life imprisonment, goes
4 to prison, he's cared for by the State of South
5 Carolina, he's fed, he's clothed, and he's given medical
6 attention." Isn't that---

7 A. Right.

8 Q. Is that something I asked you to look at?

9 A. Yes.

10 Q. Had that claim been preserved, would you have
11 raised that issue on direct appeal?

12 A. Yes, I would have. Solicitor Bailey makes
13 that argument in just about every death penalty case. I
14 don't know if he's still doing it or not. Every time
15 it's been objected to I've -- I've raised it on appeal,
16 and the reason being is that there's a lot of law in
17 the death penalty that says that you can't suggest
18 that a defendant's going to get a light sentence if
19 they sentence him to life or that it's not really
20 punishment to be sentenced to life imprisonment, and
21 every time he's argued it and it has been objected to,
22 I've raised it.

23 Q. Okay. Then, the last thing I asked you to
24 look at was voir dire of two jurors?

25 A. Right.

1 Q. Is that correct?

2 A. That's correct.

3 Q. And that would have been Juror Brenda Wise and
4 Juror William Barron?

5 A. That's right.

6 Q. And Juror Wise's voir dire begins at page 193
7 of the record and William Barron's at page 295 of the
8 record. Let me ask you if there had been a objection to
9 those jurors being qualified at trial, would you have
10 raised those issues on appeal?

11 MR. ZELENKA: Your Honor, that calls for
12 speculation about what this objection would be. The
13 record does not reveal there was any objection made to
14 those particular jurors. It's a factual finding by the
15 trial judge.

16 MR. BLUME: Well, there was no motion to
17 challenge for cause. If there had been a motion
18 to---

19 MR. ZELENKA: So, what is the motion to be is
20 what I'm asking.

21 THE COURT: Yes, sir.

22 MR. BLUME: Okay. Well, let's -- well, then
23 I'll go back. Let's go back and lay the record.

24 DIRECT EXAMINATION RESUMES BY MR. BLUME:

25 Q. Have you read the voir dire of these jurors?

1 A. Yes, I have.

2 Q. And based upon the voir dire would you
3 have filed a motion to challenge for cause on these
4 jurors?

5 A. These were two jurors that had personal
6 knowledge about the case outside of the evidence in the
7 case, and had they been objected to on that basis, I
8 would have raised that on appeal.

9 Q. And do you remember -- what was Juror Brenda
10 Wise -- what was her extraneous knowledge?

11 A. She -- her daughter was friends with the
12 sister of the victim, I believe, and would come to the
13 house and talk about it. The other guy is actually the
14 one that broke the news, I believe, to---

15 Q. To somebody?

16 A. Yeah, to a relative, yeah.

17 Q. To his family about the homicide?

18 A. That's right.

19 Q. And so -- I'm sorry -- in your opinion what
20 were you talking about that they had---

21 A. That they had like personal knowledge about
22 the case outside the record evidence.

23 Q. Uh-huh (affirmative response), and it was
24 information that came from relatives of the victim?

25 A. That's right.

1 Q. And, again, you've reviewed a lot of records
2 and raised a lot of issues on appeal. If there -- it's
3 my understanding in order to raise an issue on appeal
4 now in the post in favorem vitae era, there has to be an
5 objection at trial?

6 A. That's right.

7 Q. Or in the question of a juror, there has to be
8 a motion to challenge for cause?

9 A. That's right.

10 Q. Which has to be essentially ruled upon by the
11 judge. Is that correct?

12 A. You're correct.

13 Q. So, my question to you is is if there had been
14 a motion to challenge for cause on that basis at trial
15 in this record, would you have raised that issue on
16 appeal?

17 A. I would have raised that issue, those -- the
18 issue of those two jurors on appeal.

19 Q. Please answer any questions Mr. Zelenka might
20 have.

21 A. Okay.

22 CROSS-EXAMINATION BY MR. ZELENKA:

23 Q. Mr. Savitz, were you asked to review the
24 motion hearing---

25 A. The---

1 Q. ---related to whether the death penalty could
2 be sought under---

3 A. For this?

4 Q. ---the law?

5 A. For this hearing today?

6 Q. Yes.

7 A. No. Now wait a minute. I don't believe so,
8 but I'm -- I do remember seeing something about that not
9 too long ago. I haven't viewed it today though.

10 Q. Okay. Let me show you Volume 6 of the
11 transcript of record.

12 A. Okay.

13 Q. Beginning at page 1881.

14 A. Uh-huh (affirmative response).

15 Q. Through 1888.

16 A. Okay.

17 Q. Now, the allegations of ineffective assis-
18 tance of appellate counsel would have been raised
19 before this court, particular 10i and 10k assert
20 that "Appellate counsel failed to raise on appeal
21 any proportionality argument concerning the propriety
22 of a death sentence for a sixteen-year-old defendant
23 with mental retardation of borderline. Appellant's
24 failure was both unreasonable and prejudicial," and
25 10k asserts, "Ineffective assistance of appellate

1 counsel, that trial counsel moved to bar the State
2 from seeking the death penalty against applicant arguing
3 that imposition of the death penalty for the crime
4 committed while the defendant was a juvenile violates
5 both the United States Constitution and the South
6 Carolina Constitution. After hearing oral argument
7 the trial judge concluded that 'The appropriate case
8 law, including that of South Carolina, does not suggest
9 that one who is sixteen at the time of the alleged
10 commission of the crime cannot suffer supreme penalty
11 if a juror of twelve find it is warranted. Appellate
12 counsel failed to appeal the trial court's finding
13 on the state constitutional issue despite the lack
14 of any controlling South Carolina Supreme Court decision
15 concerning the issue. Counsel's admissions are both
16 unreasonable and prejudicial." With that understanding
17 of the allegations being raised against your
18 representation, having reviewed that material, what
19 was the reason, if any, that you chose not to
20 specifically argue the claim that the death penalty
21 upon the defendant, who was sixteen at the time of
22 the crime, was a violation of either the state or
23 federal constitutions?

24 A. I -- I'm not sure that it is, and I nor-
25 -- I've raised proportionality before, which is

1 basically what we're talking about, and I just -- I've
2 never had much luck with proportionality, and, as I
3 say, the -- the court usually puts a little stinger
4 on the end of the opinion saying, "We balance this
5 against other cases and find it's not unreasonable and
6 disproportionate." It seems to me that they ruled on
7 proportionality, and I was trying to keep this brief
8 as short as possible.

9 Q. Okay, and in your statement of facts on appeal
10 in this case you apprised the court that "Because
11 appellant was a juvenile the State filed petitions
12 alleging the four charges in Calhoun County Family
13 Court on March 21, 1994, and asked the court on March
14 24th to transfer the case to General Sessions so that
15 the appellant could be tried as an adult." You --
16 you brought that to the attention of the court in your
17 -- your brief. Isn't that correct?

18 A. That's right.

19 Q. Now, you, also, brought to the attention of
20 the court in your brief at page 5 that "Doctors at the
21 William S. Hall Psychiatric Institute do determine
22 appellant to be of borderline intelligence." Isn't
23 that correct?

24 A. That's right.

25 Q. You, also, stated in the brief at page 6,

1 "Defense counsel reminded the jury of the evidence
2 implicating Pierce and argued had Kelsey not been the
3 aggressor, this wouldn't have happened." You brought
4 that to the attention of the court, also. Is that not
5 correct?

6 A. Right.

7 Q. And you, also, brought to the attention of
8 the court and listed in your brief at page 6 through 7
9 the statutory mitigating factors that were involved in
10 this case, correct?

11 A. Correct.

12 Q. Including the age of mentality of the
13 defendant at the time of the crime?

14 A. Uh-huh (affirmative response).

15 Q. Correct?

16 A. Yes.

17 Q. And that the defendant was below the age of
18 eighteen at the time of the crime, correct?

19 A. Right.

20 Q. And that the defendant had mental retardation
21 at the time of the crime, correct?

22 A. That's right.

23 Q. So, within the first seven pages of your brief
24 you brought to the attention of the court those factors
25 that would essentially be considered based upon this

1 argument as a proportionality and mitigation argument.

2 Is that correct?

3 A. I mean, that's like, you know, a bunch of
4 ingredients. They're not the same thing as -- as the --
5 the finished dish, but, I mean, everything that I would
6 have argued had I argued a proportionality argument is
7 there, yeah.

8 Q. Okay. You have reviewed many, if not all, of
9 the opinions of the South Carolina Supreme Court in the
10 death penalty area since the Shawn Roche case in 1979.
11 Is that correct?

12 A. That's right.

13 Q. How many of those cases, other than Shawn
14 Roche and the Conyers opinion was proportionality of
15 the death sentence ever argued in a brief before
16 the South Carolina Supreme Court in what may be
17 approximately a-hundred-and-sixty-some opinions of the
18 Court?

19 A. I am thinking that I argued it one time in
20 possibly the Vondolen case, but I -- I could be wrong
21 about that. I mean, it seems to me we made a big deal
22 about proportionality, if not in the brief, then -- then
23 at argument, but I -- I remember having argued it at one
24 point unsuccessfully.

25 Q. Okay. As -- as the -- one of the primary

1 appellate advocates in the area of death penalty
2 appellate litigation in South Carolina, is it unusual
3 for you then to argue proportionality of the death
4 sentence?

5 A. Yes.

6 Q. And did you consider arguing that in
7 this particular case based upon your review of the
8 record?

9 A. Arguing it, you know, just plainly
10 proportionality, no, I don't think I ever considered
11 doing that. What -- I mean, it occurred to me pretty
12 early on that this wasn't -- that this was at the very
13 far, far end of -- of the death penalty cases as far
14 as aggravation goes. The error I found, I believe,
15 if -- if -- had it not been committed, would have
16 resulted in a life sentence in this case. I think
17 that's the difference between death and life in this
18 case.

19 Q. And the error---

20 A. It's that close.

21 Q. The error that you asserted you found
22 was---

23 A. That the---

24 Q. ---an evidentiary issue---

25 A. That's right.

1 Q. ---that the Supreme Court concluded was, in
2 fact, error but harmless error under state procedure?

3 A. That's correct.

4 Q. With respect to the -- the juvenile waiver
5 issue I wasn't sure on direct examination I under-
6 stood---

7 A. Uh-huh (affirmative response).

8 Q. ---your analysis as to why you did not raise
9 that issue before the South Carolina Supreme Court, and
10 what was that issue?

11 A. I -- I -- I don't really understand unless
12 the -- the adequacy of the waiver hearing or the
13 adequacy of the findings in the order were insufficient.
14 I know the -- the judge cites the Kent case, but he
15 doesn't really list the criteria or anything. I'm
16 not an expert on juvenile waiver hearings, by the way,
17 so I don't remember at the time if I did some research
18 on it and just decided not to do it or didn't do any
19 research at all or didn't even think about it. I can't
20 remember.

21 Q. Okay, but so I understand this, you today
22 sitting here do not know of any issue that you would
23 have asserted before the South Carolina Supreme Court
24 that that waiver, that transfer hearing, was improper as
25 a matter of---

1 A. What I -- what I'm saying is I don't -- I
2 don't know enough about juvenile waiver hearings to
3 say whether or not that's a good issue here today. If
4 it's a good issue, and I missed it, then I was
5 ineffective because there's never a reason to waive
6 a good issue.

7 Q. Okay, but you cannot look at that issue today
8 and say that that is a good issue?

9 A. No, I cannot.

10 Q. Is that what you're saying? With respect to
11 the solicitor's closing argument at page 1651---

12 A. Right.

13 Q. ---what the solicitor said, and let me make
14 sure I -- I understand it. "Let's look at life
15 imprisonment for a minute as an alternative sentence
16 to the death penalty."

17 A. Right.

18 Q. "Is life imprisonment the appropriate or
19 just punishment for the horror story that we've all
20 heard over the last few days? Herman Hughes gets life
21 imprisonment, goes to prison, is cared for by the State
22 of South Carolina, he's fed, he's clothed, he's given
23 medical attention." Those are all factually correct
24 statements. Isn't that correct?

25 A. Yes, it is.

1 Q. So, what is the -- the error in that
2 particular instruction that you claim that Phil Newsom
3 should have objected to?

4 A. I -- I haven't read -- I haven't read the
5 trial testimony, but just because something's factually
6 correct doesn't mean the solicitor can argue it to the
7 jury in the sentencing phase. The jury cannot --
8 usually he argues that like life imprisonment is like a
9 stay in a Holiday Inn.

10 Q. That's not what this argument is.

11 A. Well, he says you have -- he says you get
12 TV, you get fed, you get clothes, you get medical
13 attention. That's most -- that's probably more than
14 most people on the jury get, and what it sounds, makes
15 it sound, like is that life imprisonment is some kind of
16 vacation or free ride, and it most definitely is not.
17 That's none of the bus- -- none of the business of the
18 jury. There are early cases that say that the -- that
19 the State can't argue nor can the defense about
20 conditions of life imprisonment. That's of no concern
21 to the jury.

22 Q. When you've made your brief to the South
23 Carolina Supreme Court on other cases---

24 A. Right.

25 Q. ---that Walter Bailey did something that

1 you're asserting happened presumably, what was the
2 result of those decisions?

3 A. Actually the -- the one time I think it was
4 ruled on by the Court, they held that it was
5 procedurally barred in like Joe Gardner's case, and
6 it's currently being raised in the PCR. They held
7 it was procedurally barred, but they didn't say,
8 "Not only is it procedurally barred, it's not error."
9 They just said it was procedurally barred, and they
10 couldn't reach it, but I've raised it every chance
11 I've gotten.

12 Q. No further---

13 THE COURT: Yes, sir.

14 REDIRECT EXAMINATION BY MR. BLUME:

15 Q. Mr. Savitz, this will just take a second,
16 but---

17 A. Okay.

18 Q. ---if I -- I just wanted to clarify for the
19 record. Are you -- could you be -- could you tell me
20 what these are?

21 A. These look like the -- some notes I made.

22 Q. Okay. Can you just sort of briefly look
23 through these and see if you -- the only thing I want
24 to know is if you -- if you found anything in there
25 which indicates that you identify or consider the waiver

VOLUME TWO OF FIVE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

SUPPLEMENTAL APPENDIX

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1 issue?

2 A. No.

3 Q. Nothing further.

4 MR. ZELENKA: The Court's indulgence.

5 THE COURT: Yes, sir.

6 MR. ZELENKA: Could I see what you have just
7 shown him?

8 MS. WILKINS: We don't have it. We didn't
9 give it to you.

10 MR. ZELENKA: Why didn't you give it to me
11 pursuant to discovery?

12 MS. WILKINS: We answered pursuant to
13 discovery that it was, A, not relevant at the time;
14 B, work product. That was clarified with the attorney
15 general's office, and they made a specific letter
16 to us that they didn't object to that. This was in
17 March 1999. I can bring the correspondence if you'd
18 like.

19 THE COURT: It has at this point---

20 MS. WILKINS: It has at this point perhaps---

21 THE COURT: ---become relevant---

22 MS. WILKINS: ---become relevant.

23 THE COURT: ---and I -- all right.

24 MS. WILKINS: He can see it.

25 THE COURT: Let me give you---

1 MS. WILKINS: All it is is a transcript
2 summary.

3 THE COURT: Let me give you the opportunity to
4 review it at this time, and we'll take whatever type of
5 break that you may need---

6 MR. ZELENKA: Thank you, Your Honor.

7 THE COURT: ---and then any appropriate
8 motions that you may want to make at that time.

9 MS. WILKINS: But, I mean, he was apprised of
10 the existence of this and of its content

11 THE COURT: But, also---

12 MS. WILKINS: ---and did not object.

13 THE COURT: Right. Also, indicated that it
14 was not relevant.

15 MS. WILKINS: Yes.

16 THE COURT: All right. Well, the situation
17 clearly has changed, and let's see whether a quick
18 review will satisfy the situation.

19 MS. WILKINS: That's fine. I just wanted to
20 be clear about that.

21 MR. ZELENKA: Your Honor, I -- I've finished
22 reading the material.

23 THE COURT: All right.

24 MR. ZELENKA: Do you have any further
25 questions?

1 MR. BLUME: No, no.

2 THE COURT: All right.

3 RECROSS-EXAMINATION BY MR. ZELENKA:

4 Q. Okay. I -- I have a few questions based on
5 this, Mr. Savitz.

6 A. Sure.

7 Q. You stated on redirect that this was your
8 handwriting?

9 A. Yes, it is.

10 Q. So, in your own handwriting you acknowledge
11 that you did review that there was an objection to the
12 family court waiver of jurisdiction?

13 A. Right.

14 Q. So you were aware of that at the time that
15 you were putting your materials together to discern
16 what issues you wanted to raise on appeal. Is that
17 not correct?

18 A. Obviously I was.

19 Q. Also, when you review the solicitor's closing
20 argument, do you look for issues that stand out to you
21 upon your reading of that argument, whether there's an
22 objection or not?

23 A. Yeah, normally.

24 Q. Okay, and in the argument, referring to the
25 solicitor's closing argument---

1 A. Uh-huh (affirmative response).

2 Q. ---and we're summarizing 1625 to 1661,
3 you do not even include a reference to an issue now
4 that you discern to be so prejudicial. Isn't that
5 correct?

6 A. That's right.

7 Q. So, apparently at the time of your reading
8 of the argument on your own that issue did not
9 stand out as inherently prejudicial. Isn't that
10 correct?

11 A. I didn't write it down.

12 Q. Okay, yet you referred to Pierce's lesser
13 involvement---

14 A. Uh-huh (affirmative response).

15 Q. ---Pierce's charges will be handled another
16 day, which were different issues. Isn't that
17 correct?

18 A. That's right.

19 Q. And, also, you -- you went through the jury
20 selection---

21 A. Uh-huh (affirmative response).

22 Q. ---in that case, and you know that, in fact,
23 that Mr. Barron was made the foreman of the -- of the
24 jury. Isn't that, also, correct?

25 A. That's right.

1 Q. You didn't assert any notes in here concerning
2 the fact that Brenda Wise or Juror Barron. Isn't that,
3 also, correct?

4 A. No, I don't see any.

5 Q. And did you read the voir dire?

6 A. Yes.

7 Q. No further questions.

8 MR. BLUME: Just one.

9 FURTHER REDIRECT EXAMINATION BY MR. BLUME:

10 Q. Do you always write down every issue, which is
11 clearly not preserved in your---

12 A. No.

13 Q. --in your notes?

14 A. No.

15 Q. Nothing further.

16 THE COURT: You may step down, sir.

17 MR. BLUME: May he be excused?

18 THE COURT: Any objection?

19 MR. ZELENKA: No objection.

20 THE COURT: All right. You're free to
21 leave.

22
23 MR. BLUME: The applicant would call Phil
24 Newsom.
25

1 PHILLIP NEWSOM, BEING DULY
2 SWORN, TESTIFIES AS FOLLOWS:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: My name is Phillip Newsom, and
6 Newsom is spelled N-e-w-s-o-m, as in Mary.

7 DIRECT EXAMINATION BY MR. BLUME:

8 Q. Mr. Newsom, are you an attorney?

9 A. Yes, I am.

10 Q. And in what year were you licensed to practice
11 law?

12 A. 1978.

13 Q. And in the course of being an attorney in this
14 state were you ever retained to represent the applicant
15 in this case, Herman Hughes?

16 A. Yes, I was.

17 Q. And can you tell me a little bit about how you
18 got involved in the case?

19 A. To the best of my memory I was approached
20 by a gentleman, Mr. Nesbitt, I believe, and wanted me
21 to meet Ms. Hughes, who is Herman's grandmother. I
22 met with her. I talked to her on the phone a few
23 times. There was some issue at that time whether
24 or not this was going to be a death penalty case.
25 In my conversations with the solicitor he was not

1 certain. He had a number of death penalty cases,
2 some he thought were worse than this, so we entered
3 into a fee arrangement to where it would be one fee
4 if it was going to be -- not be a death penalty case,
5 and it would be another if it were, and she -- I
6 hesitated to get involved. I talked with other lawyers
7 who had been retained, and each one of them said they
8 regretted it. I met with her, and she started crying,
9 and I told her at that time I was hesitant to get
10 involved, and then she prevailed on me to get involved
11 in the case.

12 Q. And you said there was one fee arrangement if
13 it was a -- going to be a capital case and another fee
14 arrangement---

15 A. She wasn't able to come up with the entire
16 fee, so we -- she ended up paying me a little bit under
17 \$15,000. The -- the initial fee that was requested was
18 \$50,000. She was going to try to borrow money against
19 her house. She thought she could. She could not. We
20 talked about a mortgage, a second mortgage, on her
21 house. I didn't want to put her out of her house, and
22 she never signed that mortgage.

23 Q. Was this case -- it -- it eventually became a
24 death penalty case?

25 A. Yes.

1 Q. And I'll come back and talk to you a little
2 bit about that, but at the time this case went to trial
3 was this the first capital case in which you had ever
4 been lead counsel?

5 A. It depends on your def- -- no.

6 Q. That actually went to trial?

7 A. Yeah, oh, yeah, absolutely.

8 Q. That went---

9 A. Yeah, yeah.

10 Q. You had been, as I understand it, you had
11 some involvement in capital cases when you were a
12 law clerk for the Richland County Public Defender's
13 Office?

14 A. There were two cases there, the Shawn Roche
15 trial, and we represented Ronnie Mahaffey, and I was the
16 chief law clerk involved then. Michael Page and John
17 Doe got a represent- -- we had fifteen law clerks at the
18 public defender's office. Two of them were chief
19 clerks. I was one of those, and we got -- we got all
20 the murder cases and the rape and those kind of cases.
21 We worked with the lawyers on them.

22 Q. And that would have been---

23 A. And then---

24 Q. ---in '77 or '78, that---

25 A. '78, yeah. Uh-huh (affirmative response), and

1 then I represented Carol Allman in Beaufort in the John
2 Platt, John Arnold case.

3 Q. Now, she was a material witness. She was
4 not---

5 A. She was charged initially. We negotiated.

6 Q. An immunity agreement?

7 A. An immunity agreement, yeah.

8 Q. And she -- she did not go to trial. She
9 essentially---

10 A. No, she did not have to go to trial, no.
11 I mean, in these kinds of cases, as you well know,
12 success is negotiating a life sentence or less, okay.
13 I mean---

14 Q. Well, that was substantially---

15 A. ---the last thing you want to do is to go to
16 trial on these cases.

17 Q. And then you had some involvement in some
18 cases when you were, I guess, with the Sumter Public
19 Defender?

20 A. Two, two of them, yes, William Ward and
21 Maurice Mack

22 Q. And those were both negotiated?

23 A. One ended up with a twelve-year sentence
24 on manslaughter. The sentence wasn't negotiated.
25 The -- the plea was, and the other had a life sentence,

1 yes.

2 Q. But, again, this is the first capital that you
3 actually went to trial?

4 A. Sure.

5 Q. And at the time that you were retained in
6 this case were there counsel that were appointed to
7 represent?

8 A. There had been two counsel, I understand, in
9 Orangeburg somewhere that had been appointed. I never
10 met with them or talked with them. Ms. Hughes did not
11 seem to be pleased with the -- her perception of the
12 lack of time they were spending. I was led to believe
13 they never talked to Herman in the months they were
14 appointed to represent him.

15 Q. Okay, and just to sort of make the record
16 clear on this, you -- personally you didn't have
17 anything to do with the family court juvenile waiver
18 hearing?

19 A. Not at all. That was already over with by
20 the time I got involved in the case. That was a rather
21 quick waiver that happened within days of the -- of
22 the arrest. It was one of the -- one the fast-paced
23 scale.

24 Q. And he was represented by Martin Banks in --
25 in that proceeding?

1 A. So I was told afterwards, yes.

2 Q. But you had no involvement on that?

3 A. None whatsoever.

4 Q. Okay. Now, I want to ask you some questions
5 about some particular issues in the case and because it
6 was an unusual case. Do you remember, did you ever come
7 a time when you decided that it would be -- co-counsel
8 would be helpful?

9 A. Initially I tried to prevail on Judge
10 Cottingham that Ms. Hughes -- that Herman at that
11 time was an adult, legal adult, okay, and she could
12 hire me to assist. He would have none of that. He was
13 going to relieve those guys. It was either going to
14 be me or them, so he -- he relieved them. Subsequent
15 to that I approached him about having counsel appointed.
16 We had Herman declared indigent. He did give us
17 graciously some funds, you know, for investigators
18 for expert witnesses and the like. He would not give
19 us -- give me any co-counsel. I sought out the advice
20 of other attorneys. As a matter of fact, I talked to
21 your office as far as where I stood as far as another
22 counsel. Given I was retained, the law -- there was
23 -- nobody knew of any law that was right on point
24 about that. There was a statute that covered indigent
25 appointed lawyers, and there would have to be more

1 than one. There was none if there was a retained
2 lawyer. The only case that we were aware of was the
3 one in which David Bruck got counsel appointed. I
4 mentioned that specifically to the judge. He was not
5 impressed.

6 Q. You're talking about the Susan Smith
7 case?

8 A. Yes. Yeah. I don't think it had gone to
9 trial at this time, but I think the appointment of the
10 lady who was co-counsel had been already determined.
11 We used that as an argument to him. Now, we did --
12 you've got to understand some of these conversations
13 took place in chambers. I understand there was not
14 a record of it. I don't -- I don't know. I know we
15 had two or three pretrial motion hearings in Richland
16 County because he was holding court there. It would
17 have been at that time, and my guess it would have been
18 -- this is speculation because it has been a while,
19 and, quite honestly, I tried to -- you want emotionally
20 to forget as much about -- it's a painful time for me
21 about this. I mean, you want to forget as much
22 emotionally as you can, so I didn't -- I don't -- I
23 didn't dwell on it.

24 Q. Okay, but to, as I understand what you're
25 saying, to the best of the way you remember is, you

1 determined that since Mr. Hughes was indigent, and you
2 were being paid by the family, your argument to Judge
3 Cottingham was, "My client's indigent"---

4 A. We need---

5 Q. ---"There's a statute for two lawyers"---

6 A. That's right.

7 Q. ---"and so you should at least appoint
8 co-counsel to assist me"?

9 A. Well, no, I asked for the funds, and I asked
10 for co-counsel, but I didn't have really any case law on
11 point that I could argue to him. He asked me if I had
12 that. All we had was another circuit judge who in their
13 opinion had -- or their determination had appointed one
14 in a previous. Certainly I would have loved to have had
15 co-counsel.

16 Q. But you made this request, and Judge
17 Cottingham denied it?

18 A. Yes.

19 Q. Okay. I want to talk to you a little bit
20 about this case now. I think you had an investigator
21 named Patty Rickburn?

22 A. Well, I engaged the services of Patty
23 Rickburn. She was not my investigator.

24 Q. Right. Okay. I'm sorry.

25 A. There was Elijah Nesbitt, who helped out prior

1 to -- Patty got involved after there was funds. Elijah
2 Nesbitt was employed by Ms. Hughes, and he had done some
3 background. I don't know what happened to Elijah during
4 that time. I think he had some health problems. He
5 kinda' disappeared from the -- the case in his
6 participation. Probably, my guess is that Ms. Hughes
7 ran out of funds.

8 Q. Mr. Nesbitt was a man -- he was involved
9 with, I think, in nickel and dime investigations, wasn't
10 he?

11 A. Yeah, that was one of the businesses---

12 Q. That was his kind of---

13 A. ---he was involved. He served papers for
14 me from time to time, as well as he did other people,
15 too.

16 Q. Can you tell me briefly what your theory of
17 the case was?

18 a. There seemed to be a factual question as to
19 whether or not Herman was the triggerman, okay, the lone
20 triggerman, or whether Kelsey Pierce was. Obviously, we
21 -- it was to our advantage, and Herman never ever
22 admitted shooting Mr. Pressley. Under -- we had him
23 under truth serum. We had him hypnotized. He never
24 admitted that. We couldn't shake his story. He was
25 consistent. The story that Ms. Hoffman -- there was a

1 tape recording, an earlier one, that I listened to and
2 read a transcript from that suggested that she wasn't
3 certain of the sequence of events, okay. It was our
4 belief that she had probably passed out. She had been
5 severely wounded, and there was no question -- Herman
6 never denied shooting her, but he denied shooting the
7 young man. To be honest with you, I struggled with
8 that, still struggle with that. I don't know. I wasn't
9 there. I know what she testified to in the trial, which
10 was somewhat different factually than what she testified
11 to at a pretrial hearing. I know what Herman told me
12 and never -- I never could shake him from that story,
13 and I don't know whether he was lying, okay, or whether
14 she was mistaken, and because she knew that Herman --
15 Herman had shot her, and she may not have ever seen
16 Kelsey, okay. It was just one of those kind of things,
17 but it certainly was our position that Kelsey was the
18 triggerman. If you look at the wounds, the wounds to
19 the young girl, one was in the chest, one was in the
20 face. They were somewhat random, okay. Then you had
21 one separate wound to the young man's head and then two
22 that were close together as if it was execution style.
23 Well, if he was going to execution style shoot, he would
24 have shot her the same way because his intentions were
25 to shoot her. He indicated that he was afraid that she

1 would remember him. That's why Kelsey didn't go in, by
2 the way, and he had shot with her, and they were --
3 apparently it was random shots. Now, for the -- I tried
4 to square how she could say that, and -- and I don't
5 know that she was lying, okay, although Herman's family
6 thought she was lying. I could see where she would be
7 motivated to make sure Herman was convicted. If he'd
8 shot me, I'd remember, you know, the same thing if I
9 survived as she would, and you can't blame her for that,
10 but it -- had she passed out, and there had been no
11 other person to be able to put somebody shooting Mr.
12 Pressley, to the best of her memory -- I don't know
13 whether she was ever hypnotized -- we never broached
14 that subject, how could it have occurred that he got
15 wounded once with a bullet separate from the other
16 shots. As I was cross-examining her at the trial, I
17 asked her to demonstrate to me where Mr. Pressley was
18 standing when the shots first occurred, and she was --
19 she indicated he was standing behind her. In my thought
20 it was conceivable that the first shot -- he never
21 admitted more than two shots until we had him under
22 truth serum, okay; he admitted a third shot then. He
23 didn't know where it went. Now, there were shots that
24 went in the wall, and it could have -- the first shot
25 could have hit him, and then he shot her twice, and she

1 -- and I don't remember which time. One time she
2 testified at first she was shot in the chest and then
3 the face, and I think the other time she testified just
4 the opposite, and I'm not sure -- it's been a while --
5 whether it was at trial that she said the face first or
6 the other, but at the trial she indicated she saw and
7 that Herman shot her, then shot Mr. Pressley, shot her,
8 and shot -- that was not what she had said in her taped
9 interview. That was not what she said to the best
10 of my memory in her -- when we cross-examined her at
11 a pretrial motion hearing.

12 Q. Now then, as I, sort of understanding what
13 you're saying, you're basically---

14 A. We were trying -- all right -- you were asking
15 my theory -- we were trying to put as much responsi-
16 bility on Mr. Pierce whom we had been told they were not
17 going to pursue the death penalty. They had filed the
18 notice on him same as they did Herman. After they filed
19 the notice on Herman, Walter indicated to me he was
20 going to meet with the family at some point in time.
21 There was another trial that was going to take place
22 before Herman's if it was tried at all. At the earliest
23 it would be November, probably after the first of the
24 year. Apparently it was a meeting that took place in
25 June. The family, at least I assume the majority of

1 them, were strongly in favor of pursuing the death
2 penalty for Herman, so all of a sudden it got put on the
3 fast track. That's the way we were told it was going to
4 be tried, I think, August. We had some hearings in June
5 and in July got the -- the monies to hire experts. I
6 think the judge realized, being the trial coming up that
7 quick, we were going to need to be equipped with the
8 funds to hire experts, investigators, or he would not be
9 effectively represented.

10 Q. Okay. Let me ask you a quick question about
11 that, and then I'm going to come back to this theory,
12 but my understanding you found out in June this was
13 going to be a death penalty case?

14 A. I -- I -- yeah, is my memory -- it could have
15 been late May. Now, he gave the notice before that,
16 okay, but he had to do that by law a certain amount of
17 time, and he was telling me all the other death penalty
18 cases he had lined up. There was some other one. The
19 reason why he put Herman's case on the time schedule
20 he did, there was some problem with a witness for the
21 other trial, so they backed that one up and moved
22 Herman's up.

23 Q. Okay. Well, as I understand it, what you're
24 saying is it's not that you were surprised he ultimately
25 decided to seek the death penalty, but the timing of the

1 trial is what caused it?

2 A. A little bit of both, to be honest with you.
3 He did not seem in my conversations with him, and I had
4 never had any dealings with Walter before, okay, and it
5 certainly is an advantage when you've dealt with a
6 prosecutor before because you know the mannerisms,
7 whether -- some of them are just very blunt, and -- and
8 some of them are very subtle. I found Walter to be
9 subtle more than -- than blunt. He was very kind, but
10 at the same point in time he was relentless. He didn't
11 indicate any personal passion for Herman, okay, but he,
12 also, didn't indicate any compassion for him either. He
13 -- he was just doing his job, said that -- that he ran;
14 when he got elected as solicitor, he got elected because
15 folks understood there was too many murders going on,
16 and they wanted some death penalties, and he was going
17 to put it up to the people. He indicated he had met
18 with the family and was going to go forward, so I was
19 hoping, as you would remember if you handled the trial
20 stages of people, I was hoping to be able to prevail on
21 Walter not to go for the death penalty, using much of
22 the same information and material as we tried to use at
23 trial, I mean, his age, his -- his mental status, the
24 fact that factually Kelsey Pierce could have been one of
25 the triggermen. I -- to this day I don't know that he

1 wasn't, okay. I just don't know. It's one of those
2 things. I do know that I pointed out to Walter that if
3 he tried Herman first, and he was wrong about Kelsey,
4 he'd never convict Kelsey. They tried Kelsey later on.
5 He was acquitted.

6 Q. Okay. Now then, as I sort of understand it,
7 based upon your conversations with Mr. Hughes about what
8 happened and your investigation, your theory was that
9 Herman was involved in this, but he -- but Mr. Pierce
10 was, also, involved?

11 A. There's no question Herman was the shooter of
12 Ms. Hoffman, okay. There was a factual question as to
13 whether Herman was the shooter for Mr. -- Mr. Pressley.
14 He was being treated for the death penalty. The other
15 boys were not. I was told early on, not by Mr. Bailey
16 but by a contact in the St. Matthews Police Department,
17 that Mr. Owens, who was the cousin---

18 Q. Henry Daniel Owens, Jr.?

19 A. ---that he would never see a day in jail. A
20 deal had already been struck. He would end up
21 testifying for the State, that, for some reason, his
22 father or somebody was well liked or something and that
23 he would be taken care of. He was treated differently
24 from the other two. He was the one that supplied the
25 gun. I was shocked at that, but, you know, Carol Allman

1 probably should have received some sort of punishment in
2 that case, too. When you represent somebody, and
3 they're given favorable treatment, more treatment --
4 better treatment than they probably deserve, you -- you
5 can't say, "Wait a minute, Judge. How about -- my
6 client deserves some jail time," so I don't blame his
7 lawyer for doing that. Had I represented him, I'd
8 probably tried to pursue the same thing. On the other
9 hand, Mr. Aaron and Mr. Harvey in representing Mr.
10 Pierce, you know, they were sitting there grinning
11 because they knew that the only person who could put
12 Kelsey involved in the scene was Herman, and if he were
13 tried first, he would never be able to testify or not be
14 so inclined.

15 Q. Okay. Now, as I then understand it, there
16 were basically three players involved in this. There
17 was Henry Daniel Owens, Jr.?

18 A. Yeah.

19 Q. And he was the oldest person. He was twenty-
20 two and been in college, as I understand it?

21 A. His age I don't remember.

22 Q. And he's the one who sold them the gun?

23 A. There was some question about whether it was
24 sold or whether it was given for use. Herman was going
25 to buy it, was going to pay him later, but, as I recall

1 Herman's version, they divided the money up afterwards,
2 so Mr. Owens---

3 Q. But it was his gun?

4 A. He -- he -- he provided the gun. He knew they
5 were going to rob the store, okay, and he split the
6 proceeds afterwards, yes.

7 Q. So, he was -- and then the next person or the
8 second person would have been Kelsey Pierce?

9 A. Kelsey Pierce, yes.

10 Q. Who was nineteen years old or older than
11 Herman?

12 A. He was older than Herman, and my information
13 from talking to law enforcement folks in the community
14 that if Kelsey Pierce ever got out of prison again,
15 they were certain he'd kill somebody else, that he
16 was that dangerous. They did not think Herman was a
17 model citizen, okay. They thought Kelsey Pierce was
18 very dangerous. Now, understand I did more talking
19 to the St. Matthews Police Department than I did to
20 the sheriff's department because Calhoun County
21 Sheriff's folks wouldn't talk to me very readily.
22 St. Matthews Police Department didn't have any
23 involvement direct in the case. I had a good friend
24 who was the Chief of Police down there. I visited
25 him socially when I'd go down there to hunt. I used

1 that opportunity to find out as much about what was
2 going on as I could, and -- and they were -- I had
3 found over the course of my time when you're talking
4 to somebody about something, other than what you're
5 trying to find out, they're a lot more open. If you
6 and I went out to lunch and talked about the ball
7 game last weekend, you might give me some information
8 on a case that we had together that I -- that you
9 would never give me if I asked you directly, and they
10 were helpful as far as information, both of those
11 people.

12 Q. And did your investigation or the information
13 you got from these police officers indicate that
14 Mr. Pierce sort of had a -- was the leader of the two
15 between Mr. Hughes or the---

16 A. I don't think anybody who ever met Herman
17 could say he was the leader of anything, and I don't
18 mean any disrespect to him. He -- he's - as he sits
19 there quiet today without showing any emotion is the
20 way he was in every encounter I ever had with him.
21 There were two times I've seen that young man show
22 emotion, once when he was seated in a -- in a chair
23 similar to that at the courtroom while the jury was
24 out deliberating whether he was going to die or go
25 to jail for life, and one of the officers walked out

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CALHOUN) IN THE COURT OF COMMON PLEAS

3
4 HERMAN LEE HUGHES, JR.,) Case No. 98-CP-09-101
5 Applicant,)
6 versus) TRANSCRIPT OF RECORD
7) (Post-Conviction Relief)
8 MICHAEL MOORE, COMMISSIONER,)
9 DEPARTMENT OF CORRECTIONS,)
10 AND CHARLES M. CONDON,)
11 ATTORNEY GENERAL, STATE OF)
12 SOUTH CAROLINA,)
13 Respondents.) October 11-13, 1999
14) Conway, South Carolina

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B E F O R E :

THE HONORABLE PAULA H. THOMAS, Judge.

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

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JEAN S. JOHNSON
Circuit Court Reporter

1 the door similar to that door there, and the door
2 shut quickly behind him. Herman smiled. The second
3 time, when I went to visit him on death row to get him
4 to sign releasing me as his lawyer so that Appellate
5 Defense could be appointed, and he was smiling the
6 whole time, and I asked him how things were going,
7 and he said they were being very nice to him and
8 treating him very well there, and that was the happiest
9 I'd ever seen him in all the time I represented him.
10 I never saw any other emotion. He was just quiet,
11 as he is now. He never showed me in my opinion any
12 ability to be a leader. I never met Mr. Pierce, other
13 than seeing him on the witness stand. His lawyers
14 wisely would not let -- give me access to him, and I
15 would not if I had been them either. You couldn't do
16 that.

17 Q. I think you, also, indicated in your
18 deposition that Mr. Hughes, also, showed some emotion
19 during the sodium ambithol or the truth serum?

20 A. Yeah. He talked. Well, he -- the emotion
21 he showed there was fear of Kelsey. When it came out
22 and that he had gone in the first time, he was sent
23 in -- Kelsey was supposed to do the robbery. He didn't
24 think Herman was capable of pulling it off. He saw
25 a car or something that led him to believe that

1 Ms. Hoffman was there. He knew her from some way,
2 so he sent Herman in. Herman went in one time, came
3 out, could not do it. He was berated by Mr. Pierce,
4 called him a punk, and told him to go in and do it.
5 He went in, and -- and -- and he obviously did it.
6 I asked him, "Why did you shoot her?" and he says,
7 "Because I thought she would recognize me." He
8 apparently had seen her socially at somebody's house,
9 one of her friends. I don't know whether it was with
10 Kelsey, or it might have been a Ricardo somebody, and
11 he was afraid she would remember him. The irony of
12 it was she never remembered him. I asked him then,
13 "Why didn't, you know -- if you would shoot her because
14 you were afraid she would see you from before, why
15 wouldn't you shoot Mr. Pressley if you had just got
16 finished shooting her before then?" He said, "He didn't
17 know me," and that was his explanation, and he was
18 consistent with that. He did remember a third shot.
19 He had never told me, to the best of my memory -- and
20 I may be wrong about this -- about what Mr. Pierce
21 had indicated to him when they went outside, so he --
22 but he, also, said Mr. Pierce came in, and the two shots
23 that were -- he walked over to the boy laying on the
24 floor and shot him twice. He said that under the sodium
25 ambitol, whatever the medication was.

1 Q. Now, you talked about, you already said,
2 this thing didn't really make any sense, but --
3 sort of didn't make any sense -- in your sort of
4 experience of having represented people in criminal
5 cases, how would you rate Herman on the sort of
6 intelligence level?

7 A. He -- he'd be one of the, if not the, least
8 intelligent, one of the least intelligent. He was --
9 he was very, very little help in his case. I mean,
10 he could answer questions like talking to -- I had
11 -- I've got two biological sons and another son who
12 I inherited when his parents died, and they were about
13 the same age as -- as Herman would be. They were
14 about ten years old at the time of this case, eleven
15 years old, and I could hold a conversation more with
16 them than I could with Herman when I represented
17 him.

18 Q. Because of that, did you ever have doubts
19 about whether Mr. Hughes was competent?

20 A. Define competent.

21 Q. Competent to stand trial?

22 A. Well, that issue was broached. It was
23 discussed. That's one reason why we got Dr. Morgan
24 involved. That's one of the reasons why we got
25 Dr. Dewitt involved. There was some question about

1 whether we were going to have him evaluated at the
2 State Hospital. The rule of thumb for defense lawyers
3 is don't go volunteering your murder clients to go
4 to the State Hospital because they'll spend more time
5 getting information from them about the case than they
6 will -- you'll hear -- you'll regret it. I don't know
7 of anybody who's ever come back from there being ruled
8 that they were incompetent. It's a fishing expedition.
9 Under our law, as I understood it, the McNaghten Rule,
10 he would not qualify for being excused legally for his
11 actions. He did know right from wrong, and they left,
12 they ran. He wasn't bright. I don't agree with the
13 McNaghten Rule, but I'm not the -- I'm not on the
14 Supreme Court. None of our experts told me he was
15 incompetent to stand trial. I had my doubts as far as
16 his---

17 Q. That's what I mean. I understand---

18 A. Oh, yeah. Oh, yeah.

19 Q. ---that the experts told you he was competent?

20 A. I -- yeah.

21 Q. I'm saying you're---

22 A. Under their -- under their theory they said he
23 was competent. I had my doubts just in the day-to-day
24 dealing with him.

25 Q. Now---

1 A. It would have been -- it would have been nice
2 to have been able to have had Herman make a statement to
3 the jury showing how sorry he was about what occurred
4 and his responsibility. Herman was incapable of doing
5 that, not because he was mean. He couldn't carry it
6 out. You could not -- in my opinion I could not have
7 come close to preparing him to -- to put him on the
8 stand. It would have been great if he could have
9 testified about Kelsey's involvement. Walter would have
10 had a field day. He would have come across as
11 unfeeling, not because in my opinion that he's mean,
12 okay, but because of his limited intellectual
13 functioning. Understand, we looked at his school
14 records. He scored the lowest percentile on some tests.
15 He scored in the third percentile in a couple of other
16 standardized tests. From that year on, they expelled
17 him every year before they gave standardized tests,
18 okay. There was some reason why Herman would be
19 expelled and then promoted, okay, and it -- and it
20 was a series, I think, that started somewhere in the
21 sixth grade is when he took the test, and he never
22 finished a school year at that school, okay, because
23 there would be something, whether he'd be disrespectful
24 to a teacher, whether he was -- and he -- and he
25 missed more school than he should have anyhow; they'd

1 always find some reason to suspend or expel him
2 during testing time. He never took any more tests
3 after that.

4 Q. Now, as I understand it, one of the things
5 that you were trying -- that you were trying to do was
6 to get evidence in the record that Kelsey Pierce, also,
7 was involved in the shooting?

8 A. Yes, and then the hope in front of the
9 jury was if somehow we could inform them that Walter
10 wasn't truly going after the death penalty for Kelsey
11 although he had served notice, and he hid behind that
12 he was going to, but I knew he wasn't. His lawyers
13 knew he wasn't. I know. I go to church with one of
14 his lawyers, and I coached the other one's son this
15 past year in baseball. They knew that he was off the
16 hook for the death penalty. They, also, knew that
17 the chance of him being convicted if Herman was tried
18 first was going to be significantly diminished, and
19 -- and it proved to be true, just the way the -- the
20 proceedings went, but Walter went with him first and
21 had a better case. He had a strong case against
22 Herman---

23 Q. Uh-huh (affirmative response).

24 Q. --you know. Even if he weren't the
25 triggerman, he was going to be convicted of the murder,

1 you know. We debated a good bit about -- I say, "we,"
2 because Patty, I bounced things off her. I bounced
3 things off other lawyers. Your office was -- was a
4 big help as far as do we lose credibility with the
5 jury by saying Herman was innocent. You couldn't plead
6 him guilty. If you plead him guilty, you're going
7 in front of the judge, and I wasn't going to make
8 the same mistake the lawyers for Roche and Shaw made.
9 I -- I was going to get it to a jury and hope to do
10 that. Obviously it didn't work. Whenever Kelsey
11 Pierce was not allowed to be questioned by us in front
12 of the jury, that did more damage to our case
13 than anything, in my opinion, anything else that
14 occurred.

15 Q. But, as I understand it, you were trying
16 to basically get Mr. Pierce as involved as you
17 could.

18 A. Oh, absolutely, and I couldn't do it through
19 Herman's testimony because I didn't think he was capable
20 of being a good witness. I -- I've represented hundreds
21 of people in the last twenty years, and you can have
22 a good case even with evidence against your client.
23 If you've got a smart client, and he can testify, he
24 or she can testify, well, you have a chance of being
25 successful. If you have a client is innocent -- and I'm

1 not saying Herman was innocent because he wasn't -- if
2 you have a client who's innocent, and he or she can't
3 testify well or has the same limitations Herman had, you
4 run the risk of you putting them on the stand and
5 getting them convicted.

6 Q. And, as I understand it, one of the primary
7 ways -- there were sev- -- two primary ways you planned
8 to -- to carry out your theory. The first was through
9 the cross-examination of Ms. Hoffman?

10 A. To a degree, yes.

11 Q. In laying out inconsistencies in her---

12 A. Uh-huh (affirmative response), yes.

13 Q. ---in her prior testimony, and I'll come back
14 and talk to you---

15 A. Okay.

16 Q. ---about those, and the second one was you
17 intended to sort of then finish it off with the
18 examination of Kelsey Pierce?

19 A. One of the unique things that occurred at this
20 time, when that trial started, our state adopted, and it
21 -- and it went into effect that first day of the trial,
22 the rules of evidence, the federal rules of evidence,
23 and the judge, Walter, and I were all somewhat at a loss
24 because we were trying to -- you go through old rule
25 numbers versus the new, but one advantage that we

1 inherited was that we could call Kelsey without the
2 judge having to make a determination of whether he was a
3 hostile witness, call him and treat him as an adverse
4 witness. I had another trial in the third circuit in
5 which it was up to the judge. Judge Laney was the judge
6 in that case. It was a murder case, and we had somebody
7 who we wanted to be declared as a hostile witness, who
8 had given a statement to the police, but we had gotten
9 him on a tape two times recanting the statement. The
10 judge in that case refused to do that, and that
11 certainly was a -- that was a disadvantage to our
12 defendant, but in this case there wouldn't be any
13 choice. The only difference is all the case law we
14 had up to that time, and all the case law I was aware
15 of in this state, was I had an absolute right to
16 cross-examine and ask him questions in front of a
17 jury. Judge Cottingham wouldn't allow me to do that,
18 and then, I'm sure, you're aware of what happened on
19 the appeal.

20 Q. All right, and in your opinion now was the
21 judge's ruling in that case, did that undermine your
22 trial strategy?

23 A. It didn't help it at all, yes, you know.
24 I, also, made a conscious decision not to go after
25 Ms. Hoffman on the stand as hard as I wanted. No. 1,

1 the judge had indicated -- Walter was aware of what
2 we -- some of the things we were going to -- issues
3 we would try to raise with her, and this was the
4 situation. The only time that Ms. Hughes got upset
5 with me during the trial, because I didn't go after
6 her hard enough, okay. Our -- our theory was to try
7 to softsoap her so we wouldn't come across as being
8 cold, heartless because there was no question that
9 Herman had shot her. He didn't deny it, never denied
10 that ever. He didn't -- you know, I was -- I was hoping
11 for Kelsey, okay. In hindsight, I would have gone
12 after her a little harder had I known that Kelsey wasn't
13 going to be -- I would have, also, had to consider,
14 even though I think it could have been disastrous, and
15 had I put Herman on the stand, we could be here, and
16 you could be questioning me why I would put somebody
17 up with this question of his competency on the stand
18 to subject him to a grueling cross-examination that
19 he wouldn't -- he's not sophisticated enough to handle
20 it.

21 Q. Just to make clear, you understand there's
22 no allegations as that Mr. Hughes should have been
23 called?

24 A. Oh, I understand that.

25 Q. That's not one of our---

1 A. I understand, but had I put him on the stand,
2 you may have been raising the question about ineffective
3 assistance for having made that decision.

4 Q. Now, and so on the -- the issue of Ms.
5 Hoffman's inconsistent statements, I want to talk with
6 you about that for a few minutes.

7 A. Okay.

8 Q. At the time she testified at trial she had
9 both given a statement to Earl Rudy?

10 A. Uh-huh (affirmative response).

11 Q. And testified at a pretrial motion, too?

12 A. Yes.

13 Q. And in your opinion there were inconsistencies
14 in her accounts of what happened in those statements?

15 A. Well, the -- the first statement she gave them
16 wasn't a sworn statement, okay. It was just an
17 informational statement, so you can't impeach her from
18 that from that standpoint, but it certainly helped, and
19 she was under the influence of medication, and you don't
20 know whether she was, you know, couldn't remember, much
21 the same as when you took my deposition a couple of
22 weeks ago, I had not seen the transcript in this trial.
23 Some of the information I gave you in there, I might
24 have a different response to now because I've seen part
25 of those transcripts since then. Well, much the same as

1 when she came off that medication, her memory may have
2 improved. I didn't know. All I know was it was
3 consistent with how she -- when she was questioned in
4 the -- on the first tape, it was consistent with what
5 Herman's theory was, and she may not have seen Kelsey
6 come in after she had been shot, okay, and I don't know
7 that Herman -- if Herman shot Mr. Pressley, if you
8 believe the scenario that he gave under the sodium
9 ambitol, whatever it was, he may not have realized he
10 shot Mr. Pressley because he didn't intent to shoot him,
11 okay, if you believe that, and then the next shots --
12 and those would have been the two bullet wounds side by
13 side -- it was almost like execution like he stood there
14 and put it together. All the other wounds were random,
15 so that seemed consistent to support what Herman was --
16 was asserting, okay. Then she was somewhat -- part of
17 the reason why we wanted to question her at those
18 pretrial hearings, we wanted to size her up as a witness
19 to see, you know, what she was like. She was feisty.
20 We were told that she had a temper and that she'd be
21 feisty, and she was, okay. Somebody rehabilitated her
22 between then and the trial. I can't blame them for
23 doing that. If I was a prosecutor, I'd try to
24 rehabilitate her, too, and make her -- because she was
25 not as aggressive at the trial, okay, and certainly

1 created a more sympathetic picture, which is a smart
2 position to take, and it's another reason why we chose
3 not to go after her.

4 Q. Now, her testimony at trial, as I understand
5 it, and certainly we can go and pull the record out
6 if there's any question about it, is there was
7 absolutely no doubt in her mind that Herman Hughes
8 was the only person in there and that he fired all
9 the shots?

10 A. Yes.

11 Q. And so---

12 A. And as I remember, that's what she said.

13 Q. Pardon me.

14 A. As I recall, that's what she said, yes.

15 Q. And that there was -- she was very certain
16 about that?

17 A. Yes.

18 Q. I just want to show you -- this is my exhibit,
19 applicant's exhibit, this transcript of record. That's
20 Applicant's Exhibit 8 -- I'm sorry -- 7, which is a
21 transcript of record in The State versus Kelsey Pierce
22 trial and show you some testimony.

23 A. Okay. I'll have to put on my glasses.

24 Q. Pages 110 and 111, this is the cross-
25 examination of Ms. Hoffman at that trial---

1 A. Okay.

2 Q. ---beginning---

3 A. All right. You want me to read this out
4 loud?

5 Q. No, no. I just asked you to read this.

6 A. All right. Let me -- let me see it.

7 Q. That's just the beginning of it down there.

8 A. Okay. Okay.

9 Q. Just so the record is clear, this is the
10 transcript of record in State versus Pierce?

11 A. Okay.

12 Q. This was tried after the case you tried?

13 A. Yes.

14 Q. But you would agree with me, would you not,
15 that this testimony is inconsistent with her testimony
16 in Mr. Hughes' trial?

17 A. Yes, and that reminded me of something that
18 there were some factual differences, too. Her earlier
19 testimony in -- in our case, or it might have been from
20 her statement, was that she had her head down after she
21 was shot the first time. Now, I don't know whether, and
22 again it's been a while, whether she was shot in the
23 face first or in the chest, okay, but she had her head
24 down looking down with her hand out. Somebody, I think
25 Kelsey Pierce, in his statement described it as a

1 thinking person's position. She asserted she never saw
2 Kelsey. He never came in. Kelsey in his statement said
3 that he went in and that he left the light on and locked
4 the door. Her testimony was -- now, of course, the jury
5 wasn't able to hear that because that statement was
6 excluded. We couldn't get it in, and we couldn't cross-
7 examine Kelsey about that in the trial, so the jury
8 didn't hear that, but he said of his own -- in his own
9 statement that she was laying face down in the almost
10 like the thinking man's position when he went in and
11 turned the -- and the lights were on, and he locked the
12 door, okay. She testified that Herman had locked the
13 door, that she was looking at Herman when Herman would
14 shoot her, then shoot -- now, I believe, okay, that she
15 thought Herman was going to get off if she didn't
16 expound on her testimony, okay, and that's what I
17 believe in my heart.

18 MR. ZELENKA: Object.

19 THE WITNESS: I don't know if that's true.

20 MR. ZELENKA: Calls for speculation.

21 THE COURT: Sustained.

22 DIRECT EXAMINATION RESUMES BY MR. BLUME:

23 Q. Okay, but clearly this testimony in the Pierce
24 trial indicates that she doesn't know if Mr. -- if
25 Kelsey Pierce was in there or not?

1 A. No.

2 Q. While in Mr. Hughes' trial, she was adamant?

3 A. Yes.

4 Q. There was absolutely no way anybody else was
5 in there?

6 A. (Nods head up and down)

7 Q. And one of the things that you attempted to
8 bring out, or you -- you were talking about some prior
9 statements, and Ms. Hoffman had given some prior
10 statements at the scene, which indicated that she was
11 shot by a tall black man and some kind of short one. Do
12 you remember that?

13 A. At some -- and I don't know whether that was
14 at the trial or at the pretrial thing about a tall black
15 man. There's -- there's no question that Kelsey was
16 taller than Herman. Also, there was not -- very little
17 question that she knew Kelsey. That was some
18 information that we were led to believe she was going to
19 try to not admit.

20 Q. I'm sorry. I didn't meant to interrupt you
21 there.

22 (Applicant's Exhibit No. 11 admitted into evidence.)

23 DIRECT EXAMINATION RESUMES BY MR. BLUME:

24 Q. I'm going to show you what's been marked as
25 coming in without objection as Applicant's Exhibit 11,

1 which is a letter to you from Solicitor Bailey. Really
2 this is the part I want to ask you about.

3 A. Okay.

4 Q. And this letter indicates that Solicitor
5 Bailey provided you with information that Danny
6 Kirkland, who is a law enforcement officer at that time,
7 heard Ms. Hoffman say on the night she was shot that she
8 was shot by a tall black man, and on another occasion
9 she was shot by a short black man. Then, in response to
10 that question, "How many were there?" or something to
11 that effect, and she replied, "Two." Is this, also,
12 sir, one of the inconsistent statements that you were --
13 or at least gave some difference in the version of the
14 facts?

15 A. Yeah. I mean, I -- whether I covered that
16 thoroughly in the trial, I can't say. I don't remember,
17 okay.

18 Q. Well, that was one of the things I wanted to
19 ask you. Officer Kirkland testified at the trial?

20 A. If you say so.

21 Q. Okay.

22 A. I don't remember.

23 Q. Well, do you have any memory today of why you
24 didn't ask Officer Kirkland about this statement?

25 A. No. I mean, I don't remember whether I even

1 questioned Officer Kirkland---

2 Q. Okay.

3 A. ---whether I -- whether I asked him or didn't
4 ask him.

5 Q. Okay. Well, I mean, if -- if the record---

6 A. If -- if I didn't, if the record shows I
7 didn't, then I wouldn't deny or attempt to deny---

8 Q. Okay.

9 A. ---that I didn't.

10 Q. But I'm asking you the question today, do you
11 remember why, do you have any recollection why---

12 A. No.

13 Q. ---you didn't ask him---

14 A. No.

15 Q. ---about the statement?

16 A. No, no, and it may have been, okay, that
17 I just forgot about the letter, okay. You have so
18 much -- as you see the boxes you have, and I've got
19 what's left of my file, which is in that big box over
20 there.

21 Q. Uh-huh (affirmative response).

22 A. I've never tried a case that I've won or lost
23 that I haven't forgotten to ask something that I thought
24 was critical. You sit down and say, "Oh, I forgot to do
25 this." It's too late, and it could have been one of

1 those situations. I couldn't say.

2 Q. But certainly did you think about if Officer
3 Kirkland was testifying as a law enforcement officer---

4 A. True.

5 Q. ---who had testified about that, that
6 certainly would have been supportive---

7 A. Yeah.

8 Q. ---of your theory?

9 A. Yeah, but he, also -- yeah. I would not
10 have been able to impeach him with Walter Bailey's
11 letter.

12 Q. Well, I understand that, but, I mean---

13 A. It would have given me that information to go
14 to, yes.

15 Q. Right, but, I mean---

16 A. I agree, yeah.

17 Q. ---wouldn't, also -- the letter, as I
18 understand it, does indicate that this is what Mr.
19 Kirkland would say, if asked, that this is what
20 Ms. Hoffman had said and he would indicate?

21 A. I would assume that that's what Mr. Kirkland
22 would say. I don't know that Mr. Kirkland ever told me
23 that.

24 Q. Right.

25 A. That information came from Walter in a

1 letter.

2 Q. That's all I'm asking.

3 A. Yeah, yeah.

4 Q. Now, as I understand it, you had information
5 that you wanted to try, and I think you indicated you
6 sort of soft pedaled the cross-examination of Ms.
7 Hoffman?

8 A. Yeah. It -- it's---

9 Q. And---

10 A. Let me -- let me tell you part of the reason,
11 okay, the theory about that. You may not agree with it,
12 but this is -- this is what, you know -- when you --
13 when you consider that, I think many young lawyers
14 erroneously think that you have to browbeat every
15 witness, okay. That's my experience, and I've been very
16 successful in other trials, both felony and non-felony
17 case, that the nicer you are, you can make your point
18 being nice, the more effective it is for a jury to
19 listen to. She at the trial she was not aggressive.
20 She was not in my opinion as -- as she had -- had been
21 before. For me, after we had already made the conscious
22 decision to admit Herman's involvement, to go after her,
23 I may have -- what I was hoping not to do was to
24 alienate the jury because I didn't have -- if -- if you
25 have two lawyers, you can have the mean SOB try the case

1 and go after everything and then the second person come
2 in and clean up, be nice, and say, "Well, Mr. Newsom was
3 just doing his job. He's a jerk, but," okay, "now we're
4 here to, you know, so that you don't hate me for what
5 Mr. Newsom did." I didn't have that, okay. I didn't
6 have that advantage at all. Patty Rickburn sat there
7 during the trial as the investigator, and she did, I
8 thought, a remarkable job of helping me. Quite frankly,
9 she knew more about her stuff than some of
10 the lawyers I've sat in trials with, but I didn't have
11 that second lawyer who could go "Good guy, bad guy," so
12 I had to kinda' back off a little bit on some of the
13 cases -- on some of the situations I could have gone
14 after.

15 Q. Right. I -- and just so that sort of the
16 record is complete sort of on this, you had, as you were
17 analyzing it before apparently you made the decision on
18 what to do, you had essentially, as I understand your
19 deposition, two different ways you could have attempted
20 to undermine the credibility of her version of the
21 events. The one was that there had---

22 A. One was her---

23 Q. ---there were a number of inconsistencies in
24 the details?

25 A. Uh-huh (affirmative response), yes.

1 Q. And then the second way was you had
2 information in your possession through your
3 investigation that she had had a relationship with
4 Mr. Pierce?

5 A. Yes.

6 Q. And so, those were, as you sat back and
7 thought about it before the trial, those were
8 essentially the two ways you were evaluating, "If I'm
9 going to attempt to impeach her, this is what I'm going
10 to do"?

11 A. Uh-huh (affirmative response).

12 Q. And as---

13 A. As the motive for why she would not try to go
14 after Mr. Pierce, yes.

15 Q. And, as I understand what you're saying, is
16 there were two possible theories, one of which is she
17 was shading her testimony to either protect Mr. Pierce
18 or keep the relationship under the rug?

19 A. But more to keep the relation- -- I don't know
20 if you could define it as a relationship. We had
21 information that she had been with Mr. Pierce before and
22 with Mr. Gilmore. As a matter of fact, Herman, the time
23 that Herman said he saw her, she was coming out of the
24 bedroom with one of these gentlemen at -- at their house
25 some months prior to that, and that's when he thought

1 she would recognize him, okay. She did not remember
2 him. Now, whether that was true or not, I didn't know,
3 but that was in the back of our mind as far as that. I
4 can tell you the judge wouldn't even let us come close
5 to covering that, okay.

6 Q. Okay. That was what I wanted to ask you
7 about.

8 A. Oh, absolutely not.

9 Q. Now, as I understand it, what happened -- one
10 of the reasons you didn't ask, you didn't go into that,
11 was that the judge had indicated to you, I guess, in
12 chambers, that he was not going to permit you to
13 question along those lines?

14 A. He -- yeah -- he did not want us to inflame
15 the racial portion of that. It's a small town and
16 a relationship with a white girl and a black person,
17 and, understand, I couldn't put Herman on the stand
18 to assert that either nor Mr. Pierce, and I don't know
19 whether she would admit it or not. I don't know if
20 it was true or not. I just know the information came to
21 us.

22 Q. And then, the other possibility, I assume, was
23 is that she may have blacked out and been unaware of---

24 A. Yes.

25 Q. ---but not really accurately---

1 A. Yeah.

2 Q. ---remember?

3 A. Yeah, and that would have been more plausible,
4 okay, because I really -- my impression was that she had
5 blacked out based on hearing her on the tape. I got to
6 listen to the tape. It was very scratchy, okay. She
7 was obviously drugged, under the influence of pain
8 medication, and I was impressed at her ability to recall
9 what she recalled at that time.

10 Q. Now, do you recall there came a point in the
11 trial during your examination of her when you impeached
12 her with that tape and that -- that recorded statement
13 actually of that interview with Mr. Rudy?

14 A. Again---

15 Q. Okay.

16 A. I don't -- I don't know for sure.

17 Q. Well, I guess I -- I need to ask you about --
18 let me tell you a little bit about what happened, and
19 then---

20 A. Okay.

21 Q. ---the question really is do you remember why
22 you did certain things?

23 A. Okay.

24 Q. But what happened at the trial was you -- Ms.
25 Hoffman testified?

1 A. Uh-huh (affirmative response).

2 Q. And then you impeached her, attempted to
3 impeach her, with the statement she had given to Earl
4 Rudy in the hospital. He went -- had gone to see her in
5 the hospital.

6 A. Okay.

7 Q. And you wanted to use certain parts of it to
8 impeach her.

9 A. Okay.

10 Q. And Solicitor Bailey said, "Well, if you're
11 going to impeach her with it, the whole thing should
12 come in. We'll just play the tape for the jury."

13 A. All right.

14 Q. And that's what happened, and my -- I guess
15 what I want to know is do you remember why you didn't
16 object to that procedure?

17 A. Not at all. I don't know that I would have --
18 I don't remember why. I'm not sure I was aware of
19 anything that would be bad about letting the whole thing
20 in, okay.

21 Q. Okay, but if there were a basis upon which you
22 could have only used the impeaching part, and the whole
23 statement wasn't admissible---

24 A. Yeah, sure, in theory that would be good, but
25 I don't know -- I don't know that to this day unless

1 you can point something out, and I don't know of
2 anything in that tape, given we were going to admit
3 Herman's involvement, that was going to be damaging.
4 If we were going to try to go for an acquittal, had
5 the evidence been shakier, then certainly you would try
6 to exclude the whole thing and just get the -- the
7 parts. For whatever reason, I don't remember, but I
8 don't know of any -- I can't think of anything as to
9 what was in that tape that would have been -- we would
10 have objected to.

11 Q. Other than the fact that at least parts of it
12 would have been consistent and bolstering with her
13 testimony as opposed to inconsistent?

14 A. Sure. I mean, but you know what? I had a
15 client who didn't deny shooting her, okay. I couldn't
16 -- I certainly would put her to the task of proving it,
17 and you know our role. If you have a guilty client, and
18 they can't prove it, and you don't put him or her on the
19 stand to tell a knowing lie, you've not done anything
20 ethically wrong. You're doing your job, okay. I
21 thought the evidence -- I made a determination at some
22 point in time that the evidence was substantial, that
23 his chances of acquittal were slim and none. I -- I
24 recall Walter making a comment sometime during the trial
25 that the -- the evidence was -- it was sort of like a

1 dream case, okay. I wish I had that case to prosecute.
2 It would have been a lot prosecuting than to defend, so
3 I don't think I made a---

4 Q. On the question of guilt?

5 A. On the question of guilt, absolutely, yeah,
6 oh, absolutely, and I'm -- I'm only referring to as
7 far as the question of guilt. I'm not referring to
8 the -- the appropriateness of the -- of the penalty,
9 okay.

10 Q. But so, also, if you were -- you'd indicated
11 that another indication to you that at least was
12 supportive in your mind of Mr. -- of Herman's theory of
13 what happened---

14 A. Sure.

15 Q. ---was the gunshot wound?

16 A. Sure.

17 Q. That that somehow---

18 A. Yeah.

19 Q. You could -- you could see how it could happen
20 like he said based on the gunshot wound?

21 A. Yeah, I could see how it -- how it could
22 happen.

23 Q. And so, certainly if there were any other
24 physical evidence, which either directly or circum-
25 stantially, might have indicated Mr. Pierce was in the

1 store, that wouldn't have been inconsistent with your
2 theory?

3 A. It would not have, no.

4 Q. And the -- what I want---

5 A. But I was going to flat ask him that. If
6 he were on the stand, I was going to ask him. It's
7 not so much questions you ask but how people respond
8 to them or react, much the same as with the jurors.
9 I can ask a juror a question on voir dire. They, he
10 or she, could give me the politically correct answer,
11 and by their demeanor, by their -- the way they comport
12 themselves, I would believe that I don't want this juror,
13 or I really like this juror. Same thing with Mr.
14 Pierce. I was denied that opportunity. If he squirmed
15 up there when I asked him various questions, and I asked
16 him a handful of questions for the record. That was
17 just to make the record. I would have asked him more
18 had he been in front of the jury, depending on what
19 he said and how he answered. If he had made the mistake
20 of answering some and not answering others, it would
21 have been an indicator to -- to the jury in my opinion
22 that he had more to hide on those questions, and I
23 was going to ask him some innocuous questions, too,
24 to see if I could get him relaxed. I didn't get that
25 chance. I -- I was devastated by that during the --

1 and it was kind of like here's your theory of the case,
2 and all of a sudden the rules change, and you can't do
3 it.

4 Q. Because part of how you were going to attempt
5 to tell your story was through the cross-examination of
6 him?

7 A. Part of how I was going to try to save him
8 from the death penalty when possibly the triggerman was
9 going to walk free about it was to point out that, with
10 Kelsey on the stand, that he was the one that did the
11 shooting, okay. Now, again, I wasn't there, but the
12 things he told me and -- and the other information that
13 was consistent with that seemed a strong possibility
14 what he was saying was true.

15 Q. Now, let me ask you, if -- to assume this to
16 be true because I just want to ask you, one, if you knew
17 this fact or recall it, but there were shoeprints at the
18 scene of the crime?

19 A. Okay.

20 Q. One, they were identified; I mean, there was
21 an attempt to match them to shoes found from Mr. Hughes,
22 and they didn't match his shoes?

23 A. Okay.

24 Q. And, one, so were you aware of one -- do
25 you remem- -- recall that fact?

1 A. I remember they went to get his shoes, I
2 think, from somebody. It may have been his grand-
3 mother's house or somebody else's house. I, also,
4 remember that the EMS people indicating that they
5 walked all in the blood. Now, I don't know where
6 those prints came from, and that, yeah -- I see where
7 you may be going from. Could it have been Kelsey's
8 shoe? But, they didn't have Kelsey's shoe, and neither
9 did we, so---

10 Q. Right, but it's, also, it's possible---

11 A. Sure.

12 Q. ---that it could have been Kelsey Pierce's
13 shoe?

14 A. Yeah.

15 Q. And so, there would have been, as far as I can
16 tell, when the SLED man who did the other work testified
17 he was the one who had done it, in asking him if that
18 were Herman's shoes, and could it have been Kelsey
19 Pierce's, also?

20 A. It's possible, but I -- I wasn't aware that
21 they did any matchup with Kelsey's shoes. They
22 certainly arrested him. I was aware that the EMS people
23 said that there was -- that the crime scene wasn't -- it
24 was a small area, okay, as I remember. It was like a --
25 go ahead? It was a small casino kind of thing that used

1 to be maybe a gas station or some sort of small. It
2 wasn't a whole large space, and -- and in order to
3 get in there and treat those people medically, because
4 both of them, as I understand, were alive when the
5 EMS people got there, they were more interested in
6 trying to save their lives than they were preserving
7 evidence, and I remember at least one person -- and I
8 had been told that before the trial, as far as shoes,
9 but, to be honest with you, I don't think I ever tried
10 to in my mind to establish that as a potential
11 supporting thing of somebody else besides Herman being
12 there.

13 Q. Right, but, I guess---

14 A. I didn't think it was as important as having
15 the chance of -- of Kelsey---

16 Q. But it's certainly not inconsistent with your
17 theory?

18 A. No, it wouldn't be inconsistent at all.

19 Q. It's not---

20 A. No.

21 Q. ---Herman's---

22 A. No.

23 Q. ---print?

24 A. It would not be inconsistent at all.

25 Q. It could be his. It might be?

1 A. And it -- it would be nice if we could have
2 had that. I wasn't aware that they had his shoes to
3 match it up.

4 Q. Okay. Now, we -- we talked a little bit about
5 Henry Daniel Owens, Jr., and he testified for the
6 prosecution in this case?

7 A. Yes.

8 Q. And he testified, one, that he had given them
9 the gun and that they split the money with him
10 afterwards, and he, also, made some testimony about
11 statements supposedly made in Herman's presence and that
12 Herman made?

13 A. Yeah, and he made statements, and this was
14 another thing. At that point in the trial the conspir-
15 -- it seems to me that they were charged with
16 conspiracy, and I don't know whether I objected. I'm
17 not sure, but I think I objected to some statements he
18 had made in reference -- that Kelsey had made about
19 Herman, but I'm not sure, but the judge under the the
20 thing of co-conspirators you can have that testimony,
21 and I'd have my chance with -- with Mr. Pierce. Of
22 course, that was denied later on when they -- when they
23 told the judge that he was going to take the Fifth
24 Amendment.

25 Q. And Mr. Owens was charged with accessory

1 before the fact of murder and accessory before the fact
2 of armed robbery, accessory after the fact of murder,
3 accessory after the fact of armed robbery, and
4 misprision of a felony. Is that your recollection?

5 A. I'm not sure what all the charges he had. I
6 don't remember. I know that at some point in time in
7 the trial Walter made some reference to he could give
8 him ten years for lying or something if -- if he didn't
9 tell the truth, but how that came in, I'm not even sure
10 what his -- I don't remember what his -- the deal was
11 for him. I understand he got probation.

12 Q. Okay, and now, the penalty for accessory
13 before the fact, you can be punished?

14 A. The same as the principal.

15 Q. So he was facing a potential life sentence?

16 A. Yes.

17 Q. And he was permitted to plead guilty to
18 misprision of a felony?

19 A. Yes.

20 Q. Now, I want to ask you a couple. You would
21 agree this was a pretty good deal for him?

22 A. Sure. It wasn't as good as Carol Allman's
23 deal, but it was pretty good.

24 Q. In the range of deals, this was pretty
25 sweet?

1 A. It was a sweetheart deal, yes.

2 Q. And do you recall -- and one of the things
3 that you attempted to do with him somewhat, I assume, is
4 impeach his credibility?

5 A. Yeah. I don't know how effective it was, but
6 I tried, yes.

7 Q. Do you recall today why you didn't inform the
8 jury that he did face a potential life sentence for
9 accessory before the fact of murder?

10 A. You mean in the -- in the -- my argument?

11 Q. No, when -- I mean during your examination or
12 argument?

13 A. I don't recall why.

14 Q. You don't -- you don't recall?

15 A. No, and I don't recall if I made any
16 comments about it or not. I know, or I'm -- I'm
17 pretty sure I addressed somewhat of that in the penalty
18 phase in the argument there, okay, as to how -- what he
19 was getting and addressed that Kelsey would not be
20 treated---

21 Q. Uh-huh (affirmative response).

22 A. ---that Kelsey would not be facing the
23 death penalty. Walter tried to give the impression
24 that Kelsey was going to be facing the death penalty.
25 I knew better. Before Walter told me he had made a

1 deal with Mr. Owens, I was told by people in the St.
2 Matthews Police Department that Mr. Owens, because
3 of how well thought of his uncle or his father or
4 somebody was, he would never see a day in jail.

5 Q. But you would agree with me that a jury
6 would not necessarily know that the penalty for
7 accessory before the fact of murder is life in
8 prison?

9 A. No. I would -- I would tell you that most
10 and half of the lawyers in this state wouldn't know
11 that.

12 Q. And so, in some way if -- understand what a --
13 you know, the deal was, it would have been a
14 consideration for the jury to know what his exposure was
15 versus what he was going to receive?

16 A. I -- I can follow that theory, yes.

17 Q. And one of the things that he said when he was
18 being examined by Mr. Bailey was is that he was -- they
19 said, "What's the deal?" and he said, "Misprision of a
20 felony," and he said, "How much time are you facing?"
21 and he said, "Fifteen years"?

22 A. I -- I don't remember.

23 Q. Okay.

24 A. I mean, if -- if -- if that's in the record,
25 that's what he said. Then -- then I -- I would agree.

1 Q. Well, is your---

2 A. But the penalty for misprision of a felony, at
3 least it was under the old law, would be ten years is my
4 memory.

5 Q. Right. Then so, at the time do you recall
6 hearing that testimony? Do you recall why you didn't
7 either object or clarify the record?

8 A. No. Let me tell you what goes on in -- in
9 some of these things when you're trying a case, okay.
10 You're jotting down. They say something in response to
11 one question, and it's something that you find
12 significant, and you're jotting down notes to remind
13 yourself, and they've gone on to one or two more
14 questions, and you miss things, okay. There was a
15 time in Walter's argument -- I don't know whether it
16 was the penalty phase or the guilt-innocence phase --
17 that he said something that -- it must have been in
18 the -- no, it could have been either one because I had
19 the last argument in both -- that he said something
20 that I found to be -- I could have objected to. What
21 it was I don't remember. All I know is I was busy
22 writing my notes about making sure of the things I
23 wanted to cover in my argument. It's one of the down
24 sides of having one lawyer. You can't -- you can't
25 cover it all.

1 Q. Now, one of the things that you had said that
2 you were doing, and it's -- it's obviously clear from
3 the record, is attempting to -- we've talked about this
4 before -- I just want to go over one more aspect of it
5 -- was to get Mr. Pierce more involved, and we talked
6 about that?

7 A. Sure.

8 Q. And one of the things you did at trial, you
9 called a man named, I think, Ricardo Gilford, to talk
10 about statements, which Mr. Pierce had made at the Ebony
11 Lounge?

12 A. Yeah. If I'm not mistaken, I called -- there
13 was a couple of people we were trying to call. I know
14 we called one of them, and he was one of Kelsey's
15 cousins.

16 Q. Uh-huh (affirmative response).

17 A. They called -- they had called a girl who was
18 supposedly at the Ebony Lounge, and I remember they
19 recalled her, and she pretty much made some statement
20 that Ricardo had made some outrageous statements in the
21 hallway about getting Kelsey. I didn't find her
22 credibility to be very strong, to be honest with you. I
23 was impressed with our witness, but, again, that was in
24 the guilt-innocence phase.

25 Q. Right.

1 A. Whether -- and I -- and I hope that I in my
2 closing argument for the penalty phase covered his
3 testimony.

4 Q. Well, I guess---

5 A. Okay.

6 Q. ---and I understand that, but if there --
7 there were other witnesses who had given statements
8 indicating that Mr. Pierce had made statements?

9 A. Yeah. There were -- there were some other
10 witnesses. Some I don't know whether we could find.
11 Somebody disappeared, you know, and some, quite frankly
12 -- I think one may have been in jail at the time --
13 about their availability.

14 Q. Okay. There is -- let me show you -- I'm
15 sorry. Let me show this first to Mr. Zelenka.

16 (Applicant's Exhibit No. 12 marked.)

17 DIRECT EXAMINATION RESUMES BY MR. BLUME:

18 Q. Let me show you what is Applicant's -- marked
19 as Applicant's Exhibit 12, and I understand it will be
20 admitted without objection. It's a statement.

21 MR. ZELENKA: Is it---

22 MR. BLUME: I'm sorry.

23 MR. ZELENKA: If he can identify that he'd
24 seen it.

25 THE WITNESS: I don't know if Dwayne Gilmore

1 testified. I don't remember. It seems to me I remember
2 that Walter made a point that Dwayne -- I think Dwayne's
3 related to Ricardo, okay -- that Dwayne had indicated
4 that Kelsey was drunk and had bragged about killing or
5 shooting Kelly, which was never our theory of the case
6 that he had ever shot Kelly Hoffman. That would not
7 have been helpful. I don't know why we chose not to use
8 him. I don't remember.

9 DIRECT EXAMINATION RESUMES BY MR. BLUME:

10 Q. You don't remember---

11 A. I don't remember.

12 Q. While it -- it is somewhat indi- -- it does
13 indicate that Mr. Pierce is testifying that he was the
14 shooter in the case?

15 A. Uh-huh (affirmative response). He was going
16 to leave and go to Florida. One of the witnesses said
17 he wanted to leave and tried to talk that guy into going
18 with him. Which one I don't -- I don't remember.

19 Q. Okay.

20 A. Okay.

21 Q. And that, also, was, I assume, information
22 that would have indicated he was more culpable if he was
23 trying to get out of the state?

24 A. Sure. I think we got that out. I think that
25 came out in the -- in the trial.

1 Q. Uh-huh (affirmative response), but you --
2 you don't recall today why you -- you didn't -- why
3 Dwayne Gilmore was not called?

4 A. No, I -- I don't know. I don't know. I
5 know there was one man we couldn't serve with the
6 subpoena, okay. There was somebody else that the
7 sheriff talked to, and all of a sudden his memory
8 wasn't good.

9 Q. Okay. Mr. Gilmore, just to sort of -- so
10 the record's clear, and show you a little -- this,
11 again, would have happened after your trial, so, but
12 from the transcript of record in State versus Kelsey
13 Pierce, I see that Dwayne Gilmore is called as a
14 witness?

15 A. Okay.

16 Q. By Walter Bailey's office?

17 A. All right.

18 Q. To testify essentially in -- consistent with
19 the statement that you've reviewed?

20 A. Okay. Yes. Okay.

21 Q. Now, I want you to cover just one more.
22 Well, actually a couple more. I want to cover one
23 more sort of issue that's not -- I realize that all
24 of this in some way is just really sentencing phase
25 you've been talking about, basically your strategy, but

1 one thing I wanted to ask you about. You've talked
2 about it, but I want to, I think, just sort of make sure
3 that I understand exactly what you're saying. You
4 indicated in your opening statement to the jury at the
5 -- at the guilt or innocence phase that Mr. Hughes was
6 guilty?

7 A. I -- I don't know what terminology I used.
8 I had to walk a fine line, I know, between -- because
9 the judge was -- I don't know if he was testing me
10 on this or playing with me or what, but I didn't want
11 him -- I didn't want to say that he was pleading guilty
12 because that could take the review from the jury
13 into the judge's hands, but I wanted them to know
14 that we were not denying his culpability and legal
15 responsibility.

16 Q. Right, and one of the things that you did on
17 this before -- I don't know if you remember it, but if
18 you don't, we'll be happy just to let you review it, but
19 you told the judge that, "Your Honor, I'm going to" --
20 eventually asked the judge to do it on the record,
21 discussion of it with Mr. Hughes to make sure, you know,
22 that he was---

23 A. And -- and that was the proper protocol, as --
24 as I understood it to be, to do that, which was somewhat
25 of a farce when I had a client that I questioned was --

1 his competency as far as being able to make those kinds
2 of decisions.

3 Q. Okay. I think it would be useful, I mean,
4 because it's going to be -- I think if you just look at
5 this, it will be easier because, if not---

6 A. Okay.

7 Q. ---I'm going to have to sort of tell you.
8 It's a few pages.

9 A. Sure.

10 Q. It wouldn't really be fair to you for me to
11 ask you questions---

12 A. Okay.

13 Q. ---without letting you read it. I think if
14 you could read -- it won't take but a minute --
15 essentially the waiver hearing, which starts on 761 and
16 then goes through the waiver, if you could just look at
17 that just for a minute and just---

18 A. Okay.

19 Q. ---and just sort of see how it transpired,
20 then I'll---

21 A. Okay.

22 Q. Okay. Then I just want to -- this is much
23 shorter.

24 A. Right.

25 Q. And this is the part of your opening statement

1 where you go over that, so I just, since you've told me
2 you're going to do it, just really from there to there.

3 THE COURT: For the record would you note what
4 page?

5 MR. BLUME: Oh, yes. I'm sorry.

6 THE WITNESS: Page 809. Okay. All right.

7 DIRECT EXAMINATION RESUMES BY MR. BLUME:

8 Q. Okay. Just for the record, the part that you
9 just read was on page 809 of the transcript of record,
10 and the previous pages that I asked you to read began on
11 page 761---

12 A. Uh-huh (affirmative response).

13 Q. ---and goes through 766. Now, as I read
14 this, the discussion that you had -- well, first of all,
15 you -- the record indicates that you talked about this
16 with Mr. Hughes, I guess, and his grandmother ahead of
17 time?

18 A. And his grandmother, yes. I -- I dealt mostly
19 with his grandmother, Ms. -- and Mr. Hughes. His -- I'm
20 not sure I recall ever seeing his father. His mother's
21 involvement was limited.

22 Q. Okay.

23 A. His -- his grandmother was the one source,
24 one source of strength behind him the whole time.

25 Q. Well, the reason I ask is that really the

1 discussion from this, the waiver, and what you had,
2 the judge is really talking to him about it in terms
3 of admitting involvement. You know, the admission
4 of---

5 A. Trying to dance around admitting guilt.

6 Q. The admission of---

7 A. But at the same point in time letting the jury
8 know, you know -- and this was another strategy that
9 would be unique to having one lawyer doing both phases
10 instead of having two lawyers, okay -- didn't want to
11 lose credibility for Herman or myself. We thought the
12 evidence was substantial, that he would be convicted of
13 -- of the charges. The only charge there was a question
14 about the grand larceny with armed robbery, and that
15 would have been of the timing of when the keys were
16 taken, whether it was a part of the robbery or whether
17 it was a thought subsequent to that. If -- if the
18 people were in theory dead, and he took the keys
19 afterwards, is that a robbery? And, was he -- or if
20 they were still alive, as the evidence supported, should
21 that be armed robbery and then not grand larceny. As I
22 recall, even with our admitting to the jury in opening
23 statement that, you know, he -- he was involved, they
24 were out four and a half hours on the guilt phase, and
25 the -- and the question was the armed robbery, as -- as

1 I was told later. I didn't -- I didn't question any of
2 the jurors.

3 Q. But my question to you is really what the
4 judge asked him about in the pages was was it okay with
5 him. Did he understand that you were going to admit
6 that he was involved, that he was present in the
7 offense, which is -- or would you agree with me, it's
8 somewhat different to ask someone, "Were you involved?"
9 and to say, "Are you guilty of murder?" or at least it
10 would be a distinction which would be difficult for
11 Mr. Hughes to comprehend?

12 A. You -- you asked a couple of different
13 questions.

14 Q. Okay.

15 A. As to whether I thought Mr. Hughes understood
16 that, you know, sometimes when I'm doing guilty pleas
17 with people or in any proceedings, I have sincere
18 questions in my mind whether they understand the
19 questions the judges are asking. I think people are
20 conditioned to give responses. I couldn't tell you,
21 if my life depended on it, whether Herman understood
22 those things or not. I have -- would have some reason
23 to believe that Herman may not be able to -- to fully
24 understand all of that, but you're dealt the cards you
25 have, and I had Herman as a client. I certainly thought

1 it was in his best interest. I had not made this
2 decision on my own. I had consulted lawyers who had
3 handled other death penalty cases. Mr. Bruck was
4 the only one I had talked to. I'm not sure whether
5 he -- I don't think it was his idea but about how
6 you pull that off without losing credibility, and
7 it's a two-edged sword because you'll lose. What if
8 -- what if they mess up on some of the evidence? You
9 lose that right, and it -- it could backfire on you.
10 It wasn't a -- a difficult -- I mean, it wasn't an easy
11 decision to make, more diff- -- made more difficult
12 by a client who I couldn't tell you whether he
13 understood it. If you believed the State's expert
14 witnesses, they said he was fully capable of under-
15 standing everything. If you believed ours, they ques-
16 tioned whether he could.

17 Q. All right, but I, again, I just want to clar-
18 -- I'm not questioning whether you were convinced it was
19 in his---

20 A. Yeah.

21 Q. ---best interest to do it, but---

22 A. I was told I needed to have him questioned
23 by the court before I dare say anything about that in
24 front of the jury by lawyers who had handled similar
25 situations, and that's why we did it that way.

1 Q. Right. My -- my question is you would agree
2 with me, I guess, would you not, that on page 809 your
3 opening statement is a clear admission that he is guilty
4 of murder? I mean, it says, "You will find the evidence
5 involved"---

6 A. Yeah, and -- and there are -- there are some
7 circumstances where you're involved in felonies where
8 you're not because if you're not the trigger person,
9 okay. You have to have more involvement.

10 Q. Right.

11 A. I gave them a simple paraphrase, but, yeah, in
12 effect---

13 Q. "His guilt is clear. It does not matter who
14 had the gun. It does not matter"---

15 A. In -- in effect---

16 Q. ---"who pulled the trigger"?

17 A. Yes. Yeah, and that was the conclusion I felt
18 that they were going to draw with the evidence, you
19 know. I didn't think I was giving away anything
20 although there are technical reasons why that may not be
21 totally correct.

22 Q. But the waiver, on the other hand, the judge
23 doesn't ask him about -- the judge asked him about "Do
24 you understand he's going to admit involvement?" versus
25 "Do you understand he's going to admit guilt?"

1 A. If that's what the record says, yeah, yeah.
2 That's what he asked about.

3 Q. And, as I -- I'm sorry. I didn't mean to cut
4 you off. As I---

5 A. Now, if he'd have -- and I think the judge may
6 have been dancing on that fine line, too, because if he
7 had admitted to guilt, there would be like a guilty
8 plea, and we didn't want to waive the right to go in
9 front of the jury. I -- I made it clear to the jur- --
10 to the judge what we were trying to do. We still wanted
11 the benefit of having a jury decide because with a jury,
12 if you -- if you had one strong person or two people not
13 quite as strong to band together to hold out for life,
14 he gets life. That was our theory. We never thought we
15 could convince all twelve that this young man should get
16 a life sentence, okay. There had been multiple murders
17 in that county over the previous year and a half, a very
18 small county. It was our understanding from what we, in
19 talking to people, we knew that work down there, folks
20 who lived in Richland County worked down there. Elijah
21 Nesbitt talked to a number of people. I talked to
22 people at St. Matthews Police Department. I talked to
23 members of Mr. Pressley's family. Some people wanted
24 to, you know, hang him up right after the trial. Other
25 people were more sympathetic. We -- we didn't think we

1 were going to be able to get twelve people to say Herman
2 Hughes ought to get a life sentence. We were hoping for
3 one, two, three, or four.

4 Q. One of the things, as I recall, from your
5 deposition is that Mr. Hughes never denied his
6 involvement in -- in the offense and being present
7 and -- at the shooting?

8 A. He admitted to me on more than one occasion
9 that he shot the young lady.

10 Q. But one of the things that, I think, you
11 indicated that both he and his grandmother had
12 difficulty grasping is how he could be guilty of murder
13 if the person he---

14 A. If he didn't shoot, yeah.

15 Q. ---shot lived?

16 A. And in my mind I wonder whether they already
17 were aware or they believed that if he didn't shoot Mr.
18 Pressley, then he could not have been guilty of murder,
19 and -- and -- and certainly there are, as you well know
20 -- that he does not have to be the trigger person to be
21 convicted of murder.

22 Q. But that seemed to be a distinction which was
23 difficult for them to grasp?

24 A. Absolutely, and if -- if they had in their
25 minds seized -- and I was -- I was trying to decide why

1 he never admitted, okay. I -- I questioned whether he
2 was just holding back on me. That was my early
3 impression. My first way of -- of representing people
4 is I don't believe anything they say until I find
5 other evidence and information that supports it.
6 Then I start because they're not hiring a cheerleader.
7 They're hiring a lawyer. I'm supposed to be very
8 cynical because if I'm not cynical, and the opposing
9 attorney is, he's going to embarrass my client on
10 the stand. Initially I didn't believe him, okay, and
11 as I got into it, I started believing the possibility
12 of it, okay, particularly with Ms. Hoffman's earlier
13 taped statements, some statements other people had
14 given. If -- if the guy's own cousin tells you that
15 -- Kelsey Pierce's cousin is, I think, Ricardo --
16 that Kelsey admitted to him that he shot somebody,
17 that -- that goes a long way with me, so that started
18 supporting it, and then when I became a believer
19 that there was a strong possibility that what -- his
20 version could be true was when we had him under the
21 sodium pentothal, which his testimony under that was
22 not admissible. We couldn't ask that of Dr. Morgan.
23 I knew of no law we could get that information in.
24 I had that information, which, you know, if you -- I
25 shared it with Walter. He was -- he didn't care.

1 I mean, he had his job to do, and he was going to do
2 it. He had his case, and it was based on -- on
3 Ms. Hoffman and her version, and she either did
4 not remember seeing Mr. Pierce or did not want to
5 say it.

6 MR. BLUME: Your Honor, just so I -- if you're
7 wondering where we are, I think I'm about two-thirds to
8 three-quarters through, so I'm just---

9 THE COURT: All right.

10 DIRECT EXAMINATION RESUMES BY MR. BLUME:

11 Q. Now, I want to switch gears a little bit,
12 Mr. Newsom, and I want to ask you a few questions about
13 the sentencing phase, at least the sentencing phase
14 proper, and sort of that, the manner in which that was
15 handled. Do you recall today who selected the expert
16 witnesses? Have you -- three expert witnesses
17 testified: John Dewitt, Harold Morgan---

18 A. And Annette Bodie.

19 Q. ---and Annette Bodie?

20 A. I'm pretty sure that I got Ms. Bodie's name
21 from somebody in Richland County's Public Defender's
22 Office, okay, that she had done a number of these
23 trials, and there were other people who did similar
24 things that -- workups that she had done, who were
25 unavailable. I know that Patty Rickburn played a major

1 part in -- in some of our decisions. Patty worked with
2 the Public Defender's Office there in Richland County,
3 had been involved with some death penalty cases. She
4 knew some of the more recent actors. I had not handled
5 a death penalty case probably in -- in twelve, thirteen
6 years prior to that. The people that I dealt with, you
7 know, were -- in those years before were, you know, not
8 from this state. In those days your -- in your
9 sentencing phase you wanted to hire a juristic
10 psychologist, and I was familiar with those folks. Our
11 voir dire had been severely limited, and you couldn't
12 use those. In the Platt and Arnold trial Maurene
13 McLaughlin was used -- I don't know if you're familiar
14 with her -- and Cathy Bennett in the Fleming Moultrie
15 trial. I was able to watch the Fleming Moultrie trial.
16 I clerked for Brantley Harvey's firm years ago, and they
17 represented him in that case, so I was introduced to
18 these folks and had some of their benefit of how they
19 looked at juries and stuff. We didn't have that
20 available to us. The voir dire has been severely
21 limited. It's almost a waste of time.

22 Q. Okay. Now, would you agree with me that one
23 of the things you were attempting to do at the
24 sentencing phase was to establish that Herman Hughes is
25 mentally retarded?

1 A. I was attempting to establish that he was --
2 and there was a -- there was a debate about mental
3 retardation. You have different views. My information
4 from folks that I talked to, there's some across-the-
5 board seventy, is it -- either seventy and you're
6 retarded if it's seventy or below; if you're not -- our
7 experts that we used had a different view that it was a
8 range. Dr. Morgan did, and you have the difference
9 between psychiatrists and psychologists. I typically
10 lean toward psychologists, other than psychiatrists. In
11 this case we had a test, the Schlossen test, that showed
12 the lowest score, one score below seventy, okay. The
13 other scores were all above seventy, okay. We were of
14 the opinion that if we brought in a psychologists, okay,
15 that they would -- if they tested him, okay, he was
16 going to score above seventy because the test he had
17 been given by psychologists had been consistently above
18 seventy, and there was some deterioration. There was
19 only one test -- that was like a pretest; that was the
20 Schlossen. We wanted to make the most of that sixty-
21 eight to show him to be -- and, also, to capitalize on
22 he scored the lowest percentile on -- on the
23 standardized test in one category and, I think, the
24 lowest two or three. Some people would tell you that
25 psychiatrists are better trained than psychologists.

1 Other people would say psychologists are better at
2 certain things than psychiatrists, and -- and I've
3 shared both of the things. We chose to go with Dr.
4 Morgan. His reputation was impeccable. If you can
5 get Dr. Morgan on your side, it's kinda' like in a
6 civil case. You get certain orthopedic surgeons to
7 say your client is severely injured, and he's got a
8 rating of eighty-five per cent, and the insurance
9 company will settle it automatically; other doctors
10 are so liberal they don't believe it. Well, Morgan
11 had a conservative reputation. He was available, and
12 we got him, and we were on a short time frame here,
13 too, okay. We got the funding in that summer. We were
14 going to trial in about two months, so basically we --
15 I shut down pretty much my part of my law practice and
16 devoted most of the time to that, and the last few weeks
17 before it, it -- it was pretty much exclusive of that.
18 These folks were available. They were all capable.
19 They had been involved in other cases, and I can't
20 remember who gave me Dr. Morgan's name. I had heard
21 his name before. He had -- used to always testify for
22 the State, used to work with the State Hospital, and
23 I can't remember the specific people who told me those
24 names.

25 Q. Do you recall today why you didn't get

1 someone with expertise in sort of mental retardation
2 to look over the testing or to testify about the
3 issue, someone who that was their primary area of
4 expertise?

5 A. It was my understanding from our own experts
6 that he would not qualify under most psychologists
7 purview that he was mentally retarded as far as at
8 seventy. We wanted to be able to capitalize from his
9 school records, and I think Patty Rickburn found those,
10 that he had a sixty-eight on that Schlossen test. We
11 want to -- to push that. Now, there's different
12 theories and beliefs about what mental retardation is.
13 Dr. Morgan believed that under his version of mental
14 retardation he was, okay. It was a matter of if you're
15 mentally retarded, you're in the lower five percentile,
16 and he was in the lower six, okay, had at least one
17 test. It was trying to get -- take advantage of both
18 sides of it, but, no, I wasn't even aware of a mental
19 retardation specialist, if you -- if you're asking
20 that.

21 Q. Okay.

22 A. Okay.

23 Q. And you don't have any recollection that you
24 consulted with anyone who that was their---

25 A. No. No recollection. As a matter of fact,

1 I'm pretty sure we did not, okay, you know. The statute
2 about mental retardation somewhere was conflicting with
3 the psychologist's view of mental retardation, okay, and
4 I tried as best I could in the cross-examination of one
5 of the State's witness to hammer that home because it
6 didn't have to be. It was like sub-average versus -- it
7 didn't have to be a seventy, okay. He didn't want to
8 yield on that, and what impact we made, I don't know. I
9 think, I hope, that we were able to -- to show that
10 Herman was not a leader, was not -- that his
11 intelligence level and his maturity level because I
12 think there was some information that he, when he was
13 thirteen, they put his mental age at nine. We tried to
14 really push that, so if he was sixteen when it occurred
15 -- what was his mental age then, twelve or thirteen,
16 yeah -- he's still considered legally responsible for
17 his conduct, but what would be a satisfactory or a
18 sufficient punishment? You know, obviously, what we did
19 in that trial in those few weeks did not work with that
20 particular jury.

21 Q. And you, as I understand it, you -- you
22 testified you had Ms. Bodie, who was a MSW social
23 worker?

24 A. Yes.

25 Q. And then Dr.---

1 A. I -- I was very impressed with her. We
2 were at a loss how we were going to present some of
3 the information. Whoever it was that suggested her,
4 I really appreciate it because she was very, very
5 helpful.

6 Q. And then, you, also, had John Dewitt and
7 Harold Morgan?

8 A. Yes.

9 Q. Who were both psychiatrists?

10 A. Yes.

11 Q. And you may have covered this, but do you have
12 any recollection why you didn't use a psychologist in
13 the case?

14 A. Other than what I---

15 Q. Two psychiatrists as opposed to a
16 psychologist?

17 A. Other than what I told you before, you know.

18 Q. Okay. Would you agree with me that another
19 significant factor in the case and in your quest for
20 a life sentence was that Mr. Hughes was sixteen years
21 old?

22 A. Yes.

23 Q. And was one of the youngest people that the
24 State had sought the death penalty against in probably
25 fifty years?

1 A. Other than Terry Roche. Terry had just
2 turned, I think, seventeen.

3 Q. Right, but Mr. Hughes was still sixteen at the
4 time?

5 A. Yes.

6 Q. And Roche was seventeen, and, I mean, he was
7 essentially a child at the time?

8 A. Uh-huh (affirmative response).

9 Q. Do you recall today, or do you remember, did
10 -- did you ever -- did you consider whether you should
11 retain the services or consult with someone who was an
12 expert in sort of child development and sort of child
13 psychology to talk about, you know, what a sixteen-year-
14 old thinks like and does?

15 A. Never considered it. I would assume that a
16 psychiatrist would be capable of handling that, but
17 there are certain subspecialists, I guess, in psychology
18 that could be better equipped. I'm not even aware if a
19 person like that exists, but certainly if they had
20 existed, and I had thought about it, perhaps it could
21 have benefited, certainly.

22 Q. Okay, but your testimony, as I understand it
23 today, is this is not to the best of your recollection
24 you -- this is not something you considered and
25 rejected. You just didn't---

1 A. We were working overtime to get prepared
2 for a trial on pretty much short notice with experts
3 who I thought did yeoman's work. When Dr. Morgan met
4 with Herman, he met with him on a Sunday afternoon
5 in his office. We -- we were able to persuade Walter
6 to -- to get the sheriff's department to transport
7 Herman from the jail in Orangeburg to Columbia to
8 meet with Dr. Morgan on a Sunday afternoon so we could
9 do this, this private test, and they were -- and all
10 of this stuff was expedited because we needed him
11 evaluated. I had no reason to question Dr. Morgan's
12 credentials at all, and I still don't have any reason
13 to.

14 Q. What -- and -- and I'm certainly not
15 questioning it either. He's a psychiatrist, but
16 you would agree with me, would you not, that there
17 are some people who have special areas of expertise
18 that could be relevant to the issues in a particular
19 case?

20 A. Sure, yeah, and you've got to understand, one
21 of the groups that I consulted with was your office, and
22 y'all didn't suggest a psychologists either.

23 Q. Do you remember ever discussing that issue
24 with me?

25 A. No, but I asked for advice what to do.

1 I don't remember what all we discussed, okay, other
2 than some of the legal issues we discussed, and --
3 and other folks on your staff were extremely helpful,
4 and I would have done a lot worse of a job in
5 representing this young man had it not been for your
6 office.

7 Q. Just to make clear, at that time I was the
8 Director of the Death Penalty Resource Center---

9 A. Yes.

10 Q. ---which I'm not presently affiliated with.
11 Now, you've mentioned several times that there were
12 -- you -- everything was sort of on a tight time
13 line?

14 A. Sure.

15 Q. You were hustling to get ready. Do you recall
16 at -- at this time whether you ever filed a motion for a
17 continuance in the case?

18 A. No. As things, as it worked out, the things
19 we felt we needed to do, we were able to get ready,
20 okay. What it -- what it required was I neglected my
21 law practice. I had fairly high overhead, and I
22 neglected that for a couple of months. That almost
23 ruined me finally.

24 Q. Do you recall from the records that you
25 reviewed that Mr. Hughes had tested positive for

1 exposure to syphilis on several occasions?

2 A. I don't know about several occasions. It
3 seems to me in the information I got about that was
4 from when he went to DJJ, the evaluation there. I
5 think there was something there that said he had
6 tested positive for exposure to syphilis in the
7 past.

8 Q. And were -- were you aware of the fact that
9 his mother had had syphilis when she was pregnant with
10 Mr. Hughes?

11 A. I saw that in some of the answers to
12 interrogatories that you all had provided, the attorney
13 general's office. I can tell you this, and I think if
14 you look at the transcript of trial, there's nothing in
15 there ex- -- Patty Rickburn checked the medical records
16 for his birth. It showed it was a normal birth. There
17 was nothing abnormal. We had a chance to talk to her.
18 She never ever mentioned that. If she -- she never said
19 it to us, okay. Annette Bodie in her testimony talked
20 about it being a normal, uneventful pregnancy. It was a
21 healthy child. Got this info- -- she got this
22 information from his family, as well as the medical
23 records, and Dr. Morgan testified to that. The first I
24 ever heard about any allegations that his mother had
25 syphilis or may have had syphilis during the pregnancy,

1 and I can't deny that, was in y'all's response to their
2 interrogatories, and that had never been mentioned to
3 us, never.

4 Q. But you were aware that he had had -- he had
5 tested positive for exposure to syphilis?

6 A. Sure, at -- at the DJJ, I think, when they did
7 the evaluation for the waiver hearing.

8 Q. And do you recall whether you asked any --
9 either one of the experts that you had about whether
10 there was potentially any relationship between that and
11 any brain impairment?

12 A. I -- I can't recall asking them that. I know
13 that both Ms. Bodie and Dr. Morgan would have access
14 to all the records we had, and that information would
15 have been in that. Dr. Morgan may have -- if I
16 discussed it with anybody, it would have been -- it
17 would have been with Dr. Morgan. It would not have
18 been with Ms. Bodie.

19 Q. But you don't have any recollection of
20 that?

21 A. I don't have any recollection, and I couldn't
22 swear to you that I did.

23 Q. Right. Now, during -- I can maybe go through
24 this fairly -- a couple of areas fairly quickly before I
25 sort of turn to voir dire -- during your deposition we

1 asked you some questions about the victim impact
2 testimony, which was admitted in this case, and whether
3 you ever considered objecting to its -- the sort of the
4 breadth and the scope of it. As I understand, what your
5 answer was was that you felt like, one, strategically
6 that it's difficult testimony to object to in front of
7 the jury?

8 A. Sure. I mean, they're basically doing a
9 summary of the person's life. I don't know of any point
10 to that. I asked some folks who had tried some death
11 penalty cases more recently than I had been involved in
12 death penalty cases, and the one thing that I remember
13 that was told me was that it was one of those times when
14 you really crawl under the table on behalf of your
15 client because even if there's something you could
16 object to, if you do, you come across as being a SOB.
17 If there was something, but if there is case law that
18 suggests there was something I could have objected to,
19 and I didn't, then I -- I -- I blew it.

20 Q. Well, think what you actually said was
21 although you felt like it would be impossible, possibly
22 even harmful, to do it in front of the jury, if there
23 were some way to do it, you know, in limine, that that
24 would be a different matter, outside the presence of the
25 jury?

1 A. Sure. If I was aware of a particular point of
2 what they were going to cover because we didn't have
3 other than a summary of what they were going to say
4 because it, you know -- and I don't know, you know, that
5 there's enough. If there was something particularly
6 damaging, I mean, how hard, how bad is it for somebody
7 to say that they love their child. I -- I'm not going
8 to attack somebody for saying that.

9 Q. Oh, and -- and I just want to make clear,
10 nobody's suggesting that you should have and that nobody
11 is, also, suggesting that the testimony at least, you
12 know, that some testimony in that matter is admissible,
13 so I -- I don't -- did want the record to be clear on
14 those questions, and obviously the case law is that
15 there are limits on what you can---

16 A. If -- if there were limits, and I let it go
17 past, I can't -- I can't deny. The record would speak
18 for itself what was put in there and what I didn't
19 object to.

20 Q. And I think you can, also, this next area we
21 can go through pretty quickly based on your -- your
22 deposition. Do you remember or recall whether you did
23 any legal research to determine -- not the factual --
24 I'm talking about the aggravating circumstances, one,
25 that -- that were alleged. The State alleged three

1 aggravating circumstances?

2 A. Okay.

3 Q. Murder while in the commission of armed
4 robbery, murder while in the commission of larceny
5 while armed with a deadly weapon, and the murder was
6 committed in a public place through the means of a
7 device, which is likely -- I might be getting the
8 wording wrong -- but likely to cause injury to more
9 than one person?

10 A. Okay.

11 Q. And those are the three aggravating
12 circumstances. Do you recall today whether you would
13 have done any legal research to determine whether there
14 were any challenges to make to those aggravating
15 circumstances?

16 A. I -- I---

17 Q. Not factually again?

18 A. Yeah.

19 Q. I'm talking about the sort of the---

20 A. No. I don't recall.

21 Q. Okay.

22 A. I would assume I did not do much. I would
23 have read the statute and seen the cases there, and
24 probably that would have been one of the things I would
25 have discussed with other lawyers.

1 Q. The same with the prosecutor's closing
2 argument in this case, if you had identified parts of
3 the argument, which you deemed to be objectionable,
4 would you have objected?

5 A. Certainly, and particularly if I would have
6 caught in time, I would have objected to it. If -- and
7 I'm sure you're well aware of it -- if you've got a
8 prosecutor on a roll, and he's making headway with the
9 jury, and he messes up, it makes it -- it gives you a
10 legal excuse to object, you do well to object to it
11 because, if nothing else, you're going to disrupt his
12 flow with the jury and maybe disrupt his train of
13 thought. I didn't -- either I didn't see anything. I
14 know there was one thing he said that I -- because I was
15 jotting down notes for my own closing statement, which
16 would have been after his, and I know there was
17 something that I wanted to, but I didn't want to draw
18 attention to it, which you do if you go after the fact.
19 You almost have to repeat what he said. That hammers
20 home to the jury. In theory, the training that I've had
21 is that -- that you may be making a bigger mistake to
22 draw attention to it too late. Besides, it's -- it's
23 already out. It's too late to object.

24 Q. I mean, you don't recall---

25 A. I don't recall what it was. I know there was

1 one thing that I wanted to say something about, and it
2 was too late.

3 Q. And you don't recall today making a strategic
4 reason not to object---

5 A. No, I don't recall making any strategic---

6 Q. ---decision?

7 A. ---reason not to object. I can tell you my
8 focus was more on what I was going to say, okay, and
9 when I sat down for the next probably ten minutes, in my
10 mind I was thinking of eight million things -- that's an
11 exaggeration -- of what I had forgotten to say to the
12 jury or wasn't sure I said, okay.

13 Q. Okay.

14 A. That's an overwhelming task to have that
15 argument and feel like it all rests on your shoulders
16 and that any points to be made on behalf of your
17 client, you need to make it then, and then to sit
18 down and realize, "Oh, I forgot to say this," or "I
19 may have forgotten to say that," or "Did I cover
20 this well enough?" and I -- I was alone and exhausted,
21 too.

22 Q. The final area, which I want to cover with
23 you, is the voir dire in the case. I realize -- I
24 apologize for kinda' doing it backwards, I guess. I've
25 gone through the whole trial, and -- and now I'm to the

1 voir dire, but I wanted to -- to -- to cover that with
2 you. Do you remember or did you have a particular
3 strategy about the voir dire and how you were going to
4 handle it?

5 A. I couldn't say I had a particular strategy,
6 no. I mean, you get as -- you sit up there and look at
7 the panel, okay, and it happens every time you're going
8 to try a case. You go out there and look at the jury
9 panel and say, "Huh," and you draw some initial
10 impressions. This seems to be a good jury panel. This
11 seems to be a bad. I've been in -- in courtrooms where
12 my client on a drug trial had sold drugs or bought drugs
13 from at least five people on the potential jury panel.
14 We thought that was a pretty good jury panel, okay.
15 I've been on others on DUI cases, and you walk in there,
16 and you know, in spite of your client's low reading, he
17 or she has a chance of being convicted. Initially, I
18 thought this was a good jury panel. The African
19 American potential jurors dropped off like flies, some
20 for -- they were ineligible, okay, but when a question
21 was asked if anybody knew Herman Hughes or his family
22 and if that would impair their ability to give a fair
23 trial to him, I was surprised and shocked at the number
24 of people who came up. I don't know the number. I
25 didn't count them. I was deflated. We had a reduced

1 African American population after that. I did not think
2 it was a very good jury panel to choose from. It wasn't
3 ideal, so you're dealing with, when you pick a jury,
4 you're picking the lesser of evils. Now, I was not
5 trying to pick a twelve person, going to recommend life
6 sentence. I did not think that would occur in that
7 case. You're in a rural county, and I thought that most
8 of the -- it was my impression that most of the people
9 there, the average, ordinary citizen, black or white,
10 was going to be conservative, okay. Some background we
11 had on certain churches that were pro-death-penalty,
12 some that were against the death penalty, okay, or might
13 be. You don't have a whole lot of people there that had
14 more than a high school education, okay. I certainly
15 was trying to get some of those on there. I like to get
16 people opposites; if you have an older white man, to get
17 a younger black woman, okay. I have -- it's my
18 impression that younger black women have been in the
19 past, not so much now because I think it's more even,
20 more likely to stand up to an older white person than a
21 younger black man would. They're not going to decide
22 anything quickly. I was very pleased that it took the
23 jury four and a half hours to find my client guilty of
24 the charges in the guilt phase because we had all but
25 admitted his guilt. When the jury came out and -- and

1 in my -- either four or five of the jurors were crying
2 in the penalty phase, I didn't know what that meant,
3 but it did mean the -- the ones -- and the people who
4 were sitting together, the sub-groups, become important,
5 okay, and the women that we had heard were the hold-
6 outs, and you get, you know, they may swear them under
7 oath, but the bailiffs and the SLED guys have a way
8 of receiving information about who's holding out and
9 who's not. The same women sat together. They were
10 the same women coming back in tears, okay. They came
11 back in tears and sentenced him to die. We thought
12 we had a good chance. We were trying to get some
13 diversity there, so they wouldn't decide anything
14 quickly.

15 Q. Okay. Well, one of the things that you've
16 mentioned is that during, I guess, for -- for sake of
17 clarity, what's called sort of the general voir dire
18 -- it's when the judge was asking questions of the
19 panel---

20 A. Sure.

21 Q. ---and individual voir dire -- was it during
22 the general voir dire that a large number of people were
23 excused for a variety of reasons?

24 A. They asked to be excused. Basically they told
25 the judge they could not be fair and impartial. There

1 were a few that were on the edge of that -- that would
2 be clearly leaning towards the sentencing to death
3 that the judge in his questions got them -- that in my
4 opinion made them qualify in the eyes of the judge,
5 okay. I perhaps could have objected to it, but I -- I
6 could tell by the judge's questions that he had -- they
7 had in his mind they had been rehabilitated. As a
8 matter of fact, a couple of those people ended up on the
9 jury.

10 Q. Well, in the -- again, sort of back to the --
11 the general voir dire, we're talking about all of these
12 people, you know---

13 A. Okay.

14 Q. I mean, the judge would have basically asked
15 questions, and the jurors would either raise their hands
16 or come forward, and they were excused. I mean, he
17 generally just will ask about publicity or ask if---

18 A. Yeah, but he, also, when we brought in
19 different panels -- there were several panels brought
20 in, a group at a time, okay -- he asked -- before we
21 asked questions, he asked questions of them.

22 Q. Now, and when the judge was excusing people in
23 that, there -- the record indicates that several times
24 the judge, you know, offered you the opportunity to ask
25 the jurors any questions. Do you recall today why you

1 didn't ask any questions of these jurors?

2 A. No. As a matter of fact, looking back on it
3 now, I probably should have asked some questions to see
4 if I could rehabilitate them, okay, but let me -- let me
5 give you a little background though as to one of the
6 reasons why. My information folks I talked to in --
7 in the police departments was that some of the folks
8 in the community didn't feel very strong about Herman,
9 okay, and they, also, were -- may have been afraid to
10 have to be on the jury that was going to convict him,
11 okay, and they would do their best to try to get out of
12 it.

13 Q. Okay.

14 A. Now, which person was which, I don't know. I
15 could have asked each one of those a bunch of questions.
16 They, you know, if they would have been insisting on
17 they could not, if it had just been somebody
18 philosophically, it would have been one thing, but these
19 people came, and they were neighbors of Ms. Hughes, or
20 they were friends of the family, had known the family,
21 and they thought it would. Now, if they had said, "I
22 couldn't" -- the politically correct way to come out
23 smelling like a rose would be to say, "I know Herman,
24 and I couldn't find him guilty no matter what," okay,
25 but their real motivation might have been something

1 different.

2 Q. Of course, but you had no indication---

3 A. I did -- I did not ask them that.

4 Q. ---of any of these particular jurors
5 whether---

6 A. Didn't ask them.

7 Q. ---what they -- category they fell in?

8 A. No.

9 Q. Or sort of---

10 A. Just that they came forward on their own
11 volition. It was after a lunch break that -- that
12 several of them came forward, too, okay. I was really
13 discouraged at that time. I wondered why. Ms. Hughes
14 was angry because she knew some of those people, and she
15 felt like they were walking out on her.

16 Q. Okay. Now, I want to ask you some questions
17 about the individual voir dire. We've been talking
18 about sort of the general voir dire, and as I understand
19 it, you -- you -- you don't -- can't really think of a
20 strategy reason that you didn't question those jurors in
21 the general voir dire?

22 A. No.

23 Q. And in the individual voir dire I wanted to
24 ask you -- you may recall this from the transcript or
25 not -- I could show you a few examples, but the

1 solicitor questioned each juror or potential juror
2 during the individual voir dire on whether they could
3 give the death penalty to a sixteen-year-old, and a
4 number of jurors were excused because they said no.
5 They basically indicated they didn't have any general
6 problem with the death penalty, but when they looked at
7 Mr. Hughes and were asked a question whether they could
8 give a sixteen-year-old the death penalty, they said no.
9 Do you recall whether you've ever considered objecting
10 to that question?

11 A. Obviously not. I -- I don't -- I don't
12 recall, but if I didn't object, then I didn't. I don't
13 recall having any -- as you -- as you well know, we
14 don't get a whole lot of practice in voir dire in the
15 state, okay. I had had some training in -- in voir dire
16 in capital cases, but that had been fifteen years
17 before. There's different parameters. That's when we
18 used juristic psychologists, you know. If you're asking
19 me now if there would have been some questions that I
20 would have asked if I were trying the case tomorrow that
21 I didn't ask then, sure, yeah.

22 Q. And you don't recall, for example, whether you
23 did any legal research about what types of questions
24 could be asked and couldn't on the death penalty
25 qualification?

1 A. Some, yes, I did some.

2 Q. But you don't recall whether -- well, you
3 don't recall making any decision about whether to
4 object to that or whether you had any particular
5 knowledge at that point that that question might be
6 objectionable?

7 A. I didn't have the knowledge at that point. If
8 -- if there was something that would have allowed me to
9 object to that question, I had no knowledge of it at
10 that time because I didn't ask it, and that's where if I
11 had had co-counsel, we'd have divided up the
12 responsibilities, okay. I didn't have that.

13 Q. Well, there are often objec- -- I mean, well,
14 I guess, just to sort of -- I don't want this to be a
15 mystery. I mean, I'm not trying to be mysterious about
16 it.

17 A. Okay.

18 Q. Often what you see in voir dire is objections
19 normally by the solicitor when defense counsel attempts
20 to ask jurors, you know, whether they consider a
21 particular mitigating circumstance, and that -- and the
22 objection normally is called, "They are staking out the
23 jury." They are attempting to qualify---

24 A. Try to qualify or educate, yeah.

25 Q. ---the juror on the facts?

1 A. Uh-huh (affirmative response).

2 Q. And would you agree with me that when you ask
3 someone, "Could you give a sixteen-year-old the death
4 penalty?" that is at least a qualification on a critical
5 fact?

6 A. Yeah, it would seem to be.

7 Q. Because the juror is not excused or
8 objectionable because of their general views on the
9 death penalty but rather because that they -- of a
10 particular mitigating circumstance---

11 A. Uh-huh (affirmative response).

12 Q. ---in the case---

13 A. Okay.

14 Q. ---that -- that -- of Mr. Hughes' youth?

15 A. Now, the final area in the final area, so I
16 guess one of the final sub-area of the final area, has
17 to do, and I wanted to ask you about, was Jurors Brenda
18 Wise and William Barron?

19 A. Okay.

20 Q. And I don't know. Have you had an opportunity
21 to look at their voir dire?

22 A. Yes, I did.

23 Q. You did, and Ms. Wise, to sort of refresh your
24 recollection -- if I state anything wrong, I'm sure the
25 attorney general will correct me -- testified during her

1 voir dire that Ms. Hoffman was a friend of her
2 daughter's and had been over to her house and had been
3 consoled by her daughter?

4 A. Was it Ms. Hoffman or one of---

5 Q. I believe it was Ms. Hoffman.

6 A. Okay.

7 Q. But, you know what, rather than guess,
8 why don't we just look at it. Oh, you're -- no --
9 you're right. I apologize.

10 A. Okay. Then, Mr. Pressley's---

11 Q. Right, it was Amy.

12 A. ---sister, okay, sister, Amy, okay.

13 Q. Okay, and -- and then---

14 THE COURT: Could I ask you just a moment
15 if you would put on the record what page was referred
16 to?

17 MR. BLUME: Oh, I'm sorry, Your Honor. That
18 was the voir dire of Brenda Wise, which begins, I think,
19 on page 193. The particular pages that we were talking
20 about is really page 194---

21 THE COURT: All right. Thank you.

22 MR. BLUME: ---was where that particular
23 discussion takes place.

24 DIRECT EXAMINATION RESUMES BY MR. BLUME:

25 Q. And then Mr. Barron, his voir dire, I believe,

1 is on the night the incident happened the murder
2 victim's sister was at her farm and that basically he
3 indicated that he was the one who broke the news to her
4 that her---

5 A. Uh-huh (affirmative response).

6 Q. ---brother had been killed, and, also, her
7 daughter-in-law -- his daughter-in-law worked at one
8 point at the Blue Diamond?

9 A. Uh-huh (affirmative response).

10 Q. Do you recall today why there was not a motion
11 to strike for cause those particular jurors?

12 A. I don't recall all of what was considered,
13 but let me -- let me tell you what went with our theory,
14 okay. No. 1, in regards to Mr. Barron, our background
15 information on him was that his wife was very religious.
16 He had a daughter who was a missionary, okay. It's
17 my -- it was my belief that folks who had strong
18 Christian beliefs come in two components, either
19 strongly for or strongly against the death penalty.
20 Those who are missionaries in my estimation are more
21 likely to be more forgiving, okay. If that was the
22 daughter who was talking to Mr. Pressley's sister,
23 hopefully the forgiveness part would be there. I didn't
24 find that as -- as a bad thing necessarily. Of course,
25 it was not a perfect juror. He, also -- the information

1 was he was conservative, okay. As a matter of fact,
2 Elijah Nesbitt's notes to us was that his sons were
3 considered rednecks. He was educated, okay, and I
4 think there were only two or three of the jurors who
5 had education more than a high school or GED, okay,
6 so it wasn't perfect, and we were trying to put
7 the responsibility for Mr. Pressley's death in Mr.
8 Pierce's hands, so it did not bother us as much --
9 if you have somebody who has some intelligence, even
10 though he had some knowledge that -- I mean, everybody
11 in the town, everybody on the jury was going to find
12 out that -- that Mr. Pressley was killed, okay, so
13 that part -- he didn't indicate anything else, okay,
14 but morally, hopefully, if we could prevail that the
15 person that was the triggerman was not even going
16 to be pursued for the death penalty, and Herman Hughes
17 was, that could have worked to our advantage. It's
18 a two-edged sword, okay. With Ms. Wise, I looked at
19 my -- what I had on -- on my information on -- on
20 that part. We had checked twice by her name, okay.
21 We did impressions. You know, as well as I do, when
22 people, more intelligent people, can give the right
23 answers even though they don't believe a word of what
24 they're saying. They're not -- they don't want to
25 be embarrassed in front of people. There was something

1 about her that came across as being -- it's not what she
2 said, okay, because I questioned her probably longer
3 than I questioned anybody else. It was her demeanor,
4 okay. All we needed was somebody -- we wanted some
5 sympathetic kind of people, okay. She came across with
6 that, and then when we went through the whole panel --
7 she would not have been my first choice, okay. I would
8 have loved to have gotten some psychology graduates or
9 sociology graduates and University of South Carolina
10 Ph.D.'s and stuff on the jury. Didn't have those
11 available. They were a better choice. I think she only
12 had a GED, but, again, her connection was with the
13 Pressley family. We were trying to say, "Herman admits
14 to shooting Ms. Hoffman," okay, "but the man who shot
15 your friend's brother is getting off," and as it turned
16 out, he all but got off. He got acquitted of murder.
17 We just weren't able to, the way the trial went, we
18 weren't able to sell that, and it was the degree of
19 -- of -- of perfect, of -- of less than perfect, you
20 know. There's not a perfect juror. In hindsight,
21 perhaps I could have gone after that, but you can
22 probably poll five different lawyers who try a lot
23 of cases, and you're going to get at least two strong-
24 felt sides about which juror should have been on the
25 jury and which shouldn't.

1 Q. Would you agree with me that based upon the
2 voir dire that both of these jurors possessed what we
3 would call extraneous information about the case?

4 A. Sure, that I thought might work to our
5 advantage.

6 Q. Okay.

7 Q. Because if who that information they -- they
8 -- they heard that somebody had killed. Initially, if
9 you recall, Kelsey Pierce was the one that was charged.
10 Herman was let go a couple of days. He was questioned,
11 co-operated. He was let go. The initial statements
12 were against Kelsey. It was later that Herman was --
13 was charged, and it was believed that he was the
14 triggerman, so if their initial thing was -- now, I
15 think Ms. Wise actually was -- the sister came over
16 a couple of times. It was Mr. Barron who had the
17 immediate thing. It would have been moreso with him,
18 but he, also, had the college education, okay. There
19 was something about her that impressed us that she
20 would listen, okay, and just because you have some
21 knowledge, some people are cap- -- more capable than
22 others. Now, in hindsight, both of them obviously voted
23 for the death sentence, okay, so whatever judgment I
24 made as to those people, I misjudged how it would have
25 impacted.

1 Q. But, as I understand it, your -- your
2 testimony is that the reason -- that you made a decision
3 at the time not to move to excuse them for cause?

4 A. Yeah, I was not---

5 Q. On the basis of their extraneous knowledge?

6 A. I was not offended by them having some
7 knowledge of Mr. Pressley's family, okay, because we
8 were hoping to put it all in Kelsey Pierce's lap or put
9 the majority of it, and how unfair would it be if -- if
10 it were to be proven now, if Kelsey Pierce were to give
11 a statement saying, "I was the one who shot Mr.
12 Pressley," how unfair would it be for this young man
13 to suffer to death penalty and Mr. Pierce to get that
14 twenty-year sentence for armed robbery or whatever
15 sentence he got?

16 Q. While we're talking about -- actually
17 there was one thing I did forget to cover. We were
18 talking about Ms. Pressley or the sister, Amy, and
19 I want to ask you, were you aware of a statement,
20 actually not a statement, but a series of events which
21 occurred at several days before the murder at the Blue
22 Diamond?

23 A. You're talking about the situation where
24 Kelsey asked if---

25 Q. He went into a Hardee's---

1 A. ---somebody was going to be working that
2 night?

3 Q. ---and asked Ms. Pressley when she worked at
4 the Blue Diamond as well?

5 A. Uh-huh (affirmative response), and the
6 information was that she would -- she would be working
7 that night and not Kelly Hoffman.

8 Q. Right.

9 A. And that would have been consistent with
10 Kelsey's planning the robbery. Yeah, we were aware of
11 that, and, you know, obviously, had Kelsey Pierce taken
12 the stand in front of the jury, hopefully that would
13 have been one of the questions I'd have remembered to
14 ask him, as far as that, and then, also, it was
15 consistent with Herman's statement that Kelsey was
16 supposed to do the robbery, okay. Herman was just along
17 for the ride. Herman was getting part of the money, get
18 some money to buy that gun from Mr. Owens, and Kelsey
19 went in there, saw the car, told Herman to go in there.
20 Herman couldn't do it the first time, came back out.
21 I think that was even in Mr. Owens' version and Ms.
22 Hoffman's that Herman came back out the first time and
23 went back in the second time.

24 Q. And, I guess you would agree with me, that
25 that testimony which was offered in the Pierce trial is

1 supportive of the fact of why Mr. Pierce wouldn't have
2 gone inside? I mean, Ms. Pressley would know who he was
3 and could identify him, and then, or if he got there and
4 saw the car, he would know Ms. Hoffman could identify
5 him?

6 A. Sure. Yeah, but do you think I could have
7 gotten any of the Pressley's to volunteer to testify to
8 help Herman on that case?

9 Q. Pardon me.

10 A. I couldn't have gotten any of the Pressley
11 family to come forward and say they remembered that. We
12 had heard that information. I think we got it from Ms.
13 Hughes that -- that---

14 Q. You had gotten that information?

15 A. From Ms. Hughes, yeah. We had that
16 information available to us, and we certainly couldn't
17 get Mr. Pierce to testify, tried to.

18 Q. One second. I may be through. Just -- it's
19 not a final area. To go back to the -- to Ms. Wise
20 and Mr. Barron, as I understand your testimony, you
21 -- you understand that you could have made a motion
22 for excusable cause, but you decided not to?

23 A. I may have in theory been able to make the
24 motion. I don't know whether Judge Cottingham would
25 have granted it. I don't recall making---

1 Q. Right. I mean, I just -- I'm not -- I'm not
2 saying---

3 A. I don't recall many things Judge Cottingham
4 granted for the defense, okay.

5 Q. Okay.

6 A. You know, so I don't know that it would have
7 been granted.

8 Q. At least there was -- my point is there was a
9 good faith basis---

10 A. It would have been possible, yeah.

11 Q. ---to make a motion for excusable and that
12 these jurors had extraneous information about the case
13 which conceivably disqualified them?

14 A. We -- we had reason to believe we -- we wanted
15 Mr. Barron on the trial, okay. I mean, it -- my notes
16 that I had reflect that.

17 Q. Okay. Do you have those notes with you?

18 A. Uh-huh (affirmative response). Sure. I've
19 got the information I had. I don't know which portion
20 you want me to show you.

21 Q. Just the parts you were talking about.

22 A. Okay. I'll have to get my glasses out to
23 see them. Let's see. The notes on Mr. Barron as far
24 as his religious wife and the daughter being a
25 missionary and the son's is there. His information

1 sheet is here, as far as his education, okay. Ms.
2 Wise's information sheet is here, and here is the --
3 one of the lists that we -- as they were questioned, I
4 would give -- I don't remember all of our codes now -- I
5 would check for different things, and she was checked
6 twice, which was a positive thing for us, okay, and the
7 impression---

8 Q. That is checked. I'm sorry.

9 A. I'm sorry.

10 Q. I apologize for not---

11 A. I -- I'll -- I'll show it to you. Ms.

12 Wise's would have been checked twice, and that was
13 a -- a -- more positive indicator. Again, you're
14 dealing in ranges, okay. Initially, we were going
15 to -- to put one's and one-minuses and zeroes, and
16 that kinda' got to be somewhat cumbersome, okay,
17 so we did the checks as to whether we liked things
18 and didn't. You can see some people had one check,
19 and some people had two, okay. That was just our
20 impression. Now, our impression may have been totally
21 different than somebody else who was viewing her,
22 but certainly we were aware -- I was trying to play
23 the difference between Mr. Hughes' responsibility
24 involving Mr. Pressley with Mr. Pierce's.

25 Q. I don't have anything further.

1 A. Okay.

2 THE COURT: Cross.

3 MR. ZELENKA: Do you want me to begin
4 now?

5 THE COURT: This may be an appropriate time to
6 take a break. We will take a very brief break. Let's
7 try to hold it to ten minutes, no more. That should
8 give us enough time. We'll be back out here in ten
9 minutes.

10 (WHEREUPON, RECESS IS TAKEN.)

11

12 THE COURT: All right. Cross.

13 MR. ZELENKA: Thank you.

14 CROSS-EXAMINATION BY MR. ZELENKA:

15 Q. Mr. Newsom, is my understanding correct that
16 at the time of your retention and the hearing before
17 Judge Cottingham you had a discussion with him as to
18 whether he would allow for the appointment of additional
19 lawyers, and he denied that discussion?

20 A. He denied it. I don't know that we did it
21 on the record, okay, but I know I questioned him about
22 that.

23 Q. Okay. Let me show you a document. It's
24 provided to me by the Center for Capital Litigation
25 July 27, 1995, hearing in front of Judge Cottingham, and

1 ask if you can just briefly refer to that and maybe
2 refresh your recollection whether that's the particular
3 hearing?

4 A. Okay.

5 Q. Okay. Mr. Newsom, from your review of
6 that record, is it correct that there does not appear
7 to be any particular request by you of Judge Cottingham
8 at that time to -- to have second counsel appointed?

9 A. Yes.

10 Q. And doesn't it, also, appear that the Court
11 actually states at one point that he will not appoint
12 any counsel for him?

13 A. Yes. There -- there were discussions before
14 we went on the record---

15 Q. Okay.

16 A. ---in -- in chambers.

17 Q. So your recollection on that particular date
18 before you entered the court---

19 A. I don't know whether it was that day that
20 I asked, okay, or another day. I know he made a
21 comment, reflecting -- and mentioned the judge's name
22 in the other case. I think it was Judge Howell, but
23 I'm not sure, but that was another judge. He
24 respectfully -- he didn't agree with it, and he didn't
25 have to.

1 Q. Okay.

2 A. And I could -- I was unaware of any other case
3 law that would make him do that.

4 MR. ZELENKA: Your Honor, we would move,
5 I believe, without an objection the introduction of
6 the transcript of record of the hearing of July 27,
7 1995---

8 THE COURT: All right.

9 MR. ZELENKA: ---before Judge Cottingham in
10 The State versus Herman Lee Hughes to be made -- to be
11 made a part of this record. It is not part of---

12 THE COURT: Is it without objection?

13 MR. BLUME: There is no objection, Your
14 Honor.

15 THE COURT: All right.

16 MR. ZELENKA: It is not part of the record on
17 appeal. There is another motion appearing in there, but
18 that one is not included.

19 (State's Exhibit No. 1 admitted into evidence.)

20 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

21 Q. Did you take any other steps to secure the
22 assistance of any other counsel on this case, other
23 than---

24 A. No.

25 Q. ---that request of Mr. Hughes?

1 A. No. I mean, there wasn't -- there wasn't any
2 -- I -- I was grossly underfunded to try get somebody
3 else to come in for nothing.

4 Q. Okay, so then I can, also, assume that you did
5 not advise either Mr. Hughes or his family, who retained
6 you, that that retention was for more than just you as a
7 lawyer?

8 A. I never told them that.

9 Q. Okay.

10 A. Yeah, they only paid about thirty per cent of
11 the retainer.

12 Q. And at the time that you were retained he
13 already had two lawyers who had been appointed to
14 represent him pursuant to South Carolina law. Isn't
15 that correct?

16 A. (Nods head up and down)

17 Q. And based upon your retention, as reflected in
18 the judge's comments---

19 A. The judge's comment, his -- his decision were
20 -- was that -- I tried to get it to where I was retained
21 to assist. He would have none of that, okay. It was
22 an all or nothing kind of thing. Since neither one
23 of them could tell the judge they had even been to see
24 Mr. Hughes, I don't know that the loss of those two
25 gentlemen hurt.

1 Q. Okay. Is it not, also, correct with respect
2 to -- to the competency to stand trial issue, that --
3 that both -- both Dr. John Dewitt and Dr. Harold Morgan
4 advised you that your client under their understanding
5 of the law of competency to stand trial was, in fact,
6 competent to stand trial?

7 A. Under their understanding, yes. I had --
8 I had no expert that would tell me otherwise, yes.

9 Q. Okay, but they expressly told you that their
10 conclusions would be one of competency as opposed to
11 incompetency?

12 A. Yeah, and from a medical expert standpoint,
13 yeah, we were at that. I can you this as -- as a
14 defense lawyer though. We often are encountered with
15 representing people that we feel aren't capable of
16 assisting us that the medical profession will say under
17 the law are competent to stand trial. That's just one
18 of the things you have to encounter.

19 Q. Okay, so at the time of the Blair hearing in
20 front of the court, immediately prior to the trial, you
21 represented to the court that you had no evidence to
22 contradict---

23 A. That's right.

24 Q. ---findings and conclusions of the State
25 Hospital?

1 A. Uh-huh (affirmative response).

2 Q. That was a correct statement based upon your
3 investigation in this case, correct?

4 A. Based -- based on information that I had.

5 Q. And that investigation included inquiring of
6 -- of your forensic experts as to whether, in fact, in
7 part of their evaluation they concluded---

8 A. I don't recall every conversation I had with
9 my experts about that. Nobody was able to suggest to me
10 that we had a chance in getting him ruled incompetent,
11 so I didn't pursue that. Didn't -- I only had a certain
12 amount of time and energy to devote. I had to focus on
13 other areas.

14 Q. And with respect to jury selection in this
15 case, isn't it true that you, in fact, received some
16 materials to assist you, also, in proposed voir dire
17 questions as a part of your file?

18 A. I haven't, other than this notebook which sat
19 on the top of that -- let me explain about that file
20 for the record. Shortly after this trial, I moved my
21 law office to another. At that same point in time my
22 father was in the midst of dying with cancer, which
23 required me to live in Summerville pretty much full-
24 time. Others of my -- I drove up one night. A group
25 of my friends moved stuff from one office to another.

1 It was thrown in boxes. There used to be three boxes
2 that all that stuff -- all the stuff from Mr. Hughes'
3 file is not still there. I couldn't tell you -- I
4 haven't looked at it since I moved, other than when I
5 opened it up, found it the other day and saw this
6 notebook sitting on top, and this was the notebook that
7 the panel of the jurors who were qualified and had my
8 notes in that. Now, there's another thicker notebook in
9 there that covers the entire juror panel. We did as
10 best we could -- Ms. Rickburn was very helpful, and so
11 was Mr. Nesbitt, trying to find other information about
12 other potential jurors.

13 Q. Okay. The box you're referring to is this box
14 I have in my hand?

15 A. Yes, sir, and it's not light as you can tell
16 by carrying it.

17 Q. And let me just put it closer to you in case
18 you need to refer to any information in that box.

19 A. Okay. I could not -- and let me say this.
20 Other than those two notebooks and the transcript that
21 you provided me at my deposition, I couldn't tell you
22 what else is in there. I haven't looked at it. This is
23 not an easy issue for me to deal with emotionally, okay,
24 and not only because of my feeling that I failed to help
25 this young man, but at the same point in time my father

1 was dying. It's just not anything I care to go over on
2 a normal basis.

3 Q. You acquired some information from individuals
4 on proposed voir dire questions. Isn't that correct?

5 A. I -- I would assume, yes. I mean, I -- I did
6 not just walk in there without any kind of preparation.
7 I've had some seminars and stuff I've attended on that
8 and worked with other people in the past, like I said,
9 but those were all in the distant past. It wasn't
10 contemporaneous to this trial.

11 Q. But you were aware before you began the death
12 penalty trial that you would have the right to
13 individually voir dire the individuals?

14 A. Sure, and I was, also, aware that -- had the
15 impression of -- of the few folks I talked to that it
16 would be limited more than what was helpful. I imagine
17 there are some people who are very good at it, who do it
18 over and over again. David Bruck is probably very good
19 because he does it over and over again. Anything you do
20 over and over again you get better at, and if I'd tried
21 one, a case, shortly after this, I'd have probably done
22 a better job of voir dire to satisfy other lawyers. I
23 don't know if it would have been any more effective in
24 picking a jury.

25 Q. Okay. Did you do any legal research into that

1 area?

2 A. I did some.

3 Q. On the status of voir dire?

4 A. I -- I did some, but how much I don't know.

5 It would -- one beautiful thing about being a defense
6 lawyer, if you've been a public defender, you can pick
7 up the phone and call others, and they're very helpful.
8 I'm probably in the minority because most public
9 defenders are morally opposed to death penalty. I'm
10 not. I do have reservations about the application of it
11 at times, but I'm not morally opposed to it, but those
12 who are are committed, and they'll -- anything they've
13 had, a resource, they'll pull out of a file and hand it
14 to you like that, and I benefited from that.

15 Q. Okay, and in -- in benefiting from that, you
16 explained during your deposition that you had
17 communicated with David Bruck, correct?

18 A. I can't -- I'm not sure all of what David and
19 I talked about, okay. He wasn't the only person. I
20 used to be John Delgados' law clerk. I'm sure I talked
21 to him. I don't know whether I talked to Gadsden.
22 Gadsden and John David and I all worked at the public
23 defender's office at the same time.

24 Q. Okay. By Gadsden, you mean Gadsden Fairey?

25 A. Gadsden Fairey, yeah. I may or may not have

1 talked to him. I don't -- you know -- Nathaniel
2 Roberson was our -- he's an attorney now, but he was our
3 clerk at the time. I talked with him. I talked with
4 folks in -- in Mr. Blume's office at the Capital
5 Resource Center.

6 Q. Okay. Do you specifically recall who you
7 spoke to in Mr. Blume's office?

8 A. No, no. There was -- there was a -- both
9 a male and a female and Mr. Blume that I spoke to,
10 but what their names were, you know, and they pretty
11 much gave me carte blanche, anything they had as far
12 as form orders and motions that I would need to make,
13 which were helpful, because I would have -- had they
14 not have helped that, it would have been real easy to
15 come in here and say I was ineffective assistance of
16 counsel because I would have -- things had evolved a
17 good bit since I had been involved in a death penalty
18 case. I was very grateful for their help.

19 Q. With respect to -- to the actual jury
20 selection, it's my understanding that you made a
21 strategic decision to not either challenge Juror Brenda
22 Wise but, in fact, not to utilize a preemptory challenge
23 on Brenda Wise, and she was---

24 A. Both her and Mr. Barron.

25 Q. Correct.

1 A. Mr. Barron was more attractive because I
2 was hoping to tie that missionary thing as far as
3 the compassion and a life sentence, would that be
4 effective, and it was a gamble, okay. The lady was --
5 I had questioned more extensively probably than anybody
6 else.

7 Q. Okay, and---

8 A. And I was impressed with -- it's not so much
9 what people say. As you -- as you know, it's how they
10 say it, you know, their demeanor. She seemed to be
11 the type that would listen, and she seemed to be sincere
12 in what she said. She wouldn't just -- I had some
13 reservations at the time, and -- and one or two ques-
14 tions. I -- I looked over those pages that -- that
15 you pointed out to me that they had specified in their
16 application, and I obviously talked to her more than
17 I talked to most of the people, you know, and -- and
18 I can't tell you that everything that I'm saying today
19 is all the thoughts that went through my mind, but
20 we were dealing with a whole pool instead of, you
21 know -- there were pluses and minuses on everybody.
22 There was not a perfect juror on there. Had there
23 been, Walter would have used one of his preemptory
24 challenges.

25 Q. And you did not, in fact, utilize all of

1 your preemptory challenges. Isn't that correct?

2 A. I -- I don't remember. I -- I heard somebody
3 say that. I may not have, and, again, we were going for
4 two, three, or four. We didn't need to have the whole
5 panel, okay. We had the diversity. We had a young
6 black woman, had Mr. Barron, who suited us for a number
7 of different purposes. It was a risky thing, but we
8 figured they would at least converse for a while on
9 anything before they decided.

10 Q. When you first met with Mr. Hughes, what was
11 his version of the facts of this case as to how this
12 crime occurred?

13 A. That he shot Kelly Hoffman. He didn't shoot
14 Mr. Pressley.

15 Q. Did he state that he was aware that he was
16 involved in a robbery?

17 A. That he was aware he was involved in a
18 robbery, yeah. They went there to rob it. He had that
19 Mr. Pierce had planned it.

20 Q. And did he tell you---

21 A. I think they were over -- I think they were
22 over drinking at Mr. Owens' house, as I recall it,
23 and the idea was Kelsey Pierce's. That was his. The
24 only time that I recall him waivering from that he
25 didn't shoot enough shots that could have shot Mr.

1 Pierce was when he was under sodium pentothal, and
2 he admitted shooting a third shot, but he didn't know
3 where it went.

4 Q. Did he say whether he was aware or -- or knew
5 Kelly Hoffman or thought he knew Kelly Hoffman?

6 A. Not the first time I met him, but down the
7 road he told me.

8 Q. Okay. What did he tell you about that?

9 A. He told me that he had been over at a house.
10 I forget whose house it was. I think Ricardo and Kelsey
11 were there, and she came out of the bedroom with
12 somebody, okay, and saw him. There was some brief
13 conversation. Somebody was introduced, and that's the
14 last time he had seen her. Now, he didn't know her by
15 name, okay. He didn't say he knew her by name and that
16 when they went there that night, Kelsey was supposed to
17 rob, okay, and at first Kelsey must have -- I think he
18 noticed the car, and he sent Herman in to see, and when
19 Herman went in, he saw the girl that he had thought he'd
20 recognize from that time months before, a year before.
21 I don't know. The time escapes me, so he came back out.
22 He didn't want to rob either, and that's when Kelsey had
23 made the comments. Now, that information part he, you
24 know, also, was consistent when he was under that sodium
25 pentothal.

1 Q. Okay.

2 A. And then he went back in. He had been --
3 Kelsey didn't tell him to go in and shoot anybody. He
4 says something about "Do it, punk," okay, "Are you going
5 to do this, punk?" or something, and -- and he went back
6 in and did it.

7 Q. Okay, so the information you have is that
8 your client initially thought he recognized Kelly
9 Hoffman?

10 A. And didn't want to do the robbery.

11 Q. And didn't want to do the robbery, and he came
12 back out, had the gun?

13 A. Had the gun.

14 Q. Kelsey sent him back in?

15 A. Uh-huh (affirmative response).

16 Q. Kelsey had initially thought that he couldn't
17 go in because---

18 A. He knew the girl.

19 Q. ---he knew the girl?

20 A. Uh-huh (affirmative response), and there
21 wasn't, you know, there wasn't any plan to shoot
22 anybody, okay. There had never been any mention, any
23 allegations, that Kelsey told him to go shoot. There
24 was never any. That decision was one that he made on
25 the spur of the moment, and when I asked him why, and we

1 asked him that under the -- to the best of my knowledge
2 we asked him that -- Dr. Morgan questioned him at length
3 about that -- it was because he thought she could
4 identify him. He was afraid that she would identify
5 him, okay, and I asked him, "Why did you not shoot Mr.
6 Pressley then if you were going to shoot her because she
7 might have seen you before? Here's a guy going to watch
8 you shoot her. Why wouldn't you shoot him?" He had no
9 answer for that. It didn't cross his mind, but he did
10 admit to shooting a third time, didn't think it hit
11 anything. Now, whether he was capable of lying under
12 that medicine, I don't know, okay, but it was consistent
13 with what he told me before, and whenever I was cross-
14 examining Ms. Hoffman at the trial, and she explained to
15 me where Mr. Pressley was standing when the shots first
16 occurred -- he was standing immediately behind her -- it
17 was, also, consistent in theory with if he shot, you
18 know, three times and hit her twice and Mr. Pressley
19 once, and that would have explained him being on the
20 floor if Mr. Pierce came in, and then -- the other two
21 shots were right close together. The entry wounds were
22 very close together. The third shot for him, which I,
23 in theory, you know, would have thought was the first
24 shot, was away from it, okay.

25 Q. Okay. Did your client -- did you have a

1 discussion with your client about where he got the gun
2 from or how he got the gun?

3 A. I'm sure I did. I don't recall which time
4 when I talked to him about that, and -- and let me say
5 this. Early on, in -- in representing criminal
6 defendants, I don't ask them to tell me what they did.
7 I ask them to tell me what they're accused of, okay.
8 I don't want to get caught in any ethical violations
9 of them telling me they did something, then later on
10 them taking the stand and -- and saying something
11 different, and if they don't -- if I don't ask, and they
12 don't tell, and the government can't prove, it's my
13 responsibility still to vigorously defend them, and I've
14 done my job, okay, so I'm not sure at our first setting
15 that we talked about that, okay.

16 Q. Okay.

17 A. As a matter of fact, my guess would be we
18 would not have talked about what he did, okay, but what
19 they would have said he did. Now, his grandmother could
20 tell me freely Herman's version because what he may or
21 may not have told her -- I -- I don't know what he told
22 her. Obviously, she was the closest human being to him.
23 She loved him dearly. She was about as -- you couldn't
24 ask for a more loyal person about him than her, and I
25 suspect they talked freely.

1 Q. What did Herman tell you about how he got the
2 gun?

3 A. Got it from Mr. Owens, I believe.

4 Q. Okay. Did -- was the version the way he said
5 he got it from Mr. Owens consistent with the version
6 that you learned about in court---

7 A. I don't re---

8 Q. ---concerning the transaction?

9 A. I don't remember. I don't remember.
10 Something -- it was -- got the gun, and he was going
11 to pay it back with money they got from the robbery,
12 okay, yeah.

13 Q. But that's what Herman told you, that he was
14 going to pay for the gun?

15 A. To the best of my memory, that's -- yeah.

16 Q. That he got the gun from Henry Owens, and he
17 was going to pay for the gun based upon---

18 A. No, no.

19 Q. ---the receipts from the robbery?

20 A. I -- I think -- I don't know that he got the
21 gun. I don't know whether he or Kelsey got the gun, but
22 Herman was fascinated with the gun and wanted to buy it.
23 I -- I remember that, okay. The idea of the robbery
24 wasn't Herman's. It was Kelsey's, and Herman may have
25 gone along -- I -- I -- I'm speculating here -- to get

1 money so he could pay for that gun.

2 Q. Okay. In your discussions with Herman, what
3 did he say that Kelsey did after Herman went back in and
4 did the shooting, or did he say anything?

5 A. After Herman -- Herman's version was he
6 went back in and shot Ms. Hoffman. Kelsey came in,
7 got the gun from him, and walked over to Mr. Pressley
8 and fired two rounds, okay, and, again, that wasn't,
9 you know -- in Herman's version there were two shots
10 on Ms. Hoffman and two shots on -- on Mr. Pressley,
11 okay. He didn't -- there was not a thing -- it wasn't
12 until he was under the sodium pentothal that I recall
13 he admitted the third shot, but then even then he
14 didn't -- he wasn't shooting at Mr. Pressley in his
15 version, okay, but he was always consistent, both
16 before -- and we had to talk facts because we -- we
17 made the decision he wasn't going to be able to testify
18 just talking to him. He was not very -- he may not
19 have qualified under some psychologist's version
20 of mental retarded, but he was not capable of being
21 sophisticated enough to lie.

22 Q. Did he -- how did he describe to you the --
23 the theft of the automobile?

24 A. They got the keys. I think Kelsey -- I -- I
25 -- I'm speculating here. I -- I don't want to testify

1 to something I'm spec- -- I think Kelsey -- my memory is
2 that Kelsey told him to get the keys, and they took off.
3 They were getting away. Initially they were going to
4 rob and run, but after the shooting I don't think --
5 and I -- I don't recall him ever telling me that Kelsey
6 told him to go shooting. The initial shooting of Ms.
7 Hoffman was an instantaneous, as I surmised, decision
8 from him.

9 Q. And then what did he tell you he did with the
10 money that they took from the store?

11 A. They went back and divided it at some point in
12 time with Mr. Owens and then went to some club, and they
13 stayed out all night.

14 Q. Did Herman say who took the money out of the
15 -- the cash register?

16 A. Did he -- I don't recall. I -- I think he
17 did. I mean, clearly he was there to rob, okay.
18 Clearly he shot the girl. He didn't deny that. It was
19 not his idea to rob. He was there to rob. He doesn't
20 -- he didn't deny that to me.

21 Q. You described that you were getting
22 information not from the sheriff's department about
23 Herman, about his relationships in the community, from
24 the St. Matthews Police Department?

25 A. Different officers at different times,

1 yeah, would -- would say some things. Some of them
2 didn't hold Herman in high esteem. One of them kinda'
3 gave me the impression he had kind of like a fatherly
4 feeling towards Herman, but he, also, told me that the
5 Herman that he saw in court was more passive than the
6 Herman that was running to streets with Kelsey Pierce
7 weeks before this event. That was his statement about
8 that.

9 Q. That he was more passive than---

10 A. That he was more passive in court than he had
11 been when he was running the streets. Apparently there
12 was a period of time, which our Ms. Bodie, I guess,
13 correlated with the health of his grandfather when that
14 started going bad, that Herman, if there was a time that
15 Herman was running the streets, that was it at its
16 worst. I think he got -- had been suspended from school
17 again, so, I mean, he wasn't always the perfect citizen
18 in their opinions. They thought Kelsey was very
19 dangerous. They thought Herman would follow whatever
20 leader led him.

21 Q. So, essentially the information you got is
22 Herman could be dangerous because he was a follower?

23 A. If -- that Herman would follow whoever, you
24 know, he hung with and would do what they did but that
25 Kelsey was the stone-cold killer.

1 Q. With respect to---

2 A. I believe that came from Sergeant Green at the
3 -- it's my memory, but I may be wrong.

4 Q. With respect to Kelsey Pierce's plan, how did
5 you investigate that, other than just speaking with your
6 client?

7 A. The other statements, you know. A couple
8 of the people we talked to gave statements. We talked
9 to Investigator Rudy. I couldn't talk to Mr. Owens.
10 He didn't want to talk. Mr. Pierce wouldn't talk to
11 us nor would I have let my clients talk to a lawyer
12 representing the co-defendant in that kind of case.
13 You're asking for trouble there, and you're not going to
14 do it, so I was not surprised that I was denied access
15 to those gentlemen.

16 Q. Was there anything after the trial that you
17 thought you should have done to try to further put in
18 Kelsey Pierce's involvement based upon your reflection
19 upon the trial itself?

20 A. I mean, in -- in the past four years since
21 then?

22 Q. Yes.

23 A. I wondered what it would have been like---

24 MR. BLUME: Your Honor, I'm not really sure
25 that's an appropriate question. I'm sitting here

1 thinking whether it really matters. On the other hand,
2 I mean, legally it is irrelevant. You're supposed to
3 try and judge counsel's actions at the time and the
4 decisions they made, you know, at the time, and the
5 courts have always said we want to eliminate the
6 distorting effects of hindsight, and this is a classic
7 sort of hindsight question.

8 THE COURT: Yes, sir. Any response?

9 MR. ZELENKA: Well, the allegation is counsel
10 failed to adequately prepare and present evidence
11 regarding Kelsey Pierce's planning of and involvement
12 in the offenses. The record reveals what he -- he did
13 put in. I'm merely asking him if he, in looking back
14 at it, thinks that he was neglectful in not putting
15 some other information in. It's -- it's not clear
16 on the basis of this allegation itself to me exactly
17 where that information is necessarily going to. I'm
18 wondering if Mr. Newsom has any information, had any
19 information at the time of the trial, that should have
20 addressed that particular question because it's
21 asserted---

22 THE COURT: I'll allow that question.

23 MR. BLUME: Yes. That is a different question
24 than the one he asked.

25 MR. ZELENKA: That's the question I meant to

1 ask.

2 THE COURT: All right.

3 THE WITNESS: Okay. Did I have any
4 information that I didn't---

5 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

6 Q. Yes.

7 A. ---present to the jury? Probably so, but
8 not intentionally, okay. If -- if you ask me, I could
9 have done a -- I could have approached Ms. Hoffman
10 differently and gotten more information out of her. I
11 could have done a better job on that. I could have
12 done a better job with -- with Mr. Owens. Had we been
13 able to exclude the statements that he put in that
14 Kelsey made under the conspiracy thing -- of course, we
15 didn't know at that time that Kelsey wasn't going to be
16 up -- wasn't going to testify -- that would have helped
17 Herman, okay. You know, I was hoping to have a field
18 day with Kelsey Pierce.

19 Q. Well, let's -- let's move to Kelly Hoffman.
20 You testified on direct that -- that you made a -- a
21 strategic decision or a conscious decision to, I think,
22 using your words, do a soft-sell on -- on Kelly Hoffman?

23 A. Uh-huh (affirmative response).

24 Q. Yet you did examine her?

25 A. I--- I examined her.

1 Q. And you cross-examined her with respect
2 to---

3 A. I -- I had decided not to be rough on her. I
4 thought at the pretrial thing I was a little bit rough
5 on her. I was kinda' testing her to see how strong a
6 witness she could be. The information I had that she
7 would be feisty and might -- sometimes when -- when you
8 get a, I'll use the term, feisty witnesses, they tend to
9 go overboard trying to explain themselves or exaggerate.
10 I thought she might be more likely to do that at the
11 trial. At the trial she seemed to be more reserved,
12 which I took to be that she had been coached, which is
13 -- which -- coach may be -- I don't mean that
14 disrespectfully -- I -- I mean prepared as a witness,
15 the same kind of thing that you would try to do to a
16 witness you had access to that was not normally
17 testifying in a case. You would try to go over their
18 testimony with them ahead of time so they would get out
19 everything you wanted and instead of missing it, and so
20 often, if you don't have the opportunity to do that,
21 you're going to leave out some part. You're going to
22 forget to ask them a question, or they're not going to
23 supply you -- on direct, your own witnesses, pretty much
24 they have to know what you're going to ask and the
25 information they're looking for. I could have done a

1 different job on -- on her in retrospect, but what
2 impact it would have made with that particular jury, I
3 don't know, okay. I mean, if -- if what I did or didn't
4 do had a good impact or no impact at all on that jury,
5 you'd have to poll the jury to see what was -- what they
6 found important and what they didn't find important. I
7 don't know.

8 Q. Okay. You did seek to impeach her upon the --
9 the statement that she gave to---

10 A. Sure. Yeah, I tried to show the inconsis-
11 tencies.

12 Q. ---to Officer Kirkland?

13 A. Yeah.

14 Q. Isn't that correct?

15 A. Yeah.

16 Q. Specifically at page 1180?

17 A. I don't know about -- again, I don't remember.
18 I don't even remember Officer Kirkland testifying, but
19 if he did -- no.

20 Q. Let me refer you to your cross-examination
21 of Kelly Hoffman at page 1180, line 15, which begins,
22 "Do you recall Officer Kirkland talking to you that
23 night?"

24 A. Okay. All right.

25 Q. So you did attempt through Kelly Hoffman---

1 A. Oh, yeah, and then she said---

2 Q. ---to impeach her?

3 A. She said, "To," okay, "but I meant to me and
4 Ken," right? Yeah, and I asked her questions apparently
5 about the small black man and talking about the tall
6 black man, too, okay.

7 Q. Okay, so you -- you did try to develop
8 that---

9 A. Sure.

10 Q. ---in the record?

11 A. I don't remember it, but it says it there in
12 the record, so I couldn't -- I'd have to say I did.

13 Q. Okay. You, also, made the statement that you
14 decided not to "go after her hard" on one of the -- the
15 matters which you presented was something about her
16 relationships. What information did you have---

17 A. Had information that she had either dated,
18 was romantically involved, physically involved, with
19 some -- some of the black kids, Kelsey Pierce and/or one
20 of his cousins. Got that from Herman Stanley. That
21 would have been Herman's reason when he saw her there
22 that she may have recognized him, okay. It was
23 consistent. Now---

24 Q. How would that have been---

25 A. How could that have---

1 Q. ---relevant on cross-examination of this
2 victim at that time of the trial---

3 A. If---

4 Q. ---or even admissible?

5 A. Okay. The admissible part the judge pretty
6 much told me ahead of time he wasn't going to do that.
7 It could have gone as far as motive why she didn't want
8 Kelsey to be involved, okay, why she was protecting
9 Kelsey because she didn't want information out that she
10 was seeing a black guy in a small community that was
11 very conservative. Speculation. I don't know. I
12 didn't have a chance to sit down and talk to her about
13 that, okay. I had information here. It was consistent.
14 Whether it was even true, I don't know, okay, but I had
15 to go with it, and you go with what your version and
16 information you have.

17 Q. Okay. She denied that she knew Kelsey and the
18 man or the use of drugs, right---

19 A. I don't---

20 Q. ---on cross-examination?

21 A. I don't remember being able to ask her about
22 whether she knew Kelsey or whether it was Kelsey she
23 came out of the bedroom with or not. If the record
24 says I did, then I did. I know I wanted to. I wanted
25 to go into it in more detail.

1 Q. Okay. Well, on the next page after you --
2 you asked her about the -- the question about Mr.
3 Kirkland, you specifically asked her at page 1181,
4 lines 9 through 12, "How long have you known Kelsey
5 Pierce?"

6 A. Okay. I asked her that.

7 Q. Her answer was, "I really don't know him, but
8 I went to school with him for a few years"?

9 A. Okay.

10 Q. Isn't that correct?

11 A. If that's what the record says, yes, but I
12 didn't ask her -- I don't think I was allowed to ask her
13 the questions about whether or not she dated black men
14 or was romantically involved or anything like that
15 because the judge gave us fairly strong admonition about
16 where I was going, and it needed to have relevance, and
17 I -- I didn't go there in the trial.

18 Q. She -- she said she was romantically involved
19 with Ken Pressley. Isn't that correct?

20 A. I don't -- I don't know.

21 Q. You don't recall that?

22 A. I don't recall that. She could have been
23 romantically involved with Ken Pressley and still have
24 come out of the room with the black kid a year or months
25 earlier when my client said he saw her and was afraid

1 that she recognized him from that incident.

2 Q. Okay. Did your client tell you that she was
3 coming out of the room with Kelsey Pierce?

4 A. No, I don't remember who it was -- that she
5 was coming out with somebody. It might have been his
6 cousin, Ricardo, but I'm not sure. That part I don't
7 remember, but it came -- she came out of the bedroom
8 with a black guy. He was over at somebody's house. I
9 think he was with Kelsey, okay, at that time.

10 Q. Okay.

11 A. But that was the reason why Herman was afraid
12 that she would recognize him was that one -- that's the
13 only time he said he ever saw her.

14 Q. But that was the other way you -- you thought
15 you may have had the opportunity to go after the victim?

16 A. I mean, it was something I would have liked
17 to have explored and, yeah. Whatever good it would
18 have been I don't know. Intimidation. You know, who
19 knows?

20 Q. Under the rules of evidence, which took place
21 at that time of the trial---

22 A. The week the trial started, yeah.

23 Q. ---would that have been admissible?

24 A. I don't know, okay.

25 Q. All right.

1. A. Because I can tell you this. I didn't feel I
2 was -- was capable, as would anybody else, of all of a
3 sudden -- my practice wasn't in federal court; my
4 primary practice has been in state court -- of knowing
5 what those new rules were going to be. Fortunately,
6 neither was Mr. Bailey totally up on them, and neither
7 was the judge. We were all referring to our handbooks
8 throughout the trial.

9 Q. Okay. Under the old rules of evidence would
10 that have been admissible?

11 A. I don't recall, okay. Certainly if I had
12 asked her if she had ever seen Herman before, and she
13 denied it, I'd have been able to impeach her by asking
14 her a specific incident, yes, okay.

15 Q. But that's not what occurred in this trial at
16 all?

17 A. No, that's not at all.

18 Q. Okay, and you, also, stated you made a
19 decision not to call Herman Hughes at this trial?

20 A. Yes.

21 Q. To testify about his version of the facts?

22 A. Uh-huh (affirmative response).

23 Q. Is that not correct?

24 A. Uh-huh (affirmative response).

25 Q. And you had no information that there was any

1 shoe print at the crime scene that was consistent with
2 any shoes that Kelsey Pierce wore?

3 A. That's right.

4 Q. Isn't that, also, correct?

5 A. I didn't have any information. If I had
6 it, I don't remember ever getting it. The only other
7 shoe prints, I know they took Herman's shoes that
8 weren't supposed to match up. I know that the EMS folks
9 said they walked around in the blood. They couldn't
10 help it.

11 Q. Okay, and you were aware at the time of the
12 trial that Henry Owens had been given a plea arrangement
13 whereby he could plead to misprision of a felony. Is
14 that correct?

15 A. Uh-huh (affirmative response).

16 Q. And was facing under your understanding of the
17 law a possible ten years imprisonment for that crime.
18 Isn't that correct?

19 A. Yes.

20 Q. And the fact that he had a plea arrangement
21 came out at trial. Is that not, also, correct?

22 A. It may have come out before, as far as what
23 the plea arrangement -- I don't recall the timing of it.
24 Walter was pretty good about giving me the stuff under
25 discovery.

1 Q. Okay, so you were aware of it before the trial
2 began?

3 A. Oh, yeah, sure.

4 Q. But you don't deny that the jury, also, became
5 aware---

6 A. Oh, yeah.

7 Q. ---of the existence of the plea arrangement?

8 A. Uh-huh (affirmative response).

9 Q. Is that correct?

10 A. Oh, yeah. That's one thing you want. I mean,
11 I like to think if you look at the transcript of my
12 closing statement in the penalty phase, I covered that
13 in some fashion.

14 Q. Okay, but, also, you were aware that Mr.
15 Bailey in his closing statement advised the jury that he
16 was facing ten years, that Mr. Owens was facing ten
17 years for that crime. Isn't that correct?

18 A. Uh-huh (affirmative response).

19 Q. Is it my understanding of your direct
20 testimony that you did not realize that Mr. Owens
21 declared under oath that he was facing fifteen years
22 rather than ten years at the time of the trial?

23 A. I -- I don't remember what he declared, okay.
24 I couldn't deny that. If he said fifteen, then -- but I
25 -- I don't remember that. Then when I did a brief going

1 through this 1800-page transcript, I didn't cover that
2 part.

3 Q. And, if I understand it, at the time prior
4 to the trial you had discussions with your client where
5 you advised him that you thought it was the best
6 strategy to essentially concede guilt on the guilt
7 phase, correct?

8 A. We were prepared to plead guilty the whole
9 time if we could have avoided the death penalty.

10 Q. Okay. With respect to your desire to avoid
11 the -- the opening waiver discussion with the defendant,
12 that was based upon South Carolina precedent that if an
13 individual enters a guilty plea, he cannot have a jury
14 make a determination of the death penalty?

15 A. Yes.

16 Q. Is that correct?

17 A. Yes.

18 Q. And you are aware of the two decisions where
19 there had been -- been entries of guilty pleas, one
20 of them involving Mr. Bruck, where, in fact, they
21 were given a jury, and the Supreme Court vacated
22 those sentences and remanded for a new trial based upon
23 the---

24 A. I -- I'm not sure I was aware of those.

25 Q. You weren't aware of those cases?

1 A. I can't say that I was.

2 Q. State v. Patterson and State v. Truesdale?

3 A. I---

4 Q. But nevertheless what you were trying to
5 attempt to do was to secure your ability to have a jury
6 of twelve make the decision?

7 A. That's right. Absolutely, instead of -- yeah.
8 I'd much rather---

9 Q. As opposed to that inquiry actually turning
10 into---

11 A. In theory, you have to convince one of the
12 twelve, if you can find one strong enough to hold out
13 with the other eleven. If you do it with a judge,
14 you've got one person that has a whole lot of pressure
15 on them to follow precedent.

16 Q. Okay, and your client understood what you
17 were doing at that time as far as trying to tell the
18 jury---

19 A. He -- he was informed, and he responded
20 positively. I can't in good conscience tell you
21 under oath that he understood any of that, but he --
22 he---

23 Q. Did he ever ask you what you were -- go
24 ahead.

25 A. He never asked a compound question of me

1 in all of my discussions with him, okay. If -- if
2 you ask me, as I'm standing here under oath, I don't
3 think he was capable of asking those kind of ques-
4 tions.

5 Q. Okay. In your discussions with his
6 grandmother did you tell her about your -- your theory
7 of defense in that case and your intent to concede
8 guilt?

9 A. Yeah, it was discussed with them very -- if we
10 had not discussed it, when we had Herman questioned, she
11 would have, I'm convinced, she would have stood up if
12 she had not been aware of it and would have raised Cain.
13 She was very protective of Herman.

14 Q. Okay, and in the -- the penalty phase of the
15 case, in addition to Harold Morgan and Dr. John Dewitt,
16 you put up some other witnesses in that case, Dennis
17 Jones, James McKinney, Cathy Lane, the grandmother
18 Lucille Hughes. Isn't that correct?

19 A. Yes, if that's what the record -- there were
20 -- there were some people from the jail who wanted to
21 get some information as far as the adaptability. There
22 had been one minor incidence, but both of those folks --
23 I don't -- they may have called this witness. I'm not
24 sure whether he, whether Walter, called them, and we
25 were able to get them on cross-examination because he

1 wanted to get into the fact that there was some incident
2 with the broom, trying to get to a door or something or
3 opened a lock, but they both testified that he was
4 passive, even to the point where people attacked him,
5 and he didn't resist.

6 Q. Okay, but your -- your defense case in
7 mitigation consisted of more than just Dr. Harold Morgan
8 and Dr. John Dewitt---

9 A. Sure, yeah, and -- and pretty---

10 Q. ---and Annette Bodie?

11 A. Pretty much when it was over, we felt very
12 good about the presentation we made, you know. I -- I
13 think we made some headway with the judge because of
14 comments he made that he wasn't so sure, and he -- he
15 had within his own mind -- it wasn't his parameter to --
16 he couldn't overturn what the jury said, okay. He told
17 me he thought the jury was probably going to come back
18 and recommend life. I didn't know whether we had done
19 that good a job, but we -- we thought we had done a
20 pretty good job.

21 Q. Okay.

22 A. Ms. Hughes was very pleased with it. Whenever
23 the jury came back with the recommendation, obviously it
24 was a bottom line kind of result, and she was upset,
25 which is natural. I mean, she loved that boy. Still

1 does, I'm sure.

2 Q. Okay. Did your retained forensic experts,
3 either Dr. Harold Morgan or Dr. John Dewitt, or the
4 forensic social worker, Annette Bodie, ever apprise you
5 that you should get a mental retardation specialist?

6 A. No. Nobody ever said that.

7 Q. All right. Did those individuals ever apprise
8 you that you should get an expert in child psychology
9 based upon what they were looking at in the case?

10 A. Nobody -- nobody suggested that.

11 Q. Did you have any discussions that you can
12 recall with the State Hospital experts, their forensic
13 experts, either Dr. Frierson or the other individuals
14 from the Hall Institute, or Dr. Lester Finuf, who
15 testified at the hearing? Did you ever have any
16 discussions with them?

17 A. No, other than when they testified. We
18 had Dr. Morgan and Dr. Dewitt I think stay to give
19 -- that was part of the plan. Dr. Morgan wanted
20 to assist me in my cross-examination of them since
21 I think he had trained Dr. Frierson or Mr. Frierson.

22 Q. So, Dr. Harold Morgan wanted to stay to
23 assist you in your cross-examination?

24 A. Yeah, I'm pretty sure he stayed, either he or
25 Mr. Dewitt or both.

1 Q. Okay, so his role was not---

2 A. Yeah. I wasn't capable of on my own -- I
3 wasn't an expert in any way, shape, or form of cross-
4 examining those -- those folks. Ms. Bodie was very,
5 very helpful in structuring how I should ask the
6 questions. We -- we went over, rehearsed, and we were
7 both very pleased how fluid that presentation went. I
8 mean, it was basically me asking a question. I -- she
9 knew what she needed to say based on the information.
10 It was me remembering the sequence of questions and how
11 to ask her.

12 Q. With respect to the victim's impact testimony,
13 at any time during that presentation did you feel a need
14 to object?

15 A. No, but at the same point in time it's just my
16 own nature. You feel very, very uncomfortable when you
17 have people who are family members of somebody who was
18 killed by a person that you represent or by a person
19 who's convicted of it, okay. I felt very small at that
20 time because there's nothing these people said that I
21 thought was flagrant. They were just talking about
22 their -- their son and their brother, you know. I was
23 overwhelmed by it. I wish I would not have had to have
24 heard it. I think it goes more for passion and sympathy
25 on the jury than its probative value, but as far as I

1 was made aware, it was admissible.

2 Q. Okay, so at the time you were aware of
3 Solicitor Bailey's intent to put in that information---

4 A. Sure.

5 Q. ---from the notice of evidence and
6 aggravation---

7 A. And I was -- I was unaware of anything I
8 could do to stop that. If there was something that was
9 there, and I didn't know about it or failed to object,
10 then I -- I missed that.

11 Q. With respect to school records, I believe
12 that there were references under your examination of
13 Annette Bodie that she had acquired school records of
14 the defendant?

15 A. Yeah. I think actually Patty Rickburn
16 probably got that stuff for us. Patty, she was my jack
17 of all trades. She ended up being my, and for lack of a
18 better term, co-counsel because she sat with me
19 throughout the trial.

20 Q. Okay. Was it your intent in utilizing
21 Dr. Bodie to -- to bring in various factors about
22 your client's school background?

23 A. The unfortunate thing is there you had --
24 we had to bring out some stuff from his school records
25 to be able to show what Herman was about, the problems

1 he had in school, and I'm talking about the being able
2 to complete school. It became obvious to us, and I'm
3 -- I'm not sure -- I think was Ms. Bodie who noticed
4 the trend of the timing of his suspension, which
5 coincided with within a week or two of the days that
6 those kids were tested, so it's like the school wanted
7 an excuse to get rid of Herman so his lowest percentile
8 score wouldn't bring their average test scores down, and
9 they did, and -- and you have a -- a person who is, as
10 my own experts told me, was really a child in a almost
11 man's body. He -- he behaved like a child, and he was
12 going to give them an excuse, whether he was tardy,
13 whether he was disrespectful to a teacher, whether he
14 got in a fight with another student. He gave them the
15 -- the ammunition, so then they suspended him. I'm
16 not faulting that their suspension -- it's just
17 coincidental that they suspended him so close to the
18 testing; then they'd promote him to the next grade,
19 which really helped him a lot.

20 Q. Based upon your understanding, your intent to
21 present some of that school evidence, were you surprised
22 by the State's presentation in its initial case in the
23 penalty phase concerning the disciplinary records---

24 A. Not -- not surprised.

25 Q. ---of the defendant?

1 A. Okay, but I -- I did feel overwhelmed, okay,
2 and I think I covered this in the deposition, that
3 if there was a time I felt -- I felt inadequate, okay,
4 it was like once that floodgate opened, I couldn't
5 stop it, and we were flooded because they certainly
6 -- there were a number of instances where they
7 reported something, but the -- the punishment to
8 him was minor, so -- but it sounded terrible, okay.
9 My wife teaches early childhood education. She
10 has children to this day that three times -- I'm talking
11 about four-year-olds -- three times a week she has
12 to call their parents in. Well, you go over three
13 times a week with a kid, and these are just immature
14 kids, and if you write those up as -- as infractions,
15 it sounds terrible that this child was written up
16 thirty-eight times as a four-year-old. Well, it may
17 not have been all that bad, but it sounded terrible,
18 like Herman was Public Enemy No. 1, when the truth
19 of the matter is he had never been convicted of anything
20 in his life, okay, do I -- I did feel, if there was
21 something, and I felt bad then that I had opened up
22 a Pandora's box I couldn't close, I felt inadequate
23 at that time. Now, I don't know whether there was
24 anything that I missed. Nobody has told me that
25 "Hey, you should have made this objection." Nobody

1 has said that since that time, but I felt terrible.

2 Q. But it was still your intent, even if the
3 State hadn't put in that evidence---

4 A. I had to put in part of his school
5 records.

6 Q. ---that you were going to be putting in
7 similar evidence through Annette Bodie, correct?

8 A. Yeah, because---

9 Q. As a social historian, correct?

10 A. Yeah. You had to put in some of that same
11 stuff to show here was a child who had been passed by
12 by the system, okay, and -- and here was somebody
13 that -- that surely he's responsible for this, okay,
14 but do we need, and my theory was, do we need to take
15 his life away. Do you punish a nine-year-old for
16 stealing a car the same as you punish a twenty-year-
17 old? Well, in our mind Herman was closer to nine
18 than he was to twenty, so the punishment -- should
19 he be punished? Yes, but should it be the same degree
20 as a thirty-one-year-old adult who planned the crime
21 or a twenty-two-year-old man? No. Obviously, I --
22 I failed in being able to -- to demonstrate that to
23 the jury.

24 Q. Did Annette Bodie essentially have the same
25 information that the State witnesses presented?

1 A. I would assume so, but I couldn't -- I
2 couldn't say for certain. She did a very thorough
3 job.

4 Q. In the number of closing arguments that --
5 that you have been involved in as a defense lawyer in
6 South Carolina, do you have a -- a theory or strategy as
7 to when you should object to a prosecution closing
8 argument?

9 A. Typically, I leave them alone. If they're
10 on a roll, so to speak, if the jury seems to be leaning
11 forward listening to every word, if they make anything
12 that I am aware of I can object to, I will, and it's
13 more to disrupt that flow. With most solicitors,
14 the longer they talk, the worse they are, so you let
15 them talk as long as they want. One thing I've learned
16 over the years is longer isn't necessarily better.
17 Now, I can -- I can say this. I don't know how long
18 I talked in Herman's behalf. I'm not sure. When
19 you feel like you have the weight of somebody's life
20 in your hands, I don't know if you can talk too
21 long.

22 Q. With respect to the solicitor's argument
23 do you recall any particular part of that argument
24 that you sensed you should have objected to yet failed
25 to?

1 A. I just remember -- I don't know what part.
2 I just remember there was something he said, and I
3 don't know whether it was the penalty phase or the guilt
4 phase. It was something during the argument -- I was
5 writing notes to remind myself of what I wanted to
6 cover in my portion of the argument -- that I was --
7 should have objected to. I don't know how critical
8 it was, okay. It might have been something minor.
9 I -- I couldn't swear to it what it was, okay. I
10 was more focused on my preparation for what I needed
11 to say than I was on what Walter was saying.

12 Q. Before both the guilt phase, closing
13 arguments, and instructions, and the penalty phase
14 closing arguments and instructions, what was Judge
15 Cottingham's system on how he had his charge conferences
16 as to what proposed instructions---

17 A. I don't recall.

18 Q. ---should be given or -- or what instructions
19 he was even going to give? Did he meet with you and
20 advise you about that?

21 A. There was -- there were some -- I know there
22 were some meetings. It was -- it was typically in
23 chambers, but when and how -- I think we did some of
24 that before the actual trial, the proposed charges, and
25 it would have been logically, also, after, but I don't

1 recall, to be honest with you.

2 Q. Okay.

3 A. Typically, he wouldn't talk to one of us
4 without the other being in the room. Just
5 interestingly, each day he made sure lunch was sent out,
6 was brought in for both Ms. Rickburn and myself. We
7 were invited to eat in his chambers with him and with
8 his law clerk, somebody from his staff. It was, you
9 know -- I don't know whether that was the attempt to --
10 we were all doing a job. We all had a very solemn
11 responsibility. None of us took it lightly. I didn't
12 ever get the impression from Walter that he looked down
13 on Herman, that he was, you know, some terrible person
14 that had no feelings, you know. It was like we all had
15 a job to do, and -- and we wanted to make sure that we
16 did it as well as we could without interference from the
17 other.

18 Q. With respect to the guilt phase instructions
19 on accomplice liability, hand of one, hand of all,
20 did you have any concern at the time of the trial
21 about the -- the manner that that instruction was
22 given?

23 A. No, and -- and conceivably I could have
24 overlooked something that might have been strategic
25 there but, no.

1 Q. Okay.

2 A. I was -- I was more interested in trying to
3 fashion things and -- and the part about the sentencing
4 phase.

5 Q. Okay. At the time that the judge gave his
6 instructions, however, you were listening to those being
7 given to the jury. Isn't that correct?

8 A. I'm sure I was.

9 Q. Similarly, with respect to the penalty phase
10 instructions, were you concerned about the manner that
11 the judge instructed the jury concerning consideration
12 of mitigating circumstances?

13 A. I don't remember what my thoughts would have
14 been during that time, okay. If there's -- again,
15 if there's something that I missed, some objection I
16 could have made, a better way for him to explain it, I
17 either didn't know the language he may have used was
18 improper, or I wasn't attuned to what I needed to look
19 for, okay. I do know this, that my impression of his
20 charges, okay, is that other judges used his notebook
21 for charges, okay, and that he had been through death
22 penalty cases before, and I learned from another former
23 co-worker years ago that he was -- had sought out -- as
24 a matter of fact, Judge Pleicones, while the trial was
25 going on, there was somebody sent, a call from Judge

1 Pleicones' office, to get Judge Cottingham's notes.
2 Costa and I worked -- Costa was the one who talked me
3 into switching from the solicitor's office to the public
4 defender's office back in the seventies, and -- and
5 Costa is extremely intelligent in my opinion, far more
6 intelligent than I'll ever be, and if he was looking to
7 Judge Cottingham for advice, then he had a great deal of
8 respect on his knowledge of the law. I had no reason to
9 question it.

10 Q. Finally, with respect to one of the issues
11 with -- that you raised at the time of the trial on
12 whether the federal constitution would allow for the
13 execution of an individual who commits a crime when he's
14 sixteen years old, do you recall that?

15 A. Yes.

16 Q. Where did you develop that argument from?

17 A. The Capital Death Penalty Resource Center,
18 whatever that name was at the time.

19 Q. Okay.

20 A. I was not sophisticated enough to be able to
21 come up with that argument on my own.

22 Q. Okay. At any time, if you can recall, during
23 your discussions did they ever suggest to you that you
24 should raise this issue as one that it violates
25 international law?

1 A. No, I never heard anything about international
2 law.

3 Q. When was the first time you learned of a
4 potential international law issue with respect to your
5 client?

6 A. You faxed me some paperwork in the past two
7 weeks of issues that they had raised.

8 Q. Would that have been the application?

9 A. I -- I never -- never got any information
10 from their office prior to this trial. The only thing
11 I ever got, I got a copy of the transcripts from you.
12 I got faxed copies of the -- their answers to
13 interrogatories. I never got anything from them. I
14 had not looked at the transcript prior to testifying at
15 the deposition.

16 Q. I have no further questions.

17 THE COURT: Redirect.

18 MR. BLUME: Which will be mercifully short.

19 REDIRECT EXAMINATION BY MR. BLUME:

20 Q. Mr. Newsom, a couple of questions that --
21 that came out of this. As I understand it, on the
22 competency issue, as I understand the gist of the
23 direct and the cross, was that the experts you had
24 indicated that Mr. Hughes was competent to stand
25 trial?

1 A. None of them indicated there was a question
2 that he would not be.

3 Q. Under the legal standard?

4 A. Okay.

5 Q. You're just saying sort of as a practical
6 real world gut thing---

7 A. Yeah.

8 Q. ---you always had a lot of questions about---

9 A. Still do.

10 Q. ---what he under- -- really could understand?

11 A. Still do.

12 Q. And, you know, and your -- his ability to
13 communicate with you, you thought was impaired---

14 A. Yeah.

15 Q. By his limitations?

16 A. It -- it's -- I've represented people who
17 tried to play me by playing dumb about what occurred,
18 the offense and stuff like that. He's either the most
19 intelligent person that I've met and is capable of
20 faking that, or he could -- he's more likely one of the
21 less intelligent or the least intelligent people I've
22 ever represented.

23 Q. And if he's faking, obviously he's been faking
24 since he was a baby because from early---

25 A. From the time I saw him. I don't think he's

1 faking.

2 Q. But from childhood on---

3 A. No.

4 Q. ---I mean, in school---

5 A. No.

6 Q. ---he's always been found---

7 A. He was---

8 Q. ---to be extraordinarily limited?

9 A. He was of very little help. It was like
10 talking to a child.

11 Q. And you -- you mentioned this, but you were on
12 the case for some period of time before trial, but most
13 of the work sort of came in that---

14 A. No.

15 Q. ---period?

16 A. No, no. There was intense work. It had -- it
17 had picked up, accelerated tremendously, okay, but
18 before that, you know, getting background stuff, that --
19 that occurred before, and, also, I was constantly trying
20 to find out stuff, ways to wear Walter down as far as
21 pursuing the death penalty, okay. It had been my
22 information, the attitude of other folks that I had been
23 to seminars with, and belief all along that for a
24 defense lawyer the success in a capital case, unless you
25 have a stale evidentiary case where you can retry for

1 the fifth time and find a not guilty verdict, you're
2 lucky if you get a life sentence, and -- and if you can
3 get that by a plea, you've avoided exposure of a death
4 sentence to your client. That's what I was trying for.
5 I knew some members in -- in the victim's family. I had
6 represented his mother in an automobile accident. I
7 didn't know that, because she had a different last name,
8 until we were at one of the motion hearings. She was
9 very gracious and -- and very kind and understanding, as
10 she still appears to remain to this day. It was a very
11 difficult situation. After the jury returned the
12 -- the sentence, I stood out in the parking lot for, I
13 guess, the better part of an hour or so with her and her
14 daughter talking with them. I had hoped that their
15 belief that I was a decent, fair person would help prior
16 to that help prevail on them into relenting on pursuing
17 the death penalty, you know, but I can't fault them for
18 their views, you know. I -- I spent more -- I don't
19 want to say, "more time" -- I spent a good bit of time
20 trying to persuade Walter that this young man wasn't the
21 horrible, terrible person. Certainly he was capable of
22 shooting somebody. There's no question about that, but
23 would it be sufficient to put him away so he didn't get
24 out of jail the rest of his life, or do we -- did we
25 need to execute him, particularly when some of the other

1 folks I had been involved with avoided the death
2 penalty? It's not always the most guilty person who
3 pulls the trigger, also, so even if you follow -- even
4 if you believe that he pulled the trigger, it doesn't
5 necessarily mean he was the evil mind behind it. There
6 are those who believed Ronnie Mahaffey was the most
7 dangerous person in the Taylor Harkness murders, and he
8 got a life sentence.

9 Q. But your -- and what you're saying is your
10 view on that is this was sort of Kelsey Pierce's crime,
11 and he got Herman to sort of do it?

12 A. No, no. I -- that -- that's way too
13 oversimplified, no, no. Both of them were going to rob
14 together. There had not been a planned -- there was
15 nothing I ever heard that there was a plan of any
16 killing to take place, okay, but Kelsey was definitely
17 the dominant one in the relationship. I have no doubt
18 in my mind. I heard nothing to the contrary about that,
19 and my estimation of -- of talking to Herman and sizing
20 him up, he wasn't capable of planning a crime that
21 sophisticated, okay, and he probably, my guess is, he
22 went in there, and since he had to go through with the
23 robbery, he decided he needed to shoot Kelly, okay.
24 That showed not clear thinking.

25 Q. And you're talking about all your information.

1 The information you had from sort of law enforcement,
2 your own investigation, was---

3 A. Statements from his family, yeah.

4 Q. ---was that sort of Kelsey was really the bad
5 actor, the one who was really particularly criminal?

6 A. I believe it was Sergeant Green who -- who was
7 very emphatic that if Kelsey Pierce ever got out of
8 jail, that he thought Kelsey was capable of killing
9 again, okay.

10 Q. And you talked about Mr. Hughes' grandmother,
11 Lucille, and you -- you testified that she was very
12 loyal---

13 A. I think she was.

14 Q. ---to Herman?

15 A. She was willing to risk her whole house to try
16 to secure what she perceived to be better representation
17 of her grandson than the lawyers who had been appointed,
18 who, if they had been to see him, they might have seen
19 him once in the months before he went to court.

20 Q. But I think you, also, testified in your
21 deposition that while she was loyal, she had her -- some
22 of her own problems as well?

23 A. Everybody does, yes.

24 Q. And that one of the things, you had
25 information that she had allowed Herman to drink at a

1 very young age?

2 A. I said that in my deposition, and -- and I got
3 that information from folks at the sheriff's -- at the
4 city police that at a very early age -- it might have
5 been the year before, too -- he was sixteen then. In
6 most people's mind -- my wife -- I have a nineteen-year-
7 old daughter, and my wife thinks it's a sin if she
8 drinks a glass of wine, and I was raised to have the
9 wine accessible at an early age, and I was in a position
10 to be killed for this country when I was seventeen, and
11 I think that law is ridiculous, so we have different
12 opinions. I don't know what year they mentioned that
13 she allowed Herman to drink beer on the porch, but, yes,
14 they mentioned that, and they didn't think that was --
15 was she a perfect grandmother? No. I'll tell you what.
16 I've seen people from a whole lot more, financially
17 successful, better educated backgrounds that didn't have
18 the loyalty to their family member that that woman had
19 for him.

20 Q. And, finally, as I understand it, and the last
21 point I wanted to clarify was in regard to the closing
22 argument, Mr. Bailey's closing argument. I just wanted
23 to try and make sure I understand what your position is.
24 As I understand it or as I thought I understood it, and
25 I just want to make sure I still do, is that it's your

1 policy if you hear something objectionable, you will
2 object?

3 A. As a rule, yes. All the time, no, but as a
4 rule, yes, sure.

5 Q. But you have no recollection---

6 A. If I'd have -- if I'd have heard something
7 that I thought was prejudicial to my client that was --
8 was objectionable, I would have done that. In that
9 particular instance I was focused, okay. I was
10 listening with one ear and jotting down stuff, the last
11 kind of things, because you -- you almost -- you have to
12 wait until the last part of the testimony. I mean, it's
13 not like you can plan your closing statement ahead of
14 time. In a -- in a DUI case I can give you my opening
15 statement for a DUI case that I could be hired for
16 tomorrow, and I could pretty much give you my closing
17 because they're simple, and they fall into certain
18 patterns. When you deal with the penalty phase, and
19 you've got experts on the stand that -- that are more
20 sophisticated and trained than the average police
21 officer witness, a lot of your stuff is right there at
22 the last minute, and then you try to remember
23 everything. I don't think I ever have remembered
24 everything in a closing argument. I don't think I
25 brought out everything in his argument that I wanted to,

1 but I haven't done that in most every closing argument
2 that I've had, and I've won a lot of cases, so I don't
3 know whether it works. I think sometimes we think
4 certain things are more important than jurors do, okay.
5 It's like we're playing to each other or for the record,
6 and we're missing the boat as to what's important to a
7 jury.

8 Q. Thank you. I don't have anything further.

9 THE COURT: Anything further?

10 MR. ZELENKA: Your Honor, we would, and
11 we've spoken with Mr. Newsom about this, we would like
12 to have the possibility to possibly call him tomorrow
13 in light of my understanding that they're going to
14 attempt to put up an expert witness on ineffective
15 assistance of counsel and some more witnesses, to leave
16 the record open to allow for him to possibly be called
17 again.

18 MR. BLUME: My recommendation, Your Honor, I
19 mean, I think is they may have some points they would
20 want to recall him for. I don't know, and I think we've
21 gone over most of this pretty exhaustively. My rec- --
22 suggestion would be -- I mean, Mr. Newsom has come down
23 here and spent all day -- he was in a deposition --
24 would be that if the attorney general feels the need at
25 the conclusion of Mr. Mauldin's testimony, maybe he

1 would be allowed to depose Mr. Newsom within some
2 reasonable period of time in order
3 to prevent him from having to drive back down here
4 from Columbia tomorrow for what will probably be
5 even---

6 MR. ZELENKA: I think he's agreed to come
7 back, Your Honor.

8 THE WITNESS: If you need me, I'll come back.
9 My purpose would be to go home and never think about
10 this, but I know I'll never be able to not think about
11 this case.

12 THE COURT: All right.

13 MR. BLUME: It was my understanding he had
14 some other things that he---

15 THE WITNESS: I -- I do. I do Thursday. I
16 have -- I have a person I'm being hired to try to get
17 out of jail, trying to get a hearing set tomorrow. I
18 can do that probably first thing. It depends on how --
19 what time you need me down here.

20 MR. ZELENKA: It would be in the afternoon.

21 THE WITNESS: Could it be after two?

22 MR. ZELENKA: Yes, sir.

23 THE COURT: We'll look at the possibility of
24 having you back as early as tomorrow afternoon to be
25 recalled then. All right. All right. You may step

1 down.

2

3 MR. BLUME: Your Honor, we don't have any more
4 witnesses this afternoon.

5 THE COURT: All right. All right. Do you
6 want to take a moment now to go over any of the motions
7 that have been discussed? We've got some pending. Oh,
8 I'm seeing frowns. All right. We've got time.

9 MR. ZELENKA: No, I'm trying to remember what
10 the motions are.

11 THE COURT: Oh, what they are? All right.

12 MR. BLUME: It -- it wasn't a frown. It was
13 more a look of puzzlement.

14 THE COURT: What do we have pending? Well,
15 one of them was -- it was originally a motion to strike
16 dealing with the -- dealing with the testimony of the
17 expert who indi- -- who was testifying about---

18 MR. ZELENKA: Guilty but mentally ill?

19 THE COURT: Yeah.

20 MR. ZELENKA: Relying on State v. Wilson.

21 THE COURT: And I've had an opportunity to
22 look at that. Let me get back to it. It was dealing
23 with the irresistible impulse.

24 Basically, you had indicated that guilty but
25 mentally ill was one and the same with irresistible

1 impulse.

2 MR. ZELENKA: That's correct.

3 THE COURT: The only thing I find that's on
4 that point on that case, and it does in essence seem to
5 say this, instead it says, "The statutory scheme
6 specifically provides that one acting under such an
7 impulse is guilty albeit guilty but mentally ill."

8 As I read on though, I found why they were
9 indicating that South Carolina really wasn't using at
10 least into -- at least as far as insanity, the
11 irresistible impulse test for insanity, and I understand
12 -- it was making very clear just what test South
13 Carolina did use, but in going through that, it went
14 through the criticisms of it.

15 One of the criticisms was specifically that
16 different psychologists and psychiatrists define this
17 irresistible impulse differently, and so, upon reviewing
18 that, the Court finds that, yes, irresistible impulse
19 would be guilty but mentally ill. I do agree with
20 that.

21 I think that under their -- what -- what this
22 particular witness said, who said he fell under the
23 statutory guilty but mentally ill, but he didn't fall
24 under this irresistible impulse, that there can be
25 situations where they'll fall under the statute, but it

1 may not be irresistible impulse, and, again, I go back
2 to Wilson, who says that the psychiatrists are defining
3 it differently.

4 This may be one individual who defines it
5 somewhat differently but still says statutorily this
6 individual would fall under it, and, for that reason,
7 I respectfully decline your -- your motion. All right.

8 Now, there was an additional motion, and let
9 me see if I can recall what that was, and we can go
10 ahead and deal with it.

11 MS. WILKINS: The jurors.

12 THE COURT: Dealing with the jurors, that's
13 right. In the particular case that was cited, and I've
14 read many cases -- I want to be sure this is correct --
15 in the particular case that was cited by the petitioner,
16 these were jurors who were being questioned who were
17 actually excluded from the jury. They, in fact, did not
18 serve on the jury and did not deliberate.

19 MS. WILKINS: Which case are you referring
20 to?

21 THE COURT: Now, let me look and see if this
22 is it.

23 MS. WILKINS: That's -- that's not Hunter, is
24 it, Your Honor?

25 THE COURT: No. I'll look at Hunter. No, no.

1 There's the case of Skipper v. South Carolina.

2 MS. WILKINS: Yeah. Yes, ma'am.

3 THE COURT: This is the one. Okay. Did
4 you cite that one in your brief, or you argued it on
5 yesterday?

6 MS. WILKINS: I believe we actually cited it
7 maybe in about the third or fourth paragraph, but I
8 could be wrong, but I think we did.

9 THE COURT: Okay, because I -- I've read and
10 -- and virtually, let me tell you, distinguished every
11 case---

12 MS. WILKINS: Sure.

13 THE COURT: ---thus far, but I don't recall
14 Hunter, and my law clerk doesn't either, so give me some
15 time on this motion. I wanted to tend to it, but I want
16 to make sure I've read every case that's been cited.
17 I've read them all, I believe, and will refer to them
18 and make clear. I'll go ahead and make it clear to you
19 that I have distinguished and will distinguish on the
20 record the cases cited, and based on those, unless
21 Hunter changes my mind, will respectfully deny your
22 motion, and -- but let me take a look at Hunter, and
23 you'll get the final ruling after I've reviewed
24 everything.

25 MS. WILKINS: Thank you, Your Honor.

1 THE COURT: If there's anything further that
2 you need for the Court to review, I'll be glad to do
3 that if they're -- just be sure you exchange it with the
4 other side, any -- any other party since I'm still under
5 review on that issue.

6 MS. WILKINS: There's one minor matter, and
7 this is not something the Court really needs to review.
8 It's just something that maybe we ought to make clear on
9 the record, and we want Mr. Newsom, wherever he is, to
10 be able to leave just as soon as he possibly can, but
11 there was some slight mixup about because his files were
12 lost in the move, we think we have everything in the
13 box, but we'd like to check the box just to make sure,
14 and I think the attorney general's office pretty much
15 consents to that. There was -- when he started talking
16 about some of the juror stuff, we weren't confident we
17 had it.

18 THE COURT: All right. I'll give you the
19 opportunity to review through the box, as well the
20 attorney general's office as well.

21 MS. WILKINS: Right.

22 THE COURT: All right.

23 MR. ZELENKA: We have no objection to that.

24 MS. WILKINS: We don't want to delay Mr.
25 Newsom.

MOTIONS

1 MR. NEWSOM: I don't know how long they need
2 to look. They came to my office several months ago and
3 looked through that same box. Nothing's been---

4 THE COURT: How long do you think it'll
5 take?

6 MS. WILKINS: Ten minutes. I mean, I'm hoping
7 it will be very quick.

8 THE COURT: All right. We'll just very
9 quickly, Mr. Newsom, give them the opportunity to look
10 through it. All right. All right. Is there anything
11 further?

12 MR. BLUME: No, Your Honor.

13 THE COURT: All right. We'll need to begin at
14 10:00, but I will begin at 10:00 sharp in the morning.
15 10:00 rather than the 9:30, 10:00. Thank you.

16 MR. ZELENKA: Thank you, Judge.

17 MR. BLUME: Thank you.

18 (WHEREUPON, THE HEARING ADJOURNS FOR THE DAY.)
19

20 (WHEREUPON, THE HEARING RESUMES ON OCTOBER 13, 1999.)

21 THE COURT: Good morning.

22 MR. ZELENKA: Good morning, Judge.

23 MS. WILKINS: Yeah, we need Mr. Hughes, and we
24 have one minor housekeeping matter. The depositions and
25 affidavits that we've all agreed on, we want to go ahead

1 and have marked and entered in.

2 THE COURT: Okay. Very good. We can do that
3 at this time.

4 MS. WILKINS: Okay, and just for your
5 information, one of them was inadvertently torn. I
6 think somebody tried to open it accidentally, and we've
7 informed Mr. Zelenka, and he said he didn't have any
8 objection.

9 THE COURT: All right.
10 (Applicant's Exhibit Nos. 13 through 25 admitted into
11 evidence.)

12 MR. BLUME: The applicant would call Dennis
13 Keys.

14 DENNIS WILLIAM KEYS, BEING
15 DULY SWORN, TESTIFIES AS FOLLOWS:

16 THE CLERK: State your name and spell your
17 last.

18 THE WITNESS: My name is Dennis William
19 Keys---

20 MR. BLUME: And, Mr. Keys---

21 THE WITNESS: ---K-e-y-s.

22 MR. BLUME: I'm sorry.

23 THE WITNESS: That's okay.

24 MR. BLUME: That's about three times I've
25 jumped the gun on the court reporter on -- on the

1 spelling of the name. I apologize.

2 DIRECT EXAMINATION BY MR. BLUME:

3 Q. Can you please tell me how you are currently
4 employed?

5 A. I am an Associate Professor of Special
6 Education at the College of Charleston.

7 Q. And as a professor what are the areas that you
8 teach in?

9 A. I teach courses in mental retardation,
10 characteristics and procedures, how to teach children
11 with mental retardation. I, also, teach courses in
12 psychoeducational assessment, how to identify people
13 with mental retardation and learning disabilities and
14 emotional disabilities, and I, also, teach courses in
15 classroom management.

16 Q. Okay, and before you were a professor, what
17 did you do?

18 A. I was a classroom teacher for kids with
19 special needs, particularly in mental retardation for
20 two years as a teacher's assistant, five years as a
21 classroom teacher, and then I was a graduate student at
22 Miami University in Ohio and, also, at the University of
23 Mexico.

24 Q. Okay, and do you have -- what degrees do you
25 have?

1 A. I have a Bachelor's in Special Education from
2 Ohio University in Athens, Ohio. I have a Master's of
3 Education in Special Ed from Miami of Ohio. I, also,
4 have a Master's in Science and School Psychology and a
5 Specialist in School Psychology from Miami of Ohio, and
6 my Ph.D. is from the University of Mexico in Special
7 Education Mental Retardation.

8 Q. And are -- have you written in the field of
9 mental retardation?

10 A. I have.

11 Q. And can you -- I don't want you to go through
12 everything, but can you just sort of tell me generally
13 what areas you have written in in the area of mental
14 retardation?

15 A. Primarily in the area of criminology, death
16 penalty and mental retardation research.

17 (Applicant's Exhibit Nos. 26 and 27 marked.)

18 DIRECT EXAMINATION RESUMES BY MR. BLUME:

19 Q. While he's looking at that, let me ask
20 you, in addition to your writing and your research
21 and your experience as a classroom teacher, are you
22 a member of any organizations that deal with mental
23 retardation?

24 A. I'm a fellow of the American Association on
25 Mental Retardation.

1 Q. Yeah, what is the American Association on
2 Mental Retardation?

3 A. It is the oldest and best known organization
4 devoted specifically to a -- a disability. It's over a
5 hundred and sixty years old.

6 Q. What does it mean to be a fellow?

7 A. It means I have achieved a long record of work
8 in the field that hasn't been too badly bashed.

9 Q. Okay. In addition to that, are you a member
10 of any other professional organizations?

11 A. I am a member of the National Association of
12 School Psychologists, a member of the Council for
13 Exceptional Children, and the American Board of Forensic
14 Examiners.

15 Q. Okay. I'm going to show you in a second what
16 has been marked as your CV, so we can put it in for the
17 record, but I think we have enough at this time that I
18 would offer Dr. Keys as an expert in the field of mental
19 retardation.

20 THE COURT: Any objection?

21 MR. ZELENKA: I just have one question.

22 THE COURT: All right.

23 EXAMINATION BY MR. ZELENKA:

24 Q. Dr. Keys, you mentioned that -- that you had
25 done some writing on mental retardation and the death

RE: QUALIFICATION

1 penalty?

2 A. Uh-huh (affirmative response).

3 Q. What was that?

4 A. There was an article that was in Champion
5 dealing with competence to stand trial for people with
6 mental retardation, and we specifically focused on the
7 death penalty.

8 Q. Okay, and Champion is the---

9 A. NACDL, National Association for Criminal
10 Defense Lawyers, their publication.

11 Q. Their monthly or bimonthly publication. Is
12 that correct?

13 A. I believe it's bimonthly, yes.

14 Q. Okay.

15 MR. ZELENKA: I have no objection.

16 THE COURT: All right.

17 DIRECT EXAMINATION RESUMES BY MR. BLUME:

18 Q. Is this -- let me show you what has been
19 marked as Applicant's Exhibit 26. Is that a copy of
20 your curriculum vitae?

21 A. It is.

22 MR. BLUME: We offer this without objection as
23 Applicant's 26, and I understand there's no objection to
24 his qualifications---

25 THE COURT: Is that correct?

1 MR. ZELENKA: Correct.

2 THE COURT: Very good.

3 MR. BLUME: ---as an expert in the field of
4 mental retardation.

5 THE COURT: That's correct.

6 (Applicant's Exhibit No. 26 admitted into ev.)

7 DIRECT EXAMINATION RESUMES BY MR. BLUME:

8 Q. Dr. Keys, at my request did you review the
9 testimony, expert testimony, that was presented in
10 Mr. Hughes' case in this trial?

11 A. I did.

12 Q. And, specifically, did you review the
13 testimony of Harold Morgan and John Dewitt, Richard
14 Frierson, and Lester Finuf?

15 A. I did.

16 Q. And did you, also, review certain records in
17 this case?

18 A. Yes.

19 Q. And did you review of the records of the Hall
20 Institute evaluation of Mr. Hughes?

21 A. Both the psychological examinations, yes.

22 Q. And the school records?

23 A. Yes.

24 Q. Mr. Hughes' school records and the depositions
25 of Lester Finuf and Dr. Frierson?

1 A. I did.

2 Q. Now first, before I ask you to talk to us
3 about that testimony, I want to ask you first what is
4 mental retardation?

5 A. Mental retardation is a severe disability in
6 any case. It refers to significantly subaverage
7 intellectual functioning existing concurrently with
8 deficits in two or more adaptive skill areas that are
9 listed in the definition and has to be manifested before
10 the age of eighteen.

11 Q. And is that the commonly accepted definition
12 of mental retardation?

13 A. It is the definition of the American
14 Association on Mental Retardation that is accepted,
15 also, by the DSM4.

16 Q. Okay. Let me show you what's been marked as
17 Applicant's Exhibit 27. Is that the definition of
18 mental retardation that you've referred to?

19 A. Yes, it is.

20 Q. And this is the definition of the American
21 Association of Mental Retardation?

22 A. On Mental Retardation, yes.

23 Q. I apologize.

24 A. That's okay.

25 MR. BLUME: Just so -- we're going to be

1 talking about that. I would offer that as Applicant's
2 Exhibit 28, the top sheet.

3 THE COURT: 27 or 28?

4 THE WITNESS: 27.

5 THE COURT: 27.

6 MR. BLUME: I'm sorry. Any objection?

7 THE COURT: Any objection?

8 MR. ZELENKA: What do you enter -- just the
9 top portion?

10 MR. BLUME: No. This is the AAMR definition
11 of mental retardation.

12 THE WITNESS: The four parts underneath are --
13 are applicable to the definition. They are part of the
14 definition.

15 MR. ZELENKA: They are part of the definition?

16 THE WITNESS: Yes.

17 MR. ZELENKA: Then I have no objection.

18 THE COURT: All right. Without objection.

19 (Applicant's Exhibit No. 27 admitted into evidence.)

20 DIRECT EXAMINATION RESUMES BY MR. BLUME:

21 Q. Now, as I understand it, there's three parts
22 to the definition. First, there is the significantly
23 subaverage intellectual functioning?

24 A. Correct.

25 Q. And that's usually what you measure by an IQ

1 test?

2 A. That is correct, individualized test of
3 intelligence, yes.

4 Q. The second part is adaptive functioning?

5 A. Correct.

6 Q. And that, I guess, generally to me means
7 how does the person function in the world, or am I
8 wrong?

9 A. Well, it refers to a couple of different
10 things. Adaptive functioning is how the person adapts
11 to their environment and how well they adapt to their
12 social norms. For a person of sixteen, seventeen years
13 old, do they behave like a sixteen and seventeen-year-
14 old?

15 Q. And in assessing adaptive functioning
16 there are specific criteria, which are set forth
17 in the definition both in the AAMR definition and
18 DSM4?

19 A. That is correct.

20 Q. That you are supposed to assess in making the
21 adaptive functioning?

22 A. Uh-huh (affirmative response).

23 Q. And then, third, as I understand it, the onset
24 has to be before the age of eighteen?

25 A. That is correct.

1 Q. And I'll come back and discuss that with you
2 in detail, but let me ask you this. As a general
3 matter, if we're talking about intelligence tests, and
4 there's going to be discussion that Mr. Hughes was
5 tested, basically at age thirteen and then again before
6 this and had an IQ of 74, there's going to be some
7 discussion of that, and I want to show you what's been
8 marked as Applicant's Exhibit 29 and ask you if you can
9 identify that for me.

10 A. This is a replica of the normal curve. This
11 is a theoretical description of intelligence in the
12 United States, actually in the world.

13 Q. Okay, and so this sort of shows what the
14 normal curve of IQ is?

15 A. Given the general public, this is -- this is
16 what would be considered to be a replication of the
17 levels of intelligence across the board.

18 Q. Okay.

19 MR. BLUME: Because we are probably going to
20 be talking about that, I would offer that as Applicant's
21 Exhibit 29.

22 MR. ZELENKA: No objection.

23 THE COURT: Without objection.

24 (Applicant's Exhibit No. 29 admitted into evidence.)

25 DIRECT EXAMINATION RESUMES BY MR. BLUME:

1 Q. Okay. Now, can you tell me what are some
2 of the characteristics of people with mental
3 retardation?

4 A. There are several characteristics that are
5 specific to people with MR. Whether or not they are
6 existing in all people with mental retardation, of
7 course, is -- is just debatable, but some of the
8 characteristics include level of impulsivity that
9 would not be seen in the general public, a level of
10 difficulty with short-term -- short-term memory,
11 difficulty with communication skills, getting one's
12 points across. Some of the other classifications --
13 characteristics would make it hard to identify someone
14 with mental retardation. Egerton in his 1967 work on
15 the cloak of competence stigmatized the mentally
16 retarded. It's -- it's very important for a person with
17 mental retardation not to appear mentally retarded, and
18 they will do whatever they have to to try to look
19 normal.

20 Q. Okay. Are there any other characteristics of
21 those kinds of---

22 A. Oh, there are several. They have difficulty
23 with transference of generalization skills, which is
24 to say that they do not take situations from one place
25 and experience them in -- in more than one way nor will

1 they -- the best example I can give you is I taught
2 my students how to use napkins at school and put them
3 on their laps, but when we went out to a restaurant,
4 they forgot to do it because it was a different
5 environment. They just didn't generalize the skill
6 very well. They have problems with concentration
7 and focusing. They don't -- they're unable to attend
8 to specific things for very long. The coping skills
9 and planning skills are typically impaired. They have
10 problems with remembering how to do things and how to
11 put things together.

12 Q. Okay. Now, we've been talking a little bit
13 about the -- the concept of mental retardation, the AAMR
14 kind of definition, which is adopted by the DSM4, as I
15 understand it?

16 A. Correct.

17 Q. And then we talked about had you reviewed
18 the testimony in this case, and I want to ask you,
19 have you reached any conclusions about the presentation
20 of the mental retardation testimony at Mr. Hughes'
21 trial?

22 A. Yes, I have.

23 MR. ZELENKA: I'm waiting for the next
24 question.

25 THE COURT: All right.

1 DIRECT EXAMINATION RESUMES BY MR. BLUME:

2 Q. Yes, you have. That was an obvious answer, so
3 what are they?

4 MR. ZELENKA: I object, Your Honor.

5 Mr. Keys is not qualified as an expert witness in the
6 presentation of defense, and I would question whether
7 he has the expertise in that area to give an opinion
8 as far as the presentation of evidence in a particular
9 case. I think that's a matter for the court as a matter
10 of law.

11 MR. BLUME: Well, first of all, it -- it's not
12 -- I don't think that's correct, but, secondly, it's not
13 he is not going to critique the defense presentation.
14 He is going to talk about the fact that the issue was
15 presented in an erroneous manner by both sides, that no
16 one laid out what the definition of mental retardation
17 was, the generally accepted definition in the field at
18 the time of the trial, that no one established again the
19 definition, the accurate definition, established as the
20 definition.

21 There was no discussion of the second part of
22 the standard, which is adaptive functioning, and that
23 that allowed misinformation to the jury about the
24 question of mental retardation, and the specific
25 allegation in the application in this case is that if

1 you were going to present mental retardation to the jury
2 at this trial, it was important, it was critical, to
3 have someone with expertise in the area about it, and so
4 what Dr. Keys is going to talk about is the way that in
5 this trial the information was presented erroneously by
6 the State primarily, and certainly he would have been a
7 witness who could have been called for this very purpose
8 at trial to rebut the testimony of Dr. Frierson and
9 Dr. Finuf to say, "No, that's not right. That is not
10 the accurate definition of mental retardation," because
11 all of that would have been admissible at trial, and
12 it's certainly admissible at a post-conviction
13 proceeding.

14 MR. ZELENKA: Your Honor, again, this -- we're
15 speaking as a question of law.

16 The jury was advised and apprised consistent
17 with South Carolina law of the definition of mental
18 retardation at the time it gave its opinion.

19 Whether the South Carolina law definition of
20 mental retardation was consistent with Dr. Keys'
21 definition, to me, is irrelevant.

22 The question before the jury in making its
23 determination is whether the definition of mental
24 retardation as defined in South Carolina law and as
25 given to the jury in the statutory mitigating factors,

1 that was what these individuals were dealing with in
2 making their determination, I think.

3 For that point, I think that while he may
4 have a different definition, he may think the way he
5 does his analysis certain individuals fit within terms
6 of mental retardation for his purposes, I submit, is
7 much different than whether legally, as defined under
8 South Carolina law, and particularly in the deposition
9 statute, Section 16-3-20.

10 I think it's Subpart B that sets forth that
11 definition of mental retardation that the jury was
12 apprised, and that is not the same definition that he's
13 going under here.

14 MR. ZELENKA: Well, I think maybe he
15 misunderstands what Dr. Keys intends to talk about. He
16 does not intend to say that the definition charged to
17 the jury was wrong or that the definition charged to the
18 jury was not South Carolina law.

19 The definition that was given as far as the
20 statute in South Carolina does include the DSM4
21 definition of mental retardation. The problem here was
22 not in the judge's instructions that we'll talk about,
23 but the presentation of the evidence did not allow the
24 jury to make a finding of mental retardation, and that
25 is the question of ineffective assistance. We're not

1 challenging the legal sufficiency of the definition
2 under the statute. That has -- that's not what he's
3 here to talk about.

4 MR. ZELENKA: I have nothing further, Your
5 Honor.

6 THE COURT: And -- and I'm looking at the
7 charge. The charge -- but you're saying that there's
8 not a challenge to the charge in that regard.

9 MR. BLUME: Well, the -- the statutory
10 definition is---

11 MR. ZELENKA: Set forth in 16-3-20C. I
12 believe it's B10. "The defendant had mental retardation
13 at the time of the crime. Mental retardation means
14 significantly subaverage general intellectual
15 functioning existing concurrently with deficits in
16 adaptive behavior and manifested during the
17 developmental period."

18 THE COURT: All right.

19 MR. BLUME: That's the DSM3, Your Honor,
20 definition, which was supplanted by DSM4 at this time.
21 Now, there is---

22 THE COURT: All right. Well, we're still
23 dealing with him as an expert and -- and allowing him to
24 answer this particular question, and that is going back
25 to the the testimony, and I am -- under these

1 circumstances I'm going to allow him to -- to go back.
2 Now, what I would ask though is that he go back to that
3 point in time of what the definition was at this -- this
4 point in time, as I understand it has changed with the
5 DSM4.

6 MR. ZELENKA: Maybe but that is still the
7 definition of South Carolina law even today. We haven't
8 amended our statute to change the definition of mental
9 retardation.

10 THE COURT: I'm just -- my concern, the
11 Court's concern -- I understand, but the Court's concern
12 was that he may be dealing with the newer definition and
13 not understanding to go back at---

14 MR. ZELENKA: I agree.

15 THE COURT: ---at this point in time.

16 MR. ZELENKA: Thank you.

17 THE COURT: All right.

18 MR. BLUME: Okay. Well, I will probably
19 then sort of discuss it with both of you because
20 the differences are not that significant, as I under-
21 stand.

22 THE WITNESS: No, they haven't changed that
23 much.

24 DIRECT EXAMINATION RESUMES BY MR. BLUME:

25 Q. And the definition, which is in the statute,

1 although it's interesting at trial people -- there was
2 some use of the DSM4, but at -- the DSM3R definition is
3 here in 10, but it still, as I understand it, has the
4 same basic components: the significantly subaverage
5 general intellectual functioning existing concurrently
6 with deficits in adaptive behavior, which is the second
7 prong that we sort of talked about in DSM4 and
8 manifested during the developmental period?

9 A. Which was considered to be conception to age
10 eighteen.

11 Q. Okay, so basically the definition, although
12 it's been modified somewhat in the DSM4, had the same
13 essential components, and it worked, more or less, the
14 same way?

15 A. That is correct.

16 Q. Now, the question that I would ask again
17 is, again, have you reviewed the testimony in this
18 case?

19 A. I have.

20 Q. And in your opinion was the testimony
21 presented on the question of mental retardation -- was
22 there anything about it that you found unusual as an
23 expert in the field of mental retardation?

24 A. Yes. I felt that the -- the absolute cutoff
25 that was used as seventy is erroneous. The law -- the

1 -- the rules of diagnosis do not say that seventy is
2 the know-all, end-all cutoff and that, in fact, there
3 was a distinctive lack of -- of description of the
4 individual's adaptive skills, and given those lacks of
5 adaptive behaviors, then they -- they could not have
6 done what I would consider to be an adequate and
7 accurate definitional investigation.

8 Q. Okay. Let's go back, and I want to talk about
9 it in sort of in the components that we talked about.
10 Primarily what I really want to talk to you about is the
11 IQ score and then the adaptive functioning. Let's first
12 talk about IQ scores. Now, you said seventy is not an
13 absolute cutoff?

14 A. No.

15 Q. Is that just your opinion, or is that what's
16 commonly recognized by experts in the field of mental
17 retardation?

18 A. That is commonly recognized by everyone who is
19 an expert in mental retardation, yes.

20 Q. And why is that?

21 A. The reason simply is that there is a variance
22 in IQ scores and that there is, also, a standard error
23 of measure with every intelligence test that is
24 something that the test even admits, that error does
25 occur. Given that error, anywhere from one to six

1 points -- most tests are four to five points -- given
2 that error, you cannot rule out that there is some areas
3 that the individual functions better in and some areas
4 that the individual functions less well in, and given
5 that, then the adaptive behavior becomes so much more
6 important.

7 Q. And let me ask you this. In 1994 and 1995 was
8 it, also, commonly understood that seventy was not an
9 absolute cutoff?

10 A. Yes, it was.

11 Q. And was that recognized in the DSM3R as
12 well?

13 A. Yes -- or no. In the DSM3R?

14 Q. Yes.

15 A. Probably yeah -- no, it would have been---

16 Q. As I under---

17 A. Yes, that would have been.

18 Q. As I understand it---

19 A. It was not a dead cutoff.

20 Q. ---and correct me if I'm wrong, the difference
21 is it was recognized in the DSM3R, I mean, by the
22 professionals who applied the DSM3R---

23 A. Correct.

24 Q. ---but the DSM4 made it explicit?

25 A. Very, yes.

1 Q. And specifically says a plus or minus five
2 range in the DSM4 itself?

3 A. Yes.

4 Q. But the DSM4 was in effect at the time of
5 Mr. Hughes' trial?

6 A. Yes, it was, since '94.

7 Q. And from your review of the testimony did
8 anyone explain to the jury that there was a plus or
9 minus five range here?

10 A. Not to -- not according to my review.

11 Q. And so someone with an IQ of 74, if they had
12 deficits in adaptive functioning would be or could be
13 mentally retarded?

14 A. Yes. It's exponential. As the IQ edges up
15 toward 75, the intellect -- the adaptive skills
16 typically go down, and significantly lower would be the
17 red flag.

18 Q. And people that are in this sort of range, you
19 know, seventy to seventy-five range, do they present
20 some special problems?

21 A. Yes.

22 Q. And why is that?

23 A. Because there are so many people who -- there
24 are several people who don't understand the disability,
25 who would say, "Well, the seventy is -- is definitely

1 the cutoff, and so anybody above that is not of concern,
2 that mental retardation cannot be the issue," when, in
3 fact, the definition since 1992 has said that very
4 clearly people with mental retardation have lower
5 intellects, but the lower adaptive skills is what really
6 tells us that they are mentally retarded, even if they
7 have that seventy to seventy-four range, yet so many
8 people still disregard it at that point.

9 Q. Okay. Let's talk about the adaptive
10 functioning prong a little bit. Adaptive functioning,
11 we talked a little bit about it and how it's measured in
12 specific areas. Based upon your review of the testimony
13 that was presented in this case, was the concept of
14 adaptive functioning explained?

15 A. I don't remember reading a good explanation of
16 it, no.

17 Q. And is that an important part of understanding
18 whether someone has mental retardation?

19 A. It is very important, yes.

20 Q. And, as I understand it, you analyze adaptive
21 functioning in specific areas, such as communication,
22 self-care, home living, social skills, community use,
23 self-direction, health and safety, functional academics,
24 leisure, and work?

25 A. Those are the ten areas that are listed in the

1 definition, correct.

2 Q. And those are the areas in which to make an
3 assessment of adaptive functioning someone would have to
4 look at?

5 A. Uh-huh (affirmative response).

6 Q. And if you didn't go through and look at those
7 criteria in a particular case, then you couldn't make a
8 reliable determination of whether someone had mental
9 retardation?

10 A. Correct, regarding that the IQ is within the
11 range.

12 Q. And, as I understand the definition, you --
13 you don't have to have deficits in all of these. It's
14 two or more?

15 A. That is correct.

16 Q. Is there any standard or are there standard
17 tests or standard scales that are used by people with
18 expertise in the field of mental retardation to
19 determine adaptive functioning?

20 A. Yes.

21 Q. And what are those?

22 A. The most common is the Vineland. There's two
23 forms of Vineland: The Social Maturity Scale and the
24 Vineland Adaptive Behavior Scale.
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Q. And the purpose of that instrument is specifically to determine adaptive functioning?

A. Yes, but it's -- it's not like an IQ test. You don't give the test to the person in -- in question. You give the -- you actually interview people who have knowledge of the person so that what you're, in fact, doing is getting various points of view about this individual's functioning, and then you do -- I -- the way -- the method I use is convergent validation. I put together seven, eight, ten interviews, sit down and talk with each one of these people, and then I sit down and figure out the best accurate portrayal of his adaptive skills.

Q. And, as I understand it, in the adaptive skills area, that someone may have strengths in some of these areas?

A. That's correct.

Q. And that can coexist with limitations in other areas of adaptive functioning?

A. That is correct.

Q. Now, based on my review of the record, and you

1 and I discussed this, one of the reasons that Dr.
2 Frierson, who was the State psychiatrist who testified
3 in this case, indicated that he did not think that Mr.
4 Hughes was mentally retarded was because he used words,
5 certain words. As an expert in the field of mental
6 retardation, is that an appropriate basis to say someone
7 is not mentally retarded?

8 A. No.

9 Q. And why is that?

10 A. Well, because there are various strengths
11 and weaknesses that individuals have, and some people
12 are better at using words than others. I know some
13 people who are very intelligent that don't use words
14 very well.

15 Q. And let me -- I wanted to sort of -- the
16 specific words that he talked about, said, "Well, I did
17 not think he was mentally retarded because of the words
18 he used," were words, I believe -- I'm trying to get
19 them -- testimony and evidence -- I'm trying to get them
20 exactly. I don't want to misquote them. I -- I want to
21 show you this. It's on page 1570 -- now -- of the
22 record.

23 A. "He used some words that were remarkable for
24 someone with an IQ of 74, words such as he spontaneously
25 used the words of "testified, evidence, co-defendant,"

1 words such as those, which I thought indicated that he
2 had a fairly good understanding of English."

3 Q. Okay, and since -- in your opinion, again, is
4 that a -- a legitimate basis to say someone doesn't have
5 mental retardation?

6 A. No.

7 Q. Is it---

8 A. That's like saying they have the spark of
9 intelligence in their eye.

10 Q. And is it -- would Mr. Hughes, the fact
11 that he used all of these words, which were legal in
12 nature, the fact that he had been in jail for some
13 period of time, talking to lawyers and investigators,
14 would that, also, be part of an explanation of those
15 words?

16 A. That's an explanation, yes. He might, also,
17 watch television.

18 Q. Because there are a lot of---

19 A. Legal shows on TV nowadays. You can't turn on
20 the television without seeing a courtroom.

21 Q. Now, let me -- now, you reviewed the records.
22 You did not -- I did not ask you, and you did not
23 actually evaluate Mr. Hughes?

24 A. No, sir, I did not.

25 Q. Or do any testing yourself. What I asked you

1 to do was to review the testimony as an expert in mental
2 retardation to talk to me and advise me about how the
3 issue was presented in this case?

4 A. Correct.

5 Q. And so I understand that it would be
6 inappropriate for you to render an opinion about whether
7 Mr. Hughes is mentally retarded?

8 A. That is correct nor would I.

9 Q. In your case, but what I want to ask you, sort
10 of based upon the raw components that we have talked
11 about, was there certainly -- was there anything about
12 the information or the material in there which rendered
13 him ineligible for the determination?

14 A. No. There was nothing in evidence that I
15 reviewed that would have suggested that -- that it was
16 not necessary to continue the investigation. There is
17 plenty of evidence that -- that this could be, in fact,
18 a person with mental retardation.

19 Q. And what was really required was a
20 comprehensive assessment by someone with expertise in
21 the area?

22 A. Of adaptive skills particularly, yes.

23 Q. Now, I want to just ask you one final sort of
24 series of questions on another area. As you indicated
25 that you've taught in the area of school education and

1 school psychology. Is that---

2 A. Yes, correct. I---

3 Q. And---

4 A. I -- I -- I am a school psychologist.

5 Q. Okay, and as a school psychologist is one of
6 the areas that -- is a test that you've ever had an
7 experience with the Bender Gestalt?

8 A. Yes, it is.

9 Q. And did you, also, review Mr. Hughes' school
10 records?

11 A. Yes, I did.

12 Q. And in those school records were there
13 indications that he had been given a, I guess what's
14 called a Bender on several occasions?

15 A. Uh-huh (affirmative response).

16 Q. And can you tell me, what does a Bender
17 measure?

18 A. It measures technically visual motor
19 integration, but we're looking for specifically four
20 factors: the rotations, the distortions, the
21 integration problems, and perseveration, and
22 specifically we're looking for soft signs of brain
23 damage in that area.

24 Q. And based upon the Bender that you -- that you
25 reviewed that were given by the school system on those

1 two occasions, would there be any -- was there anything
2 of significance to you?

3 A. Yeah, there were several distortions and
4 integration problems, rotation difficulties throughout
5 the -- the different administrations of the test, which
6 would from day one have suggested that there was
7 evidence of brain damage.

8 Q. Which should be further pursued?

9 A. Absolutely.

10 Q. And would the best way to pursue that have
11 been through a comprehensive neuropsychological
12 assessment?

13 A. My -- in my opinion, yes, that would have been
14 the best way.

15 Q. Thank you, Dr. Keys. Please answer any
16 questions that Mr. Zelenka might have.

17 A. Thank you.

18 CROSS-EXAMINATION BY MR. ZELENSKA:

19 Q. Dr. Keys, I have a few questions. The -- the
20 materials you reviewed, did you review the test scores
21 of the defendant through his school?

22 A. I did.

23 Q. What were those test scores?

24 A. The full scale, the eighty, I believe is the
25 one you're referring to specifically. At that time he

1 was eight years three months old, I believe, and any
2 school psychologist will tell you that it's prudent not
3 to put too much faith into an IQ score of -- score of a
4 child under ten years old.

5 Q. Okay, but -- but an eighty plus-or-minus five
6 is still above seventy. Isn't that correct?

7 A. That is correct.

8 Q. And even under your theory an individual
9 that's eighty would not be deemed to be mentally
10 retarded. Isn't that, also, correct?

11 A. That is correct.

12 Q. What were the next test scores of his
13 intelligence level that were done?

14 A. Seventy-four.

15 Q. And when was that done?

16 A. I presume probably three years later.
17 Technically in those days IDEA, the Individuals with
18 Disabilities Education Act, was in effect, the '91
19 edition, I think. The first testing was done in '86,
20 so it would have been 99457 that was in -- in -- so
21 it would have been every three years, probably '90,
22 '89.

23 Q. Okay, and they didn't determine him to suffer
24 from mental retardation, the individuals that gave those
25 test scores. Isn't that, also, correct?

1 A. Regrettably, no.

2 Q. But their -- their opinion was he was not
3 mentally retarded, correct?

4 A. At the time.

5 Q. When was the next test score done?

6 A. I believe it was '91.

7 Q. Okay, and what was the test -- testing---

8 A. Again, it was seventy-four..

9 Q. Again, seventy-four?

10 A. Uh-huh (affirmative response).

11 Q. And, again, the professionals that evaluated
12 him at that time concluded that he was not mentally
13 retarded. Is that not, also, correct?

14 A. That is correct.

15 Q. When was the next test score done?

16 A. At Hall.

17 Q. And what was the testing on that?

18 A. Well, first -- well, there was first the --
19 the Schlossen of sixty-eight. There was a Schlossen
20 score that was done of sixty-eight. I don't remember
21 what year that was.

22 Q. Okay.

23 A. And then the next one was the one at Hall, and
24 the test was seventy-four.

25 Q. Okay, and that was a---

1 A. Full scale.

2 Q. ---performance IQ of seventy-one, verbal IQ,
3 seventy-nine, full-scale IQ of seventy-four.

4 A. Correct.

5 Q. What's the significance of the performance
6 level and the verbal scale when you're doing an
7 evaluation of that testing?

8 A. When you're doing an evaluation, looking
9 specifically at the intellectual functioning of the
10 individual, and the question exists whether or not the
11 individual is mentally retarded, the significance is
12 that the verbal area would be how well the person learns
13 auditorially, how well the person knows how to use
14 language, and the performance area is the visual
15 abstract skills and kinesthetic movement, how well they
16 are able to use their body.

17 Q. Okay. Why do they have two different scales,
18 and why would those scales be different than the full
19 scale or---

20 A. The---

21 Q. ---how do they compare to put together for the
22 full scale?

23 A. It -- it has to do with the use of language.
24 One is -- one is -- the -- the language usage, which
25 is the verbal scale, specifically looks at how well

1 they do in vocabulary usage, whether or not they're
2 able to use the words in English, at similarities, how
3 well they are able to categorize things, and how well
4 they are able to use language overall, and, also, short-
5 term memory, auditory memory, such as attention digit
6 span.

7 Q. Okay, so, so then the use of words is a very
8 important factor in determining one's IQ level?

9 A. Yes.

10 Q. And -- and, in fact, in his test data his
11 verbal skills reflected a higher level of intelligence
12 than his performance skills. Is that not, also,
13 correct?

14 A. If they were -- if they were scored correct,
15 yes.

16 Q. Okay.

17 A. I never got a chance to see the verticals.

18 Q. Okay. You stated that you reviewed some Hall
19 Institute reports?

20 A. Uh-huh (affirmative response).

21 Q. Let me show you an item dated August 21, 1995,
22 and ask if that is a -- materials that you reviewed.

23 A. Uh-huh (affirmative response).

24 Q. All right. Could you look all the way through
25 it please?

1 A. Uh-huh (affirmative response). Uh-huh
2 (affirmative response).

3 Q. Is that---

4 A. Yes, this is---

5 Q. ---a document you reviewed in making your
6 determination?

7 A. Uh-huh (affirmative response).

8 MR. ZELENKA: I would like to move this into
9 evidence as respondent's exhibit.

10 THE COURT: Any objection?

11 MR. BLUME: No objection, Your Honor.

12 THE COURT: As Respondent's---

13 MR. ZELENKA: Respondent's Exhibit 2.

14 THE COURT: ---2. Okay.

15 MR. ZELENKA: It's the Richard Frierson
16 opinion of three pages. Attached to it is a February 9,
17 1995, Donna Schwartz Watts, Teaching Psychiatrist,
18 evaluation, and attached to that is Forensic Psychiatry
19 Social Worker Readmission Evaluation History.

20 THE COURT: All right.

21 (State's Exhibit No. 2 admitted into evidence.)

22 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

23 Q. Now, in that report by Dr. Frierson he notes
24 or came up with the opinion of borderline intellectual
25 functioning. You do not, as I understand your testimony

1 today, have an opinion one way or another whether that
2 determination is correct. Is that correct?

3 A. Well, I don't use the word "borderline." The
4 American Association on Mental Retardation dropped the
5 term "borderline" in 1973, but as far as his functioning
6 level, I have no objection to what they did.

7 Q. Okay, so your profession has dropped that
8 particular term of "borderline"?

9 A. Uh-huh (affirmative response).

10 Q. Yet the testimony at this trial did refer to
11 that level as borderline intellectual functioning
12 throughout -- isn't that correct -- distinguishing that
13 from the true existence of mental retardation?

14 A. Therein lies the difference between psychiatry
15 and mental retardation.

16 Q. Okay. Now, before your standards that you
17 applied were involved, what was borderline mental
18 retardation defined as, or was there a term "borderline
19 mental retardation"?

20 A. Yes, there was.

21 Q. And what was that level?

22 A. Eighty-five to seventy.

23 Q. Eighty-five to seventy was considered
24 borderline mental retardation?

25 A. Up until 1973.

1 Q. Okay, and in his report he's not referring to
2 this as borderline mental retardation but borderline
3 intellectual---

4 A. Functioning.

5 Q. ---functioning?

6 A. That's correct.

7 Q. And, in fact, I believe in his testimony there
8 was some testimony presented at the trial that this is
9 very close to being mental retardation, on the edge of
10 it, or something like that. Isn't that correct?

11 A. Somewhat, yeah.

12 Q. All right. Okay. Just -- just another area.
13 Do you have a moral position on the death penalty?

14 A. I do.

15 Q. And what is that position?

16 A. I am not particularly anti-death-penalty, but
17 I am vehemently anti-death-penalty for people who are
18 retarded.

19 Q. And your -- your fees for testifying in this
20 particular case for the work that you did on it, how are
21 you billing those fees? What is your normal rate?

22 A. My normal rate is a hundred dollars an hour,
23 but testimony, I charge \$200.00 an hour.

24 Q. Okay, and approximately how much time have you
25 spent in preparation for this case?

1 A. About seven hours.

2 Q. And you still do not have any opinion as to
3 whether Herman Hughes suffers from mental retardation at
4 this time or suffered it at the time of this criminal
5 incident. Isn't that correct?

6 A. It would be unethical for me to render an
7 opinion at this point.

8 Q. Okay. I have no further questions.

9 THE COURT: Redirect.

10 REDIRECT EXAMINATION BY MR. BLUME:

11 Q. I just wanted to clarify one or two things,
12 Dr. Keys, at this time. It's actually more matters
13 of historical record, but, as I understand it, based
14 upon your records he was given in '86 at age eight and
15 a half an IQ test, which showed a full-scale IQ of
16 eighty, and which you said as an expert -- he was eight
17 years old---

18 A. Yes.

19 Q. ---in field of mental retardation you wouldn't
20 put much emphasis on that?

21 A. I would never place a child in a class
22 for kids with mental retardation based upon scores
23 that I received from a child who was less than nine,
24 ten years old. Eight years old is really too
25 young.

1 Q. And does the research, also, indicate
2 that people's IQ tests sort of drop down after that
3 point?

4 A. They regress towards the mean typically.

5 Q. And then the Schlossen you mentioned was
6 in '91, and that was the sixty-eight you're talking
7 about?

8 A. Correct.

9 Q. But according to the federal law based upon
10 your expertise in the area of teaching, there should
11 have been another one in '89?

12 A. Yes.

13 Q. But apparently that wasn't done?

14 A. No, apparently not.

15 Q. So, the school system was obligated to re-
16 evaluate Mr. Hughes in '89---

17 A. They did not.

18 Q. ---but apparently didn't do so, even though he
19 was continuing to fail and do dismal in school?

20 A. Three failures in elementary school should
21 have been a red flag.

22 Q. Why is that?

23 A. Because if he had been appropriately placed,
24 he would not have been failing.

25 Q. And in -- in May of '91 he had the full-scale

1 IQ of seventy-four -- that was at age thirteen -- and
2 then again in '95 in connection with these charges, he
3 was -- the Hall Institute scale of seventy-four?

4 A. Correct.

5 Q. But again, there's no question but that there
6 is nothing about that score of seventy-four which
7 eliminates Mr. Hughes as possibly being mentally
8 retarded?

9 A. No, not at all.

10 Q. And in order to make that determination in
11 your opinion would any responsible mental health
12 professional have to consider adaptive functioning?

13 A. Absolutely.

14 Q. And if that wasn't done, if a comprehensive
15 assessment of adaptive functioning was not performed,
16 then no one could reliably determine Mr. Hughes mental
17 retardation?

18 A. Not at that point, no.

19 Q. Thank you.

20 MR. ZELENKA: Just one followup.

21 THE COURT: Yes, sir.

22 RECROSS-EXAMINATION BY MR. ZELENKA:

23 Q. And -- and this goes back to some of my
24 original questions. In the May 1991, when he was age
25 thirteen, the full scale here is shown as seventy-four?

1 A. Right.

2 Q. Yet the verbal and performance scales are
3 higher than the full scale?

4 A. Right.

5 Q. What causes that in the test data?

6 A. Oh, you mean the -- the verbal and the
7 performance were higher than the full scale?

8 Q. Yes.

9 A. Oh, it's not an average. A lot of people
10 think that it's an average of the two and that it should
11 come out seventy-six, but, in fact, it's based on a
12 totally different scale. The sum of the sub- -- scale
13 scores from both areas actually come up to a -- a
14 separate verbal and performance IQ. Then you take those
15 two verbal IQ's and come up with a full scale based on
16 that, but it's not an average. It's -- it's based on,
17 in fact, which are considered to be better indicators of
18 intelligence, which tests.

19 Q. Okay. Thank you very much.

20 A. Thank you.

21 MR. BLUME: Nothing further.

22 THE COURT: You may step down, sir.

23 THE WITNESS: Thank you very much.

24
25
MR. BLUME: Yes, Your Honor. The applicant

1 would call Amy Pressley.

2 AMY PRESSLEY, BEING DULY
3 SWORN, TESTIFIES AS FOLLOWS:

4 DIRECT EXAMINATION BY MR. BLUME:

5 Q. Ms. Presley, I only have just two or three,
6 two or three questions for you. In -- were you called
7 as a witness in the case of The State versus Kelsey
8 Pierce?

9 A. Yes, I was.

10 Q. And did you, in fact, testify in that
11 case?

12 A. Yes, I did.

13 Q. And was the testimony that you gave in that
14 case truthful?

15 A. Yes, it was.

16 Q. And, as I understand it, what you basically
17 said was that two days before your brother was murdered,
18 that Mr. Pierce came into a Hardee's Restaurant where
19 you were working?

20 A. Yes, he did.

21 Q. And, as I understand it, he was standing --
22 you like felt somebody standing really close to you, and
23 you turned around and saw him?

24 A. Uh-huh (affirmative response).

25 Q. And it sort of -- it made you feel uncomfor-

1 table?

2 A. Yes.

3 Q. And, as I understand, what you did, because
4 you were uncomfortable, you sort of moved away and made,
5 started making, I guess, small talk?

6 A. Yes.

7 Q. And what you basically said was, "Well, when
8 are you coming back to the -- to the video poker lounge?

9 A. Uh-huh (affirmative response).

10 Q. Because at that time I think you worked
11 there. Isn't that correct?

12 A. Yes, I did.

13 Q. And -- and he made the comment, "Oh, like,
14 when are you working again?"

15 A. Yes, he did.

16 Q. And you said, "Friday night"?

17 A. Yes.

18 Q. And after that he left?

19 A. After that, I guess so. I left. I went back
20 behind the counter.

21 Q. Now, let me ask you this. Had you been called
22 as a witness in the trial of The State versus Herman
23 Hughes, would you have testified the same way then as
24 you did at Mr. Pierce's trial?

25 A. Yeah.

1 Q. Because that's what happened?

2 A. Uh-huh (affirmative response).

3 Q. And I -- I just really have one other
4 question, which is something I -- I don't -- I'm
5 confused about. As -- as I understand it, you -- you
6 have a sister. Is that right?

7 A. Yes, I do.

8 Q. And there was testimony yesterday when Mr.
9 Newsom was up about two jurors, Ms. Wise and Mr.
10 Barron?

11 A. Uh-huh (affirmative response).

12 Q. And there was discussion about Mr. Pressley's
13 sisters?

14 A. Uh-huh (affirmative response).

15 Q. And it -- I -- what I -- I really don't know.
16 That's what I'm trying to ask. Was it the same person
17 or was -- Ms. Wise apparently had a daughter who was
18 a -- who was either a friend of you or your sister,
19 and Mr. Barron, somebody was, also, at Mr. Barron's
20 house?

21 A. I was at Mr. Barron's son's house---

22 Q. Okay.

23 A. ---with his wife. Ms. Wise, I don't know who
24 she is. I can't say. I don't know.

25 Q. Okay.

1 A. I mean---

2 Q. All right, but that wasn't you. That's really
3 all. That's not you?

4 A. Not for her. I was the other one, I guess.

5 Q. That's -- that's really all I wanted to know.
6 Thank you so much.

7 A. You're welcome.

8 CROSS-EXAMINATION BY MR. ZELENKA:

9 Q. Now, Ms. Pressley, I just -- let me just show
10 you something, and referring to page 194 of the
11 transcript in State versus Herman Hughes and ask if you
12 -- which is the -- some of the testimony of Brenda Wise,
13 and I just ask if you can review from line 9 through, I
14 believe it would be, line 25 and ask if that may refresh
15 your recollection or not.

16 A. I know a Sherry, but it's Sherry Arrant, so I
17 don't know if -- I don't know how old this lady is. The
18 Sherry that I know is like forty, so if this lady was
19 like sixty or so, that could be her mom. I don't --
20 that's the only Sherry I know.

21 Q. Okay. No further questions. Thank you.

22 THE COURT: All right. You may step down.
23

24 MR. BLUME: The applicant calls Patty
25 Rickborn.

1 PATTY RICKBORN, BEING DULY
2 SWORN, TESTIFIES AS FOLLOWS:

3 THE CLERK: Please state your name and spell
4 your last name.

5 THE WITNESS: My name is Patty Rickborn,
6 R-i-c-k-b-o-r-n.

7 DIRECT EXAMINATION BY MR. BLUME:

8 Q. I think you're only the first person I've
9 let spell their name before jumping in. Ms. Rickborn,
10 how are you currently employed?

11 A. I'm a private investigator.

12 Q. And how were you employed in 1994 and
13 1995?

14 A. I was a private investigator.

15 Q. And in the course of your employment as a
16 private investigator did you ever get a call from a
17 lawyer named Phillip Newsom?

18 A. Yes, sir.

19 Q. And was this in connection with the case of
20 The State versus Herman Lee Hughes?

21 A. Yes, sir.

22 Q. Do you remember when you got that call?

23 A. Not exactly. I know it was probably a little
24 less than two months before the case went to trial.

25 Q. Okay, so sometime in the summer of 1995?

1 A. Yes.

2 Q. The case went to trial the first week of
3 September?

4 A. September, right.

5 Q. And what did Mr. Newsom ask you to do?

6 A. He said that in the event this case went to
7 trial he needed some investigation done for the penalty
8 phase of the trial.

9 Q. Okay, and what did you do?

10 A. I went and met Herman, met Ms. Lucille, his
11 grandmother, and started trying to collect records.

12 Q. Okay, and can you elaborate on that a little
13 bit more?

14 A. Yeah. I started doing interviews with Herman
15 and his family to find out some of his social
16 environment. I started to collect school records so
17 that we could see what his grades and test scores were,
18 as well as interview teachers, counselors, principals,
19 people who had had contact with Herman over the years
20 to try to give a full picture of what his social
21 environment was.

22 Q. And did you -- did you ever interview his
23 mother?

24 A. I spoke to his mother briefly a couple of
25 times just a couple of days before the trial.

1 Q. Uh-huh (affirmative response).

2 A. My main contact was with Ms. Lucille and her
3 son, Herman's father, Herman Hughes, Sr.

4 Q. Uh-huh (affirmative response), and why was
5 that?

6 A. There was -- I don't think that Ms. Lucille
7 and Herman's birth mother, Miranda, really had a very
8 good relationship. As a matter of fact---

9 Q. Is that an understatement?

10 A. That's an understatement. As a matter of
11 fact, I don't know that they had spoken in years, and I
12 had a hard time even locating and contacting Miranda.

13 Q. Uh-huh (affirmative response), and did your
14 investigation reveal that Mr. Hughes' mother had
15 recently moved back to town?

16 A. She had recently returned, and I think that
17 she had moved into the Richland County area by the time
18 we went to trial.

19 Q. Uh-huh (affirmative response).

20 A. She had in the time before the trial, before
21 the incident occurred, she had moved back into the Saint
22 Matthews area where the families were from, but I didn't
23 know where she was in that interim between Saint
24 Matthews and Richland County.

25 Q. And, as I understand it, at least Herman's

1 grandmother thought that was a negative influence on
2 Herman?

3 A. Definitely.

4 Q. Can you elaborate?

5 A. Well, Ms. Lucille had told me about parties or
6 barbecues that Miranda would have, and kids Herman's age
7 would be invited. They were allowed to drink beer and
8 that sort of thing at that time, and Herman liked to go
9 over there and be a part of it because he was accepted
10 to a group of kids his age that he wouldn't have been
11 normally.

12 Q. Do you remember -- did you -- did you ever ask
13 Herman's mother if she had had any diseases during her
14 pregnancy?

15 A. No, sir, I didn't.

16 Q. Now, to your awareness did anybody of the
17 defense team ever ask her?

18 A. Not to my knowledge.

19 Q. But if -- I guess if anybody would have asked
20 her, would it have been you?

21 A. I think it would have been me.

22 Q. Okay. Now, let me ask you this. Did you
23 ever -- I mean, as the investigator in the case,
24 were you integrally involved in the trial preparation?

25 A. Yes, I was involved in trial preparation.

1 Q. And did you ever become concerned and in
2 your opinion feel as if you were not ready to go to
3 trial?

4 A. Yes, sir.

5 Q. And what was that based upon?

6 A. Well, we hadn't collected some records.
7 Even at trial time I was trying to locate some more
8 psychological testing that I had reports that Herman
9 had had. Even when we were -- when Mr. Newsom was in
10 voir dire, I was at this time trying to interview guilt
11 phase witnesses because, as it turned out, the
12 investigator that had been involved in the case -- I
13 don't know his name -- never showed up again, and guilt
14 phase witnesses had not been interviewed by the time
15 trial was occurring.

16 Q. Okay, but -- so basically you just felt like
17 you were not prepared?

18 A. We---

19 Q. There was still work -- even in the voir dire
20 the investigation was still actively going on?

21 A. Very actively going on.

22 Q. And, in fact, do you remember the expert
23 witnesses that were involved in this case? Do you
24 remember when they were retained?

25 A. The ones I recall, Annette Bodie, I contacted

1 her after I was involved in the case. I don't know that
2 they actually got retainers until well after the case
3 was over, but she got involved in the case. I believe
4 that I contacted Dr. Morgan. I know Dr. DeWitt was
5 involved in the case, but I don't re- -- remember having
6 any contact with him.

7 Q. But based upon your recollection this was
8 all several -- this all happened several weeks before
9 trial?

10 A. Yes, sir.

11 Q. Now, based upon your -- in the discussions in
12 which you were involved with Mr. Newsom -- or did you
13 discuss the case with Mr. Newsom?

14 A. Yes, sir.

15 Q. And do you remember, did -- did anyone ever
16 discuss the possibility of locating someone with
17 expertise in the area of mental retardation?

18 A. No, sir.

19 Q. And in your discussions did anyone ever
20 consider or discuss the possibility of retaining someone
21 with expertise in the area of child psychology or child
22 development?

23 A. No, sir.

24 Q. But at the time that you were involved in the
25 case, was it your opinion, the defense theory, that

1 Mr. Hughes was mentally retarded?

2 A. Yes, sir.

3 Q. And, in fact, that was confirmed by your
4 interactions with him?

5 A. The first time I met him I knew that -- that
6 Herman was slow from a lay person's standpoint.

7 Q. And was difficult to get information from and
8 talk to?

9 A. Yes, very reticent.

10 Q. And, also, obviously part of the defense case
11 was that Mr. Hughes was sixteen years old?

12 A. Yes, sir.

13 Q. And that he didn't deserve the death penalty
14 because he was sixteen-year-old person with severe
15 intellectual limitations?

16 A. Yes, sir.

17 Q. Thank you, Ms. Rickborn.

18 THE COURT: Cross.

19 CROSS-EXAMINATION BY MR. ZELENKA:

20 Q. Ms. Rickborn, who -- did you interview the
21 guilt phase witnesses while the voir dire was going
22 on?

23 A. Oh, I was---

24 Q. Do you remember which ones?

25 A. I believe that -- and it's hard for me -- I

1 haven't looked at any of these documents since the last
2 day of trial -- I think that there were some of the
3 fellows that had hooked up with the co-defendants at a
4 club later in that evening, and these were fellows that
5 had been -- had been, you know, not able to contact. I
6 had actually even gone to the city police -- Mr. Lott
7 was the chief then -- and asked them if he -- they could
8 help me locate these people, but I don't recall all of
9 their names, people who had -- possibly ones who had
10 been at the Hardee's during that -- the event where Mr.
11 Pierce was up at the Hardee's. I was looking for people
12 that saw the defendant and his co-defendants after the
13 incident, those people.

14 Q. Okay. Did you work with Annette Bodie in
15 acquiring the medical records involving Herman's birth?

16 A. Yes, sir.

17 Q. Okay, and she had those records at the time
18 she did her social history, correct?

19 A. Any records that I got I would have forwarded
20 to any of the mental health experts---

21 Q. Okay. Did you---

22 A. ---any records that I was able to collect.

23 Q. Did you review those records yourself, or did
24 you just collect them and pass them on?

25 A. Mostly I'd collect and pass on.

1 Q. Okay, so you would not testify about what
2 your understanding and review of the records were or
3 your discussions with any individuals?

4 A. No, sir.

5 Q. Okay, so you don't know whether he had
6 a normal birth or not a normal birth? That was somebody
7 else's determination from a review of those records?

8 A. That would be, I would think, yes.

9 Q. Okay. How involved were you in the -- the
10 jury selection process? Did you discuss potential
11 jurors with Mr. Newsom?

12 A. No, sir. I was out of the courtroom most of
13 the voir dire and jury selection, and I'm not from that
14 area, so I wouldn't have anything much to offer.

15 Q. Okay, but you did sit in during some of the
16 voir dire process. Isn't that correct?

17 A. Yes, sir. I would come in and wait for
18 Mr. Newsom to have a break so I could either pass
19 on information or ask him questions and then wait
20 for another good time again to leave the courtroom.

21 Q. Okay. Did you ever have any discussions with
22 Herman about his background at all?

23 A. Some, and I would end up a great many times
24 going to Ms. Lucille because he wasn't really accurate
25 on things. He disremembered years he was at what school

1 and things like that.

2 Q. There was an issue during the trial about some
3 testing of Herman where there was the risk of syphilis.
4 Do you remember that at all?

5 A. I don't remember that.

6 Q. Okay. No further questions.

7 MR. ZELENKA: Thank you, Your Honor.

8 THE COURT: Redirect.

9 MR. BLUME: No further redirect.

10 THE COURT: All right. You may step down,
11 ma'am.

12 MR. ZELENKA: No objections to her being
13 excused.

14 THE COURT: All right. You're free to
15 leave.

16 MR. BLUME: Your Honor, we have one further
17 witness who is not here. Well, he should be here any
18 second. He's coming from the upstate.

19 THE COURT: We will take about a ten-minute
20 break. See you back in here in ten minutes.

21 (WHEREUPON, RECESS IS TAKEN.)
22

23 MR. BLUME: The applicant would call John
24 Mauldin.
25

1 JOHN MAULDIN, BEING DULY
2 SWORN, TESTIFIES AS FOLLOWS:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: John Mauldin, M-a-u-l-d-i-n.

6 DIRECT EXAMINATION BY MR. BLUME:

7 Q. Mr. Mauldin, how are you currently employed?

8 A. I'm the Greenville County Public Defender.

9 Q. And how long have you been the Greenville
10 County Public Defender?

11 A. Since July of 1992.

12 Q. And so you're a lawyer?

13 A. Yes.

14 Q. And what year did you graduate from law
15 school?

16 A. Graduated in 1973.

17 Q. And that was from the University of South
18 Carolina?

19 A. Emory. Emory University.

20 Q. Okay, and where did you get your undergraduate
21 degree?

22 A. Wofford College.

23 Q. And since 1973 what have you been doing?

24 A. When I got out of Emory, I went for a short
25 stint in the Army. Then I was sworn in in February of

1 1974. I began practice as an Assistant Public Defender
2 in Greenville County, was there for two years, and then
3 in 1976 I started private practice, and I remained in
4 private practice until July of 1992.

5 Q. And then you became the Public Defender?

6 A. Right.

7 Q. In your career as a public defender, assistant
8 public defender/public defender, and private
9 practitioner, have you had any experience in death
10 penalties?

11 A. Yes. In -- in 1974 the statutory scheme at
12 that time was an automatic death penalty for a
13 conviction of murder. I participated in two or three
14 cases during those two years in the Public Defender's
15 Office as essentially an assistant. I was not -- they
16 didn't have the structure then that they do now
17 regarding co-counsel, but I participated in research and
18 motions practice and so forth, actually had the
19 opportunity to go to the Supreme Court, South Carolina
20 Supreme Court, on one of those cases. When I left
21 private practice, I basically made myself available for
22 appointment after the new, the bifurcated system came
23 into effect and was -- and participated in a number of
24 cases as co-counsel and as lead counsel during the time
25 I was in private practice. Of course, in 1992, as Chief

1 Public Defender for Greenville County, I'm lead counsel
2 in any death penalty case that -- wherein there isn't a
3 conflict.

4 Q. Approximately how many capital cases have you
5 been co-counsel or lead counsel in?

6 A. I would estimate probably between fifteen
7 and twenty, probably closer to fifteen, in that
8 neighborhood.

9 Q. In addition to your actual trial experience in
10 capital cases, have you attended any education programs
11 that devoted to the trial of a capital case?

12 A. I have the last, I guess, six or seven years
13 attended the national programs sponsored by the National
14 Legal Aid Defender Association. It's an annual program.
15 In fact, the last two years I've participated as a
16 faculty for that, and that is a capital litigation
17 training program, about a week-long program that they
18 hold at different places across the country once a year.
19 I have attended the NAACP Legal Defense Fund Program in
20 Virginia. I have participated as a presenter or speaker
21 on various programs across the state of South Carolina
22 involving death penalty litigation.

23 Q. Have you ever been involved in sort of any
24 judicial programs?

25 A. This past year I did make a presentation to

1 the judicial conference.

2 Q. On capital case trial?

3 A. On the handling of capital litigation.

4 Q. And, in fact, I think you presented for the
5 defense, and the solicitor in this case, Mr. Bailey,
6 was---

7 A. Right. Mr. Bailey and I did participate in
8 that multi-day program.

9 Q. Okay.

10 MR. BLUME: Your Honor, at this time -- well,
11 let me go ahead and get one area out of the way because
12 I'm sure it's going to come up.

13 DIRECT EXAMINATION RESUMES BY MR. BLUME:

14 Q. Have you ever -- has your license to practice
15 law ever been suspended?

16 A. Yes, it has.

17 Q. And what was that for?

18 A. It was suspended in 1996 for ninety days for
19 failure to file a timely tax return.

20 Q. And I'm sure that the question is going to be
21 whether -- was that case -- was that handled by the
22 Attorney General's Office?

23 A. It was handled by the Attorney General's
24 Office, yes.

25 Q. So, one question which sort of may come up in

1 this, as a result of that do you have any bias against
2 the Attorney General's Office which would lead you not
3 to testify truthfully in this matter?

4 A. Well, I don't have any bias at all about the
5 Attorney General's Office. I mean, they -- about the
6 office staff -- and any discomfort I have with the
7 present Attorney General certainly is not going to lead
8 me to testify untruthfully. That's just a problem that
9 I had, and I regret it, but, you know, I still don't
10 particularly -- I don't consider myself a good friend of
11 the Attorney General, Charlie Condon.

12 Q. Do you feel that based upon your experience
13 -- excuse me -- your experience in capital litigation,
14 the seminars that you've attended, the material that
15 you -- you've read, that you are able to offer your
16 opinions on what the standard of care is for a lawyer
17 in a capital -- a capital defense lawyer in a capital
18 trial?

19 A. I think that I am able to form an opinion
20 and offer that opinion for the Court's consideration
21 on the standard of care that an attorney in a capital
22 case should have and the standard of care that was
23 apparent in the -- in the case that I was given to
24 review.

25 Q. And now in this case what have you reviewed?

JOHN MAULDIN - EXAMINATION BY MR. ZELENKA
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1 A. Pardon me.

2 Q. What -- did you review the transcript of
3 record in this case?

4 A. The Herman Hughes case, yes.

5 Q. And you reviewed the entire transcript of
6 record?

7 A. I did.

8 Q. And you have, also, reviewed Mr. Newsom's
9 deposition?

10 A. Yes, sir.

11 Q. I think the deposition of Jeff Bloom?

12 A. Yes, sir.

13 Q. And certain other background materials, which
14 were provided to you by my office?

15 A. That's right.

16 MR. BLUME: Your Honor, at this time I would
17 offer Mr. Mauldin as an expert on the standard of care
18 for a South Carolina lawyer in a capital case.

19 THE COURT: Yes, sir.

20 MR. ZELENKA: A couple of voir dire questions?

21 THE COURT: Yes, sir.

22 EXAMINATION BY MR. ZELENKA:

23 Q. Mr. Mauldin, have you ever testified a
24 deposition post-conviction relief case as a -- a witness
25 who is being challenged for ineffective assistance of

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1 counsel?

2 A. As a witness for what?

3 Q. Whose own competency was being challenged?

4 A. Yes.

5 Q. And, in fact, in the Herman Hughes death
6 penalty case did you not conceded on that case---

7 A. This is the Herman Hughes case.

8 Q. Excuse me. Shawn Paul Humphries case, did you
9 not, also, concede that you failed to do adequate
10 preparation in that case?

11 A. I was called as a witness in that case,
12 and after reflection I felt like I had -- had done
13 some things and failed to do some things that I wish I
14 had.

15 Q. Including the preparation of social history
16 witnesses, correct?

17 A. In the sentencing phase there were things
18 I wish I had done in -- in the Shawn Humphries case,
19 yes.

20 Q. Including the preparation and presentation
21 of witnesses, correct, the social worker particularly?

22 A. Oh, yes, yes.

23 Q. Failing to object to victim's impact testimony
24 that was introduced, correct?

25 A. That's right.

1 MR. ZELENKA: Your Honor, I would move that by
2 his own admissions he is not qualified to be an expert
3 witness in this area. I don't disagree that Mr. Mauldin
4 is a competent lawyer. I don't disagree that Mr.
5 Mauldin is qualified to be appointed to represent an
6 individual in a death penalty case based upon his
7 experience, but I think the question here is whether he
8 is competent as an expert witness, whether he has
9 acquired knowledge or skill in a business, profession,
10 or science or study or experience or both so that he
11 will be better able than you, the judge, to form an
12 opinion on a particular matter since you are the finder
13 of fact in this case, and I would submit that under
14 those reasons, based upon his own stipulation, that in
15 his own practice he doesn't feel that he has met a
16 standard of care, that he should not be qualified as an
17 expert in this situation.

18 Second, I do not believe in a death penalty
19 post-conviction relief case or any post-conviction
20 relief case expert testimony is necessary for you as
21 the finder of the fact to make a determination as to
22 whether a lawyer properly practiced law. You are a
23 judge. You are the finder of the law, also, in this
24 situation, and you have an understanding of the quality
25 of representation that is necessary by your own oath as

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1 a judge, and I would submit that, first, he is not
2 qualified and, second, that expert testimony would not
3 be appropriate or necessary under Rule 703.

4 THE COURT: All right.

5 MR. BLUME: Well, I mean, obviously we
6 disagree, but the important points, I think -- let me
7 turn to the attorney general issue having to do with
8 this.

9 THE COURT: Let's deal with the -- the issue
10 regarding his -- whether or not he qualifies as an
11 expert. Deal with that.

12 MR. BLUME: Aside from the testimony itself,
13 whether the -- the area of expertise. You aren't
14 talking about his particular expertise.

15 THE COURT: Yeah. I want to talk specifically
16 about the objection to him qualifying as -- and based on
17 the fact that in the Shawn Humphries case he had
18 conceded that he failed to make adequate preparation and
19 failing to object to some of the testimony that was
20 presented in the sentencing phase.

21 MR. BLUME: Well, I -- I think any lawyer, one
22 who has ever tried a capital case and has achieved --
23 and there has been a death sentence, there is then an
24 allegation of ineffective assistance against him in
25 post-conviction. I am not aware of any.

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1 I think that no lawyer, no matter who it is,
2 whether it's, you know, David Bruck in South Carolina,
3 whether it's Steve Bright in Atlanta, whether it's
4 Johnny Cochran, would ever say that they have tried a
5 perfect case or admitted -- admitted, if asked, if
6 testified truthfully, that there are certain things they
7 would have done differently and felt like they didn't
8 handle properly.

9 I think the fact that he has been involved in
10 a number of cases, in fact, as near as I can tell, it's
11 the only one in which they mentioned there has been any
12 challenge of his competency, doesn't render him
13 incompetent.

14 I mean, that would mean no doctor, for
15 example, could testify in a malpractice case if there
16 had ever been a malpractice allegation against him, or
17 they had admitted they had done something wrong.

18 In reality, sometimes you learn from things
19 you do wrong.

20 THE COURT: All right. Now, one of the
21 questions that I did have was whether or not this Shawn
22 Humphries case was the only case in which he was called
23 in on post-conviction relief and admitted that he had
24 made an error, if that was something that he -- that
25 he does on a regular basis or if this was the one that

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1 you found, "Gee, I neglected to do this." We can either
2 ask him the question, or you can ask supply the
3 information.

4 MR. ZELENKA: Well, if you want me to -- to
5 continue some of the voir dire---

6 THE COURT: Yes.

7 MR. ZELENKA: ---which -- which may reflect
8 some of the history that I've had with Mr. Mauldin over
9 the years, which may go back into some of the specific
10 individuals who have been sentenced to death that you
11 represented.

12 EXAMINATION RESUMES BY MR. ZELENKA:

13 Q. Who particularly were those individuals?

14 A. Well, the -- the -- I guess the one that --
15 that comes back, the most significant in my mind, was
16 Dale Yates. It was a case that spent, I guess, ten or
17 twelve years in the appeals process before he was
18 ultimately resentenced to life. Mr. Humphries is the
19 only client that I've represented who is on death row,
20 and -- and I'm not absolutely sure about this, and I
21 certainly -- it could be corrected, but, if I -- if I'm
22 not mistaken, in that -- in the Humphries post-
23 conviction that you referred to a moment ago Judge Hall,
24 I think it was, Dean Hall from Anderson actually issued
25 an order in that case---

1 Q. Yes, sir. That is correct. Judge Hall found
2 as a fact that his performance was not deficient in that
3 case for failing to object. It -- excuse me -- that
4 there was not prejudice found based upon the failure to
5 object based upon his assertion of, or admission of,
6 deficiency.

7 A. And I haven't read that order. I don't really
8 know what -- what actually -- what actual findings were
9 made. I just understood from counsel that that case had
10 not been remanded for -- for a new trial.

11 MR. ZELENKA: That's correct. It's on appeal
12 to the South Carolina Supreme Court right now, Your
13 Honor.

14 THE COURT: Let me ask you. Is that the only
15 death penalty post-conviction relief at which you've
16 testified?

17 THE WITNESS: The only one where I have made
18 statements regarding things I wish I had done. That's
19 right.

20 MR. ZELENKA: The other case would have been
21 the Dale Yates case, I believe.

22 THE WITNESS: The -- yeah. In the Dale Yates
23 case there never was, if I'm not mistaken, there never
24 was an allegation of ineffective assistance that I can
25 recall. The -- the issue in the Dale Yates case that,

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1 if -- if I'm not mistaken, led to two or three trips to
2 the United States Supreme Court was the presumption
3 of malice issue. I don't recall testifying in --
4 in a proceeding in the Dale Yates case where I was
5 asked about my effectiveness. I just don't remember
6 testifying on such in the Dale Yates series of
7 cases.

8 MR. ZELENKA: I don't want to be a fact
9 witness in this, but I did handle the Yates case, but I
10 believe there were some claims, and i believe Mr.
11 Mauldin did testify in that case, other than on the --
12 the malice issue. I do not have any recollection nor
13 would I take the position that he conceded inefficiency
14 in that case.

15 MR. BLUME: Which is in -- in the early
16 seventies, anyway.

17 THE WITNESS: It was early eighties.

18 MR. BLUME: The trial?

19 THE WITNESS: He was convicted in '81.

20 THE COURT: All right. I'm -- I find him an
21 expert in -- in the area of death penalty defense work,
22 and I will deem him qualified as such.

23 Now, we've got the second issue to deal with,
24 and that is do we even need an expert in this area, and
25 let me hear from you on it.

1 MR. BLUME: Well, Your Honor, I would think it
2 certainly is an area -- no one is saying that whatever
3 he says is binding upon you or ties your hands, but it
4 is an area in which there are a number of issues.

5 There is, I think, generally recognized things
6 that a lawyer should do, and -- and the standard of
7 care, the testimony on the standard of care, what a
8 lawyer would do in a number of situations is certainly
9 testimony which could inform the trier of fact and could
10 give you information about that. Testimony like that is
11 admitted in a number of jurisdictions.

12 Actually we have a memorandum which lays --
13 I'll give it to you -- which lays out some of this under
14 the rules, and -- and I think it would be -- it would be
15 probative to have Mr. Mauldin testify.

16 I would, also, I mean, suggest that the Court
17 -- I understand if the Court wants to sort of, you know,
18 take this issue at least under advisement, regardless of
19 the ruling, since it's a post-conviction relief
20 proceeding, that we are going to have to -- we would
21 need to make a proffer, so maybe this, I don't think,
22 will be very long testimony. Maybe the best thing to do
23 would be for us to go ahead and put him up, subject him
24 to cross-examination, and the Court can consider the
25 issue and then make a decision about whether to consider

RE: QUALIFICATION

1 it or not.

2 THE COURT: Any objection, Mr. Zelenka, to
3 postponing? I'll have a chance to review and make that
4 determination?

5 MR. ZELENSKA: No, I don't have any objection
6 to -- to that format. Also, it's noted in their
7 memorandum in support, one of the depositions that they
8 intend to proffer involves another attorney out of
9 Columbia, the material Mr. Mauldin has relied upon,
10 Mr. Jeffrey Bloom, and that matter is, also, going to
11 be coming before the Court, also, and we objected to his
12 qualifications as an expert, also.

13 MR. BLUME: As I understand it, the objection
14 to the Bloom deposition, it's not the first part, which
15 is the fact part, but is the additional part about the
16 expert testimony and the voir dire issue.

17 MR. ZELENSKA: No, it -- it was an objection to
18 him being qualified as---

19 MR. BLUME: Oh, right, right, but I'm saying
20 there were two, if you remember. There were two aspect
21 to his testimony, one that he came in at the beginning,
22 and I just wanted to clarify for the record---

23 MR. ZELENSKA: He had a factual---

24 MR. BLUME: ---he had a factual---

25 MR. ZELENSKA: Right.

1 MR. BLUME: ---but there's no objection---

2 MR. ZELENKA: Right.

3 MR. BLUME: ---to that part of his deposition
4 coming in.

5 MR. ZELENKA: Right.

6 MR. BLUME: The objection is solely to his---

7 MR. ZELENKA: Correct.

8 THE COURT: All right.

9 DIRECT EXAMINATION RESUMES BY MR. BLUME:

10 Q. All right. Mr. Mauldin, we've gone through
11 what you've reviewed in this case, and I just have three
12 or four areas in which I want to ask you about, and,
13 first, the record is clear in this case that Mr. Newsom
14 tried the case by himself, that there was no co-counsel
15 appointed. In your opinion and based upon your
16 experience as a capital trial lawyer, can a lawyer
17 really do one of these cases by himself?

18 A. Well, I think the question of whether an
19 attorney can do one by himself is perhaps a little bit
20 too broad. I -- I think that the wisdom is -- is clear,
21 and that is that the Legislature enacted a statute that
22 provided for two attorneys to be appointed in death
23 penalty cases. There's no other area of the law that
24 I'm familiar with in South Carolina where the
25 Legislature, in fact, has taken it upon themselves to --

1 to express such a -- such a -- a level of -- of demand,
2 but I think that more than that from a practical point
3 of view, in my opinion, a -- a case of the magnitude of
4 a capital case should never be handled by one attorney.
5 It is much too -- generally these cases, and in
6 particularly my review of the Hughes case, indicates
7 that there is simply much too -- they are much too
8 complicated for an attorney to call upon himself to try
9 to be the watchdog for that entire process, many too --
10 much too broad a spectrum of responsibility. The stakes
11 are certainly tremendous. As -- as capital litigators
12 it's my impression that these cases need to -- the focus
13 on these cases needs to be at the trial, the original
14 trial of the case, and so it's my impression that no
15 attorney should accept the responsibility of trying one
16 of these cases alone.

17 Q. Would your answer be different in any way if
18 the -- if you knew that the lawyer had never actually
19 been to trial in a capital case, taken a capital case
20 through the trial process?

21 A. Well, obviously my answer would be multiplied
22 by that fact. When I say that no -- I feel like I've
23 had a lot of experience in capital litigation -- I would
24 never take a capital trial alone. If I had to, I would
25 associate co-counsel out of my own pocket before I would

1 do that, and -- and -- and yet I consider myself rather
2 extensively experienced in those cases. I think that
3 the -- the lesser experienced attorney, it would be even
4 more profoundly necessary that he have co-counsel.
5 appointed or retained or in some way associated in a
6 case of this magnitude.

7 Q. Thank you. I -- I want to now talk about
8 several specific areas of the trial and the part that
9 you reviewed. Start with the voir dire, and based upon
10 your review of the record in this case, have you come to
11 any conclusions about the manner in which the voir dire
12 was handled?

13 A. I think that -- my observation about the
14 voir dire would -- would go under two areas. First
15 would be the general voir dire where you have the entire
16 panel present, and then the second level would be in
17 the individual sequestered voir dire of the prospective
18 jury members. My feeling with regard to the general
19 voir dire, this is -- and I don't have the -- the page
20 references, but it's -- began at the very beginning
21 of the transcript of record that I reviewed -- there
22 was an apparent just a very significant number of jurors
23 who were excused for reasons that had to be taken into
24 consideration by the Court, such things as -- and I'm
25 not talking about excuses for like age or like an

1 exemption -- I'm talking about where a person could
2 very well have been kept on the panel, but they were
3 released after expressing some concern about whether
4 they could fairly participate in the case. It appeared
5 in my review of the transcript that this was a -- that
6 there were an awful lot of jurors that were excused
7 for -- for various reasons. The -- the concern I had
8 as a capital litigator is that -- that one of the things
9 that I would want to do as a defense counsel is keep
10 as many people in the pool as I possibly could,
11 particularly one thing of consideration would be until
12 they get on individual voir dire where you can discuss
13 their individual reasons with them, it's difficult
14 when they're out in a big group to get real specific,
15 but there were a number of occasions where Judge
16 Cottingham even stated into the record that he was
17 giving counsel an opportunity to question the jurors,
18 and he -- and counsel was apparently choosing not to.
19 In my---

20 Q. And that, I believe, is on page 124 and 135 of
21 the record?

22 A. Yes. They -- I -- I made reference to a
23 number of pages, but 124 and 135 are both included
24 in my list. I've got a list of probably ten or fifteen
25 page references where there was some comment either

1 directed to the attorney or directed, in fact, to
2 the record saying that the -- the attorney has that
3 opportunity and is choosing not to or asking the
4 attorney if he wants to question the jurors, and --
5 and the attorney was saying that he did not. What
6 that does, at least to me, reading just the black letter
7 of the transcript is it indicates to me that the judge,
8 in fact, was thinking about the fact that they were
9 losing a lot of jurors, and nobody was saying anything
10 about it.

11 MR. ZELENKA: Your Honor, that calls for
12 speculation and move to strike.

13 THE COURT: And I'll sustain that. We'll just
14 strike---

15 THE WITNESS: Well, from reading the
16 transcript I gained the impression that because the
17 judge kept mentioning that -- that -- that the attorney
18 was not expressing any concern, I -- I just let the
19 record speak for itself on that, but it did occur a
20 number of times, and it got my attention.

21 DIRECT EXAMINATION RESUMES BY MR. BLUME:

22 Q. On the individual voir dire I wanted to ask
23 you some -- some specific questions. In your opinion
24 was the mode of questioning used by Mr. Newsom adequate
25 to determine whether jurors were qualified under the

1 law? First, let me set the stage. The standard, as I
2 understand it, is that a juror is qualified or is not
3 qualified, I guess, if their views on the death penalty
4 would substantially impair their ability to follow the
5 law.

6 A. That's, more or less, right, yeah.

7 Q. And jurors, as I understand it, can be
8 disqualified for two reasons: either their views
9 against the death penalty or their opposition to the
10 death penalty would prevent their ability to follow
11 the law, and those people are often referred to by --
12 as Witherspoon excludibles---

13 A. Right.

14 Q. ---or whatever, and then, on the other
15 hand, there are jurors who would always vote for the
16 death penalty in a case of murder, and they're gen-
17 -- often referred to as ADP or automatic death penalty
18 jurors?

19 A. That's right.

20 Q. In your opinion as a capital defense lawyer,
21 is that an important thing to know, where the juror
22 falls along the spectrum?

23 A. Well, it -- in my opinion that is the
24 most important consideration is making a legitimate
25 determination based upon their responses to the

1 questions during voir dire about how strong either
2 way they are. Obviously, the questions, if they
3 -- if the questions ultimately show that the person
4 does appear to be always in favor of the death penalty
5 in a -- in a -- in the case of a conviction for murder,
6 then that person should be struck for cause. On the
7 other hand, the prosecutor certainly would move to
8 strike a juror for cause if it appeared that juror
9 would never give the death penalty in a conviction for
10 murder, and -- and what the purpose of voir dire is is
11 to determine those in the middle. In other words,
12 you're going to have those struck for cause on both
13 ends, and -- and then you're going to have those in
14 the middle that are going to technically be qualified.
15 In order to determine if they're technically qualified,
16 you've got to ask them how they feel about the death
17 penalty and whether they understand that it's not
18 just merely a matter of considering mitigation because
19 some jurors actually think that self-defense is
20 mitigation, and so you have to ask them questions
21 about how they feel about the death penalty in order
22 to determine where in between those two extremes they're
23 going to fall.

24 Q. Were those questions asked in this case?

25 A. Well, they were not. There may have

1 been an occasion here and there where somebody said
2 something about the death penalty, but essentially
3 what happened was Solicitor Bailey very -- and he did
4 a very, very good job -- he -- he, first of all, he went
5 first.

6 THE COURT: Okay. Push the mike. It's
7 probably -- if you'll push it back just a little bit.
8 There you go. That should do it.

9 THE WITNESS: First of all, Solicitor Bailey
10 went first every time, which is just what you might in
11 my business say is an absolute no-no.

12 DIRECT EXAMINATION RESUMES BY MR. BLUME:

13 Q. Is that unusual in your experience?

14 A. Well, I mean, it -- it's just -- it just never
15 happens if it is brought to the Court's attention at the
16 beginning that -- that that is not the way it ought to
17 be done.

18 Q. Why does it matter?

19 A. Well, it -- it matters because if jur- --
20 let's say, if Juror No. 1 comes into the courtroom
21 and is questioned first by the solicitor, the solicitor
22 essentially gets to "teach" the juror the meaning
23 of statutory aggravators, mitigation, mitigating
24 circumstances, bifurcated trial, so he does a lot of,
25 I guess you might call, teaching during the --

1 the original or early questions to that juror. If
2 he is allowed the first bite, if you will, at the
3 apple on every juror, then it's difficult to -- to
4 get an objective view of how all these jurors feel.
5 What I generally do is I ask, No. 1, that the judge
6 declare that the prosecutor not be allowed to -- to
7 do individual sequestered voir dire. That motion is
8 always denied, and there are cases that say that they
9 do have the right to individual voir dire, participate
10 in individual voir dire. The -- the next motion is
11 that we alternate going first, and -- and that's
12 always granted. You know, I don't recall trying a
13 case where it was denied, where we were denied the
14 right to at least an alternating turn at the juror.

15 Q. In your experience is that a common practice
16 around the state?

17 A. Well, I can't---

18 Q. If you know?

19 MR. ZELENKA: Object, unless he actually
20 knows.

21 THE COURT: See if you can lay the foundation.

22 DIRECT EXAMINATION RESUMES BY MR. BLUME:

23 Q. Have you ever discussed this particular issue
24 with other public defenders in the state?

25 A. In -- in con- -- in training conferences and

1 in other South Carolina Public Defender Association, of
2 which I'm a board member, the subject of the handling of
3 death penalty cases certainly is a very important
4 subject of discussion, and I have never heard any public
5 defender say, at least to me, that they always go last.
6 I mean, I just kinda' -- I've always assumed that they
7 at least have the right to alternate the order of
8 questioning.

9 MR. ZELENKA: I -- I move to strike that.

10 THE COURT: Sustained. He's indicated that
11 he's assuming they've gotten that right.

12 THE WITNESS: They've never made statements to
13 me---

14 MR. BLUME: Okay.

15 THE WITNESS: ---otherwise.

16 DIRECT EXAMINATION RESUMES BY MR. BLUME:

17 Q. Well, but in your opinion there's no question
18 that this -- it's important to at least attempt to go
19 first?

20 A. Absolutely.

21 Q. And in your experience in Greenville, that's
22 always been -- that's always happened?

23 A. My recollection is that's always been the case
24 in our capital cases that we, at worst, alternate the
25 order of questioning.

1 Q. And then you, also, were saying that the
2 defense counsel -- we're talking about defense counsel's
3 handling the voir dire -- never or did not
4 systematically ask jurors what their opinions or views
5 or beliefs were about the death penalty?

6 A. My review of the voir dire, it was many, many
7 pages in the transcript, and I didn't actually make note
8 of when he might ask it or when he didn't. I just know
9 that it appeared very, very rarely in his questioning
10 did he actually just come right out and ask the juror or
11 prospective juror how they felt about capital punishment
12 or the death penalty, and -- and the thing that -- that
13 is of significance to me is that that is, in fact, the
14 point. The point is -- I mean, the questions about
15 employment and what kind of cars you drive and all of
16 that, those are -- those are nice things for us to know,
17 but as litigators we have got to know the central and
18 focused issue, and that is how this prospective juror
19 really feels about the imposition of the death penalty
20 for a murder case.

21 Q. Now, there were, also, a number of jurors who
22 were asked questions about whether they could impose the
23 death penalty on a sixteen-year-old, and, in fact, a
24 number of jurors were disqualified for cause because
25 they indicated they could not give a sixteen-year-old

1 the death penalty. Is that consistent with your
2 recollection of the transcript?

3 A. Of my recollection of the transcript? Yes.

4 Q. In your opinion should that question have been
5 objected to?

6 A. The -- the first time that question was
7 asked, I would have objected to the form of that
8 question. That -- that question essentially what I
9 -- I call qualifying on the facts of the case, the
10 juror was being asked a specific fact of that specific
11 case and how they felt, pro or con, about that fact.
12 I believe that that question would have been disallowed
13 if -- if you had objected to it at the very first
14 occasion, and then, of course, the -- if it had been
15 allowed, if the -- if the Court had overruled that
16 objection, then the least that would then have followed
17 would have been followup questions from the defense
18 counsel about whether they would consider specific
19 fact situations that related to the mitigation in his
20 case. In other words, if the prosecutor is going to
21 be allowed to ask a specific question that I consider
22 qualifying the juror on the facts of the case, then
23 the -- if that objection is overruled, then you could
24 assume that if you asked the jurors if they considered
25 a -- a -- an accused person's mental retardation or

1 mental illness or---

2 Q. Intoxication?

3 A. ---intoxication or any of the other things
4 that were going to be supported in the record of the
5 case, then that objection from the prosecutor would
6 likewise be overruled. I mean, you know, what's good
7 for the State's good for the defense in my opinion,
8 and I just -- I think the question should have been
9 objected to, and then, depending upon the way the judge
10 ruled, you would develop your voir dire based upon that
11 ruling.

12 Q. And a lot of times the objection, as I
13 understand it, when the defense lawyers do it, is
14 there's an objection, and you're trying to stake out the
15 jury?

16 A. Stake---

17 MR. ZELENKA: Your Honor, he's leading the
18 witness to a great extent.

19 THE COURT: Sustained. Rephrase.

20 DIRECT EXAMINATION RESUMES BY MR. BLUME:

21 Q. Have you ever heard the phrase "staking
22 out"?

23 A. Yes.

24 Q. And what does that mean?

25 A. What that means is is that you're trying to

1 focus that juror on a particular fact of mitigation in
2 your case, and you are staking out that juror in support
3 of a fact in your case. Well, that's exactly what
4 occurred from the prosecution's point of view with the
5 question, "Could you impose the death penalty on a
6 sixteen-year-old?" That's -- that's exactly the same
7 question.

8 Q. And you've indicated what in your opinion
9 defense counsel should do if the motion were denied,
10 and was that done here based on your review of the
11 record?

12 A. There was no objection to it, and then when
13 -- and what defense counsel should then have done is
14 the -- the defense counsel should have qualified the
15 jurors on his mitigation factors because then any
16 objection from the State would have led to him being
17 disallowed the question about the sixteen-year-olds,
18 so -- so that -- that was my impression about that
19 question. It, in my opinion, it is objectionable.
20 Now, if it -- if it is -- if the objection is sustained,
21 then it prevents the State from asking that question.
22 If the objection is overruled, it should then allow the
23 defense counsel to ask questions about mitigation, so it
24 was -- either way or the other, it would have been
25 better than -- than the way it turned out in terms of

1 the questioning.

2 Q. Let me ask you about -- there were two jurors
3 -- there's been some discussion about them already,
4 Jurors Brenda Wise and William Barron?

5 A. Yes, sir.

6 Q. In your -- who were qualified without
7 objection and then not challenged and actually ended
8 up on the jury in this case -- based upon your
9 experience and your review of the record, would you
10 have made a motion to challenge for cause those two
11 jurors?

12 MR. ZELENKA: Objection, Your Honor. He's
13 already declared he did not hear Mr. Newsom's testimony
14 as a basis on this issue. That includes evidence
15 outside of his understanding of the record in this
16 case.

17 MR. BLUME: I'm just ask- -- okay -- well,
18 I mean, that's certainly legitimate for cross-
19 examination.

20 DIRECT EXAMINATION RESUMES BY MR. BLUME:

21 Q. Based solely upon your review of the
22 record?

23 A. Based upon my review of the record regarding
24 Juror No. 293, who was Brenda Wise, and Juror No. 7,
25 who was William Barron, it was absolutely extraordinary

1 to me that those two jurors could ever have possibly
2 ended up among the twelve jurors to decide the case.

3 Q. Why?

4 A. I mean, that -- that is a very, very bad
5 error.

6 Q. And why do you -- you hold that opinion?

7 A. Well, the -- the -- in Juror 293, Brenda
8 Wise, there's testimony under individual voir dire.
9 She stated that -- that she -- that her daughter had
10 counseled the sister of the -- of the victim who had
11 been killed, and -- and this was between, obviously
12 between, the -- the time of the incident and the time
13 of trial, the period of time pretrial. A member of
14 her family had -- had served as a counselor, if you
15 will, or a support mechanism for the sister of -- of
16 the victim. My impression is that a person in that
17 position literally could have ended up being called as
18 a State's witness under victim impact testimony. I
19 mean, this person had personal, direct, personal
20 knowledge of the -- the crisis that a member of --
21 of the deceased family had gone through during the
22 period of time prior to trial, and that in my opinion
23 would form a heart-wrenching connection between
24 that juror and that victim's family member. I mean,
25 it's impossible for it not to have. She felt strongly

1 enough about it to tell the Court that she had been
2 involved that situation, that, you know, and -- and
3 it should have led at the time of the individual
4 sequestered voir dire when Ms. Wise was asked to step
5 out of the room, the least that should have been done
6 was at that time defense counsel should have asked
7 that she be struck for cause. If I'm not mistaken,
8 she was the first juror, the very -- the very first
9 individually sequestered juror, and the least that
10 could have happened was he should have asked that she
11 be struck for cause and they just go on to the next
12 person who'd had no personal contact with the victim's
13 family. Not only at that time did the attorney say,
14 "I think she's qualified," but he then -- when she --
15 she was the first juror then in line to sit, and he did
16 not strike her. He had ten strikes available to him at
17 that point, and he did not strike that juror, you know.
18 I just thought that it was an extraordinary fact that
19 she could end up on the jury. I believed from her
20 questions in voir dire, had she not even had any
21 personal knowledge, it appeared that she may even be
22 qualified as a automatic death penalty potential. Now,
23 I don't know where any other questions would have led
24 because there were no questions asked that would have
25 really expounded on that fact, but it was just --

1 it just jumped off the page to me that she ended up
2 actually one of the twelve jurors in the case. She
3 had a personal connection with the family, who --
4 who -- and that family actually testified in the
5 victim impact presentation in the sentencing phase,
6 and that's -- that's just an extraordinary situation.

7 Q. What about Juror William Barron?

8 A. William Barron, also, had in my opinion an
9 extraordinary connection or direct personal connection
10 with the case. He, in fact, he brought it out on his
11 own, before the questioning even began, he started out
12 his -- his voir dire by saying, "Judge, I think I need
13 to make a statement," and so it was profoundly important
14 to him as a juror. He wanted to make sure everybody in
15 the room knew the situation. He stated that he had
16 received a telephone call from the police, and the --
17 the sister of the victim was staying at his farm. She
18 was like a visitor. I think she was a friend of one of
19 his family members, and the -- the juror himself had
20 gotten a telephone call to go inform her about what had
21 happened about the individual or her family member being
22 killed, and -- and, you know, furthermore, he, also,
23 testified that his own daughter-in-law worked at the
24 same, had worked, or did work -- I can't recall -- I
25 think, it seems to me like she had worked at the same

1 crime location, the place where the incident had -- had
2 taken place. You know, it -- it -- to me what brought
3 -- brought -- what that brought to mind to me is that
4 that was -- that's a perfect example of why family
5 members are disqualified from serving as jurors in
6 cases like this. I mean, he -- his connection was
7 very, very clear. It was equally compounding to me
8 that he and Juror Brenda Wise would have had this same
9 connection. I mean, they -- it -- it could have created
10 a serious bond, if you will, between those two jurors
11 because either one of them could have been witnesses at
12 the victim impact stage of this trial, and -- and the
13 -- the -- the attorney in the case did not ask Mr.
14 Barron one single question about how that circumstance
15 about that phone call from the police could affect his
16 -- his ability to -- to be fair and impartial. Not one
17 single question was asked by defense counsel. I mean,
18 that's -- I don't know whether he was afraid of what
19 the answers would be or what, but he should have moved
20 the Court to strike that juror for cause, and if -- if
21 it -- if that juror wasn't struck for cause, the least
22 he could have done was ex- -- exercise a preemptory
23 challenge. He did not do that. He had plenty of
24 preemptory challenges left. I think Mr. Barron --
25 I don't remember what number he was, but he was in

1 the first half of the jury selection, and to further
2 compound the problem, Mr. Barron ended up being
3 appointed foreman of the jury, which -- which is
4 just an extraord- -- just a nightmare to me, and
5 that's just my observation from the transcript in this
6 case.

7 Q. Did -- based upon your review of the record
8 was there a single challenge for cause made by defense
9 counsel in this case?

10 A. I don't recall seeing any motions to strike
11 a juror for cause by -- by the defense. Now, I may
12 be mistaken. It was a very lengthy transcript, and,
13 you know, and -- and I wasn't keeping a tally of
14 how many motions for strike he made. I just do not
15 recall him making any motions to strike a juror for
16 cause.

17 Q. Is that unusual?

18 A. It is unusual in that if you have a -- like in
19 the automatic death penalty case scenario, if you ask
20 questions where a juror appears to be an automatic death
21 penalty or a ADP juror, when that juror steps out of the
22 room, you need to make your motion. Now, if your
23 motions are denied, seven times out of ten the fact is
24 is at least in three of those cases that juror is
25 excused, and you're not going to have to use one of

1 your preemptory challenges to get rid of that juror,
2 so from the -- the point of planning ahead for what
3 you're going to do with your preemptories when the
4 jurors are -- are called, it is important to attempt to
5 develop strikes for cause for jurors that are -- that
6 are not -- don't tend to be at least leaning in your
7 direction.

8 Q. I want to turn now to the voir dire and ask
9 you about two specific guilt phases, two specific
10 instances at the guilt or innocence phase---

11 A. Right.

12 Q. ---of the proceedings, and the first question
13 I want to -- issue I want to ask you about has to do
14 with the testimony of Henry Daniel Owens, Jr., who was a
15 witness for the prosecution in this case, and I want to
16 ask you if, based upon your experience, you have any
17 opinion about how the impeachment or attempted
18 impeachment of Mr. Owens was handled?

19 A. I think that the -- that there were a couple
20 of points with regard to the handling of Mr. Owens that
21 I think need to be addressed with regard to whether he
22 was effectively handled on cross-examination. The first
23 is -- relates to the charges against him, and the second
24 relate to other matters of appearance of a bias. The --
25 the -- with regard to the charges against him, which is

1 clearly the -- the most important with regard to his
2 handling as a witness, he was charged with accessory
3 before the fact of murder, among other things, and
4 accessory before the fact of murder carries a potential
5 life sentence, accessory before the fact of murder. The
6 agreement that he had entered with the State was that he
7 would enter a plea to misprision, and the jury was, in
8 fact, informed that misprision carried as much as
9 fifteen years. Well, the fact is is that it actually, I
10 think, that's incorrect. I believe it carries as much
11 as ten, so they factually were misled about what he
12 faced. What they were not told is that accessory before
13 the fact, which is what he was charged with, carried a
14 life -- a life sentence, and so the -- the -- the --
15 what should have been done is that the jury should have
16 heard that that witness had made a deal with the State
17 that had reduced his exposure from a potential life
18 sentence to no more than ten, which would have been an
19 actual accurate statement. Now, the -- the fact is is
20 the guy ended up receiving probation, so I just think
21 that -- that the jury should have been -- it should have
22 been addressed to the jury the magnitude, if you will,
23 of the deal that Daniel Owens was -- was getting as a
24 result of his co-operation with the government, and --
25 and they never were told that. They -- I just don't

1 -- I think that they felt like accessory before some
2 crime might mean he would have to serve six months on
3 the chain gang or something. I just don't think they
4 felt like it was a big deal, and they should have been
5 told what the deal really was, and they were not told
6 that.

7 Q. Okay.

8 A. And with regard to the bias of the witness,
9 I felt like -- and -- and the -- the defense attorney
10 did address the fact that Kelsey Pierce, who was a
11 co-defendant in this case, was this fellow's nephew,
12 and I believe he was asked a time or two during his
13 examination about whether he was the nephew -- I think
14 he could have worked a little harder on that, and I
15 don't know, maybe that's just a matter of degrees, so
16 I don't know if that would raise to the level in terms
17 of the standard, but the -- the fact that -- that Kelsey
18 Pierce admittedly owed him a lot of money, there were
19 -- there was talk about he owed them -- owed him a lot
20 of money -- I think Mr. Owens could have been hammered
21 aggressively on the fact, on -- on those, those two
22 facts, plus the fact that he was getting the deal of a
23 lifetime from the prosecutor.

24 Q. Okay. I want to ask you about one other
25 guilt phase area I want to ask you. There was a witness

1 for the prosecution, a young woman who is actually a
2 victim in this case, by the -- by the name of Kelly
3 Hoffman?

4 A. Right.

5 Q. And there were -- there was an attempt to
6 impeach her at the conclusion of her direct examination
7 by defense counsel on the basis of a taped statement
8 that she had given to an Officer Rudy. Are you familiar
9 with what I'm talking about?

10 A. To the extent that it's reflected by the
11 transcript.

12 Q. That's what I mean.

13 A. Yes.

14 Q. To the extent it's reflected by the
15 transcript.

16 A. Yes.

17 Q. Based upon your experience was that
18 impeachment handled properly?

19 A. The impeachment of a witness by a prior
20 inconsistent statement is a very mechanical process, and
21 -- and if it's done in a mechanical way, then it should
22 go relatively smoothly. On cross-examination you have
23 the witness confirm their present testimony; that is, if
24 you have a number of things you're going to impeach that
25 witness on, A, B, and C, you go back and have that

1 witness confirm what they've said today at trial. Then
2 you have them identify, and that is by date, place, and
3 to whom they were speaking, a prior statement. You --
4 that's -- that's called crediting that statement. Then,
5 after they have credited the statement, that is, "Yes, I
6 did give a statement to so-and-so on such-and-such a
7 date. Yes, I was at such-and-such a place," you then
8 centralize the conflicting points of those statements,
9 and you confront the witness about the conflict. "You
10 said A today; you said Z on such-and-such a date; you
11 said B today; you said X on such-and-such a date," so
12 it's a very mechanical process. In this particular case
13 what happened was there was a question about whether she
14 had given a statement to the police, and the prosecutor
15 then offered at that time to introduce and place for the
16 jury a taped statement. I mean, that was a devastating
17 fact in this case because there's, you know -- my
18 experience is the most devastating evidence that a
19 prosecutor can put up are the -- this was a statement
20 that had been given by a shooting victim, I think, just
21 a matter of days after the statement. She had suffered
22 injuries. She could not speak very clearly, and to play
23 a taped recording for the jury where they heard her
24 voice in obviously a strained way would have had a
25 profound effect on that -- on that jury, and so the

1 -- the use of the prior statement simply blew up in
2 the face of defense counsel. It ended up hurting him
3 much worse than just simply the mechanical method of
4 having her confronted with the individual impeaching
5 elements of that statement. I picked out three or
6 four particular conflicts in the two statements that
7 he could have focused on and just simply asked her,
8 "Did you say this today?" and "Did you say this on
9 such-and-such a day?" and that would have been the end
10 of it.

11 Q. And doing that does not make the statement in
12 its entirety admissible?

13 A. Absolutely not.

14 Q. Now, I want to turn to the sentencing phase
15 and ask you some questions about the sentencing phase of
16 the trial, and, as you can tell from the record, Mr.
17 Hughes was sixteen years old at the time of the offense,
18 and there was, also -- the defense, also, contended
19 through the presentation of expert testimony that Mr.
20 Hughes suffered from mental retardation, and I want to
21 ask you in your opinion based upon your experience under
22 those circumstances was it important for the defense to
23 secure experts or professional assistance from
24 individuals with expertise in those particular areas of
25 mental retardation and child psychology and child

1 development?

2 A. The -- the -- if there's one thing that I
3 certainly have learned from my own experience is that
4 lawyers' words don't mean a whole lot unless you've got
5 witnesses or facts or testimony to back up what you say.
6 The defense in this case spent a lot of time talking
7 about mental retardation, but they produced very little
8 substantive and -- and -- and forthright presentations
9 for the jury to get any real appreciation for what they
10 were talking about. I believe in this case the use of
11 one -- there were two psychiatrists called -- I believe
12 the use of one of those psychiatrists was a wise thing.
13 I don't think that the use of two was -- was really any
14 good because Solicitor Bailey did an excellent job in
15 cross-examining those psychiatrists about the fact that
16 they were not mental retardation experts, and that --
17 that's the whole point. If you had presented the
18 psychiatrist first and had Solicitor Bailey cross-
19 examine on the fact that they weren't mental retardation
20 experts and then called to the stand a mental
21 retardation expert, then it would have made a -- a
22 serious impact on that jury's appreciation for the level
23 of this defendant's mental incapacity, so there's no --
24 there's no question that from a -- from a trial
25 presentation point of view that should have been done.

1 Now, in terms of -- of how that would have been
2 identified while counsel was preparing for this trial,
3 there were a lot of references, and he certainly had
4 access to these references as well, about the mental
5 retardation issue and the history, and when that history
6 began to show itself, the defense counsel at that time
7 should have taken the steps to have a mental retardation
8 expert evaluate and test his client. Then he could have
9 used that expert as a witness in court. Same thing
10 applies with regard to the child psychologist or
11 developmental psychologist witness. You had a sixteen-
12 year-old who had a certain level of mental retardation
13 or -- and I'm no mental retardation expert, so I can't
14 -- the numbers will have to speak for themselves, but
15 there was a -- the issue of mental retardation existed
16 in this case. The -- there was no question that an
17 expert needed to testify about the effect that that
18 type of mental incapacity would have on a sixteen-year-
19 old, on the developmental sixteen-year-old, and in the
20 history of that -- that client. That's what he needed
21 to present for the jury to get an appreciation. It
22 was almost like there was a sixteen number kinda'
23 hanging out in a vacuum, and there were references
24 to mental retardation but no real testimony or
25 significant presentation, and those things were supposed

1 to save this client's life just by their existence,
2 and that doesn't fly. You've got to put up people to
3 talk about it and present it to the jury for their
4 understanding.

5 Q. And presumably to be able to confront any
6 adverse testimony from the State?

7 A. Well, and -- and Solicitor Bailey did an
8 excellent job again in -- in presenting on reply.
9 At the sentencing phase he presented a psychologist,
10 who just point-blank said, "This guy's not mentally
11 retarded," and there wasn't really a lot of that jury
12 to be able to take and to -- to weigh -- not to weigh
13 because weigh really is not a good word in -- in this
14 state but to evaluate the legitimacy of the two sides.
15 The -- the defense was left pretty much empty-handed,
16 and -- and they -- that should not have been the case
17 when you had two very clearly -- clear issues from the
18 very beginning of this case. From the time that
19 incident happened it was very clear that his age was
20 going to be important, and it was very clear from
21 everything in this record that his mental capacity
22 was going to be an issue, so these were not things that
23 came up late in the game. They were things that existed
24 from the date of the incident all the way through the
25 trial.

1 Q. Then, the final thing that I'd really like to
2 ask you about has to do with in your opinion if counsel
3 is going to secure the assistance of the mental health
4 expert, is it important to ask them to consider the
5 question of adaptability to confinement?

6 A. The -- well, and it obviously was important in
7 this particular case because, I think, the first two
8 witnesses that Solicitor Bailey called during the
9 sentence phase, and I -- no, I may -- no, I think that's
10 not right. They involved the records. There were a
11 couple of witnesses who were called during Solicitor
12 Bailey's presentation that related to Herman's conduct
13 while he was being held in jail prior to trial, and --
14 and though it was -- it was as though those witnesses
15 had never even testified. Now, my impression is, or at
16 least the -- the current opinion among those who I find
17 myself in, and that is capital litigators, is that how a
18 jury views the defendant's prison adaptability is very,
19 very important in what kind of sentence they're going to
20 give him. The -- the witnesses brought in by Mr. Bailey
21 were witnesses presented about Herman messing with the
22 locks, beating on the lock in one case and sticking a
23 toothbrush in the lock in another case. Those are
24 presentations that will scare the wits out of the jury.
25 I mean, the jury thinks, "This guy is scary, and we're

1 afraid if we don't give him the death penalty that he's
2 going to be back out on the street," and -- and that had
3 to -- it was like it was ignored. No- -- nobody ever
4 said another words about it, except Solicitor Bailey in
5 his closing argument made reference to it obviously as
6 he very appropriately should have, but it was
7 unrebutted. There was no testimony about Herman Hughes'
8 adaptability to prison, and it really needed to be
9 presented in that case.

10 MR. BLUME: One second. Please answer any
11 question Mr. Zelenka might have.

12 THE COURT: Yes, sir.

13 CROSS-EXAMINATION BY MR. ZELENKA:

14 Q. Mr. Mauldin, you would concede based upon your
15 -- your review of South Carolina law that there have
16 been situations where single lawyers under the new death
17 penalty act have represented individuals charged with a
18 death sentence. Isn't that correct?

19 A. You're asking me if I would concede that that
20 has happened?

21 Q. Yes.

22 A. I -- I don't know whether it's hap- -- I
23 honestly do not know whether it's happened or not. I
24 haven't paid attention to that.

25 Q. All right, so you don't know, in fact, that

1 there have been at least three cases where single
2 individuals had represented individuals charged with
3 capital crimes, and their representation was found to be
4 effective?

5 A. No, I do not have actual recollection of that
6 fact.

7 Q. Okay, so you don't know about the Gilbert
8 and Gleaton or State versus Horace Butler. Is that
9 correct?

10 A. I -- I know about the history of those cases,
11 but I don't know whether or not they were represented by
12 individual---

13 Q. Okay.

14 A. ---individuals as opposed to co-counsel. I
15 don't know that, so---

16 Q. Okay, so you haven't read the opinions where
17 that was challenged?

18 A. I don't recall that.

19 Q. Okay. There have been two opinions in the
20 South Carolina Supreme Court, actually three, involving
21 ineffective assistance of counsel in death penalty
22 cases. Have you reviewed those cases?

23 A. If you could give me the names of them,
24 I could tell you whether or not I'm familiar with
25 them.

1 Q. Horace Butler versus State of South Carolina?

2 A. I recall Horace Butler's case, but I don't
3 recall the specifics.

4 Q. Okay, and you don't recall the specifics that
5 it was determined that the lawyer in that case met the
6 standard of competence?

7 A. No, I do not recall the specifics. That's
8 right.

9 Q. Okay, and Leroy Drayton versus Evatt?

10 A. I remember that -- I remember the -- the case
11 name, but I do not recall the specifics of that case.

12 Q. Okay. What is the standard set forth in Leroy
13 Drayton for a determination of ineffective assistance of
14 counsel?

15 A. Well, the -- I can't quote that case, if
16 that's what you're asking me to do. I simply can't
17 quote that case.

18 Q. Well, quote to me the standard as determined
19 by the South Carolina Supreme Court.

20 A. The -- the standard would be that it -- it be
21 at a level that was sufficient to ensure the rights of
22 the defendant, you know, so it's not -- I don't have,
23 you know -- if you showed me a case, I -- I could quote
24 language to you in that regard.

25 Q. So you don't know the -- the precise terms of

1 the standard?

2 A. Not other than what I've -- I've just said,
3 and, you know---

4 Q. That's a -- that's a very broad due process
5 statement, Mr. Mauldin?

6 A. That's right.

7 Q. Have you reviewed the decision of Strickland
8 versus Washington in the United States Supreme Court
9 concerning the standard of ineffective assistance
10 and the standard required for the first prong,
11 whether an individual has committed prejudice in his
12 representation? Have you reviewed that?

13 A. Prior to my testimony today I did not go back
14 and review that. I would have read it at some point,
15 but I didn't go back and review that prior to coming to
16 testify today.

17 Q. Did you review it prior to doing your analysis
18 as to whether this standard of care---

19 A. No.

20 Q. ---that -- that is your standard of care,
21 occurred in this case?

22 A. No. The testimony that I've given today is
23 what I would consider my -- my standard. I've given my
24 comments on what I read in the transcript.

25 Q. Okay.

1 A. And what I feel like should have been done in
2 order to effectively represent this defendant.

3 Q. Okay. Involving the -- the manner of voir
4 dire, you stated that it's your recollection that you've
5 always alternated the voir dire?

6 A. In -- in -- let me say that -- that I don't
7 know -- I can't say a particular year or a particular
8 point in time when that began to be the standard
9 practice in Greenville, for example. Quite frankly,
10 the prosecutors in Greenville, I know, Joe Watson,
11 who was the prosecutor prior to the -- the current
12 solicitor, Bob Ariel, and Bill Traxler was the
13 prosecutor before Joe, in the cases that we tried, at
14 least under those three solicitors, which would go back
15 at least until the mid-eighties, there was never even a
16 dispute about alternating questions.

17 Q. Well, what -- what occurred in the Dale Yates
18 case? Do you recall?

19 A. And -- and Dale Yates was 1981.

20 Q. And a different prosecutor, correct?

21 A. Billy Wilkins was the prosecutor, and -- and I
22 -- I simply cannot -- I'd hate to testify because I
23 simply cannot -- don't have personal recollection of
24 whether we alternated in that case or not. That was
25 eighteen -- eighteen years ago, but I know that in cases

1 involving then-Solicitor Traxler and then-Solicitor
2 Watson we did alternate the questions on -- on
3 individual voir dire, and it was always -- it was
4 actually always by agreement between those solicitors
5 and -- and the defense side.

6 Q. And -- and, as I understand it, you don't
7 know whether in the cases within this circuit the
8 normal practice of the bar is, in fact, that the
9 solicitor go first and the defense counsel go second,
10 do you?

11 A. I do not know the normal process in this
12 circuit. That's right.

13 Q. So, the normal process might, in fact, be and
14 have been at that time that Solicitor Bailey generally
15 in the some twenty death penalty cases that he's tried
16 has always gone first?

17 A. I don't know whether he's always gone first or
18 not. I -- my opinion is that that place is a
19 significant advantage at the State's table in that
20 process.

21 Q. Maybe he hasn't gone first in all, but in the
22 vast majority he has?

23 A. I actually had no knowledge of how many cases
24 he's tried or when he's gone first and when he hasn't.

25 Q. And you, also, don't know the practice in

1 other parts of the state about that?

2 A. Well, I mean I---

3 Q. Isn't that correct?

4 A. I know what we talk about at our conferences,
5 and I know that I have not heard any defense counsel say
6 that they were unable to at least obtain alternating
7 questions, and I think that would have come up had --
8 had that been the case because we would be talking about
9 the voir dire at the time.

10 Q. Okay, but you acknowledge you can be corrected
11 upon what you assume by their silence. Isn't that
12 correct?

13 A. That's right. I don't know that -- I just
14 haven't heard them say that they always had to go
15 second.

16 Q. Okay, and in your review of the voir dire of
17 this case I believe you said you had some notes?

18 A. Yes, sir.

19 Q. And could I see those please? Were these
20 notes prepared before or after Jeff Bloom did his
21 deposition?

22 A. Those notes were a continuing process while I
23 reviewed the record. You know, I -- I reviewed that,
24 and -- and, you know, it was a -- a work in progress the
25 whole time I had -- had the transcript.

1 Q. Okay. When did you complete these notes?

2 A. I think I was probably making modifications to
3 them as early -- as recently as yesterday.

4 Q. All right, sir. With respect to your review
5 of then-Solicitor voir dire in this case, isn't it
6 correct that Judge Cottingham asked each juror their
7 opinion on the death penalty?

8 A. In -- when they were originally brought into
9 the courtroom, he used the method of having given them
10 the three choices, and -- and they were to pick out the
11 type of juror they thought they were, and that's kind of
12 a standard practice across the state.

13 Q. Okay, and picking out the type of juror that
14 they thought they were was whether they would always
15 vote for the death penalty?

16 A. Yeah.

17 Q. Correct?

18 A. They had three choices: always vote for it,
19 always vote against it, or be willing to listen to the
20 evidence.

21 Q. Well, that's not necessarily what it said.
22 It's whether they would always vote for the death
23 penalty, whether they would always -- or whether they
24 would always vote for life imprisonment or to consider
25 the evidence---

1 A. Right.

2 Q. ---before they would make a decision?

3 A. Right, right.

4 Q. Each of the jurors that were qualified based
5 upon your review of the evidence fell in that middle
6 category -- is that not correct -- that they could
7 consider the evidence?

8 A. I didn't keep a statistic on -- on that,
9 Mr. Zelenka. I -- what happens typically in these
10 cases, sometimes a juror will come out and say they
11 are a No. 1 or a No. 2, and then the counsel, if you
12 will, against whom that operates is given an opportunity
13 to rehabilitate them, and so sometimes you have jurors
14 -- and I would suspect it happened in this case, but,
15 like I say, I didn't actually take a tally where you
16 would have a juror who would come in and say they were a
17 No. 1 or a No. 2, and they'd end up being qualified, so
18 I -- I would suspect that happened.

19 Q. Did any of the jurors that were qualified and
20 seated in this jury involving Herman Hughes indicate
21 that they could not consider a life sentence based upon
22 the facts presented in this case?

23 A. Based upon the -- what I considered to be a
24 very limited questioning, no, there -- there -- I don't
25 recall a juror being seated on the jury that had

1 actually said during their voir dire that they could not
2 consider a life sentence.

3 Q. Okay, and isn't it true that Juror Wise and
4 Juror Barron, also, testified under oath at the time
5 of the trial that they could set aside whatever their
6 other understanding was concerning the matters that they
7 expressed to the Court and base their decision solely on
8 the law and the facts? Isn't that correct?

9 A. I think that -- that Juror Wise actually said
10 that she thought it probably would affect her, and then
11 they asked some further -- I don't -- it's page --
12 between page 190, I think, 193 and 208 was where she was
13 questioned, if I'm not mistaken, and I think that --
14 that she actually said that it probably -- I can't
15 remember a quote, but it was -- it -- it had to be
16 further ques- -- she had to be further questioned to
17 clarify that point.

18 Q. And---

19 A. But she ultimately -- what she ultimately was,
20 yes, she could set that information aside.

21 Q. Okay, and you haven't had any conversation nor
22 are you aware of the particular reasons why Mr. Newsom
23 expressed, even despite those comments, he made a
24 strategic decision to put that person on the jury. Is
25 that correct?

1 A. In my wildest dreams I cannot imagine what the
2 connection could have been or what his intangible
3 impression might have been that would have overridden
4 what she said on that transcript.

5 Q. Okay. In your normal practice as a criminal
6 defense lawyer do you do jury inves- -- juror
7 investigations before selection is made?

8 A. In capital cases are you referring to?

9 Q. In any case, not just in capital cases?

10 A. Well, in -- in the normal case we have very,
11 No. 1, we have very, very short notice about the jurors.
12 We have very, very limited resources in the defender
13 office to try to actually do any type of independent
14 investigation, so I would have to say almost none in the
15 normal non-capital case.

16 Q. So you're saying in your normal practice of
17 law when a jury is selected at the time of the trial,
18 you have no idea who those jurors are or anything about
19 their background, and you've done absolutely no inquiry
20 of other individuals within the community to assist you
21 in making a reasoned decision?

22 A. Well, I think that is -- is not really what
23 I'm saying. I'll be glad to repeat my answer, if that
24 will---

25 Q. Tell me what you do.

1 A. All right. What we do is usually about a week
2 and a half or so before a term -- and this is a --
3 you're talking about a non-capital term of court. Is
4 that right?

5 Q. Yes, because---

6 A. Because they are very different. These are
7 two very different areas. In a non-capital term---

8 MR. BLUME: Your Honor, I don't know that I
9 really, I mean, see the relevance of what he does in a
10 non-capital case.

11 THE COURT: What's -- what's the relevance?

12 MR. BLUME: The issue here is how he
13 handles---

14 MR. ZELENKA: The relevance is under
15 Strickland versus Washington, whether counsel acted
16 reasonably as a lawyer would in the defense of criminal
17 cases. It does not particularize that standard to
18 be necessarily different in a death penalty case,
19 so what I'm trying to do is understand what normal
20 counsel would do, what he would do, and his reasonable
21 practice, and then if he wants to say how it's dif-
22 ferent in a capital case, I'll lead up to that, but
23 the standard is not -- it's reasonably effective
24 assistance.

25 THE COURT: I'll -- I'll be glad to hear it,

1 and I would ask that you, also, question in specifically
2 the -- the death penalty case as well.

3 MR. ZELENKA: I definitely will.

4 THE WITNESS: Okay.

5 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

6 Q. Please continue.

7 A. All right. Now, this -- this is what our
8 normal practice would be in a normal non-capital term of
9 court. Our office would get the jury list. We -- we
10 get, first of all, we get about a week to ten days'
11 notice of the trial list, so until then we don't even
12 know our -- if we have any cases on the trial docket, so
13 it would be inappropriate, I think, for me to instruct
14 the attorneys that work at least under my indirect
15 control to investigate jurors when they didn't have any
16 trials on the docket, so we wait until we get the trial
17 docket, which is usually a week or week and a half from
18 the terms of court. Then the week before the term of
19 court we try to obtain from the court, clerk of court,
20 the jury list. We pass the jury list among the
21 attorneys in the office to see if there's anybody who
22 actually knows someone. We will, if we see familiar
23 names or -- or something like that, we might look them
24 up in the computer in an -- an office that we have
25 access to that shows who has been arrested and put in

1 the Greenville County Jail and -- and things like that,
2 but there -- but because we don't have the -- we've only
3 got one investigator working for nine lawyers, so we
4 can't -- it's just impossible for us to investigate
5 every juror on a list. Usually maybe the Thursday or
6 Friday before the Monday when the term starts we get
7 back the little card -- card -- copies of the little
8 cards that they jurors have mailed back to the clerk
9 that show their employment, their spouse's employment,
10 where they've actually filled it out on a card,
11 education, whether they've ever served on criminal or
12 civil juries before, when that was, and then we pass
13 that list around, and the lawyers will circle relevant
14 information, that this is important, or put a question
15 mark or put an X by something that they want the lawyer
16 to see when he picks the jury. Other than that, there's
17 really not any aggressive going out and trying to
18 discover about jurors.

19 Q. Okay, and when you do a capital case, how is
20 that different from the other case as far as juror
21 preparation?

22 A. In a capital case the first thing we certainly
23 try to do is we try to obtain funding from the -- the
24 trial court to have assistance in selecting the jury. A
25 jury consultant is used. A lot of lawyers use those.

1 I'm -- I use a jury consultant.

2 Q. Okay.

3 A. We---

4 Q. Were you allowed to retain a jury consultant
5 in the Dale Yates' case?

6 A. I don't recall, and -- and I -- I apologize.
7 That's---

8 Q. Okay.

9 A. ---1981. I do not remember whether we had a
10 -- a jury person sitting with us during the selection of
11 that jury or not.

12 Q. Okay. Are you aware of the cases in the South
13 Carolina Supreme Court which had held that defense was
14 not entitled to funding for a jury consultant?

15 A. I know that there are cases that don't
16 necessarily approve it. I know that the trial judges in
17 -- in my cases are more than willing to approve it
18 because I think they -- they find that it helps the
19 process.

20 Q. Okay. Go ahead.

21 A. But the first thing, of course, we would do is
22 attempt to obtain some funding for a jury consultant or
23 a jury -- a person to assist us in selecting the jury.
24 We then provide to the Court a proposed questionnaire.
25 These questionnaires are usually essentially compromise

1 forms that come out from the prosecutor and I in our
2 office. Our prosecutor is very willing to -- to agree
3 to pretty lengthy questionnaires because he finds them
4 as helpful for him as -- as we do us. He wants the
5 information, too, and the judges think that it cuts down
6 on the -- the time that -- that it takes to voir dire
7 the jurors. Those are sent out some two or three weeks
8 or a month in advance. They come back in, and then we
9 have the jury consultant review the -- the forms. We
10 have in selected cases actually gone out and observed
11 residences from a very -- from a great distance to try
12 to get some idea of where people live, try to focus on
13 their neighborhoods and so forth and---

14 Q. You actually take photographs of the jurors'
15 homes sometimes, don't you?

16 A. I don't think my office has ever had any
17 photographs taken. In fact, I recall telling people
18 they could not do that.

19 Q. Okay.

20 A. We have a form that we ask people to fill
21 out when they go -- you know, they just drive down
22 the street, and then they stop down at the other end
23 of the street and fill out a form, and they go to the
24 next juror. They do not stop, and they do not take
25 photographs, but that's -- that's kinda' in the process

1 of getting ready to select a jury, and -- and, quite
2 frankly, Mr. Zelenka, I have no idea what was done in
3 this case, so I don't know how that compares with what
4 was done.

5 Q. Okay, but what you're plainly doing is you're
6 relying upon information, other than just a juror's
7 responses to a voir dire and making your determination
8 as to whether a juror should sit or not sit in a case.
9 Is that not correct?

10 A. The information that I'm providing you is what
11 I use to consider soft, what I categorize as soft,
12 issues on voir dire. There are soft issues, and there
13 are hard issues on voir dire. The soft issues are
14 employment, where a person might go to church, where
15 they might live, how many dogs they might have, what
16 kind of cars they might drive. Those are soft issues.
17 The hard issue is how that juror feels about the death
18 penalty, and that's what you get from voir dire, and
19 that's why it's absolutely critical that the questions
20 be asked of the -- of the juror. You don't make your
21 decisions on the soft issues. You make your decisions
22 on the hard issues, and you break ties with the soft
23 issues.

24 Q. Okay, and in the jurors in this particular
25 case you aren't disputing that there is something in

1 the record that reveals their opinions and positions
2 generally on the death penalty. Is that not, also,
3 correct?

4 A. Very generally, and -- and most of those
5 positions were the result of the questioning of the
6 prosecutor, which, I mean, he did a great job. There's
7 no question about it, but what happened was defense
8 counsel sat there and let him do that.

9 Q. Okay, but then defense counsel with that
10 information was then provided the opportunity to ask
11 what other questions he deemed appropriate. Isn't that
12 correct?

13 A. He -- he was given the opportunity to ask any
14 juror any questions he saw fit, and -- and I just felt
15 like he -- he failed to ask the questions that I think
16 would have been the minimum questions necessary to -- to
17 satisfy any reasonable standard.

18 Q. Okay, and the judge had the obligation to
19 ensure that the defense counsel knew and was aware and
20 had the opportunity to ask questions of each of those
21 jurors before a determination was made to strike the
22 individual for cause or otherwise as a matter of state
23 law. Is that not, also, correct?

24 A. If you're asking me if the pros- -- if the
25 Court had the obligation---

1 Q. Yes.

2 A. ---I think the -- the Court, as in any other
3 case, serves as the referee. The Court is not an
4 advocate, and certainly we would hope that if the Court
5 saw happening before, right there in -- in the
6 courtroom, something that was inappropriate, we kinda'
7 hope somehow that the Court might do something about it.
8 I don't think the record reflects that the Court did
9 anything about it in this case.

10 Q. Did anything about allowing, making sure the
11 defense had the opportunity to ask questions?

12 A. The oppor---

13 Q. Go ahead.

14 A. The opportunity to ask questions was given to
15 the defense on individual voir dire in every one of the
16 ones I read. The -- the opportunity to ask questions
17 was -- was there, so -- so I don't -- I don't say that
18 he didn't give him the opportunity. I thought you asked
19 me if he had the obligation to make sure that he was
20 doing a good job, and he certainly did not have that
21 obligation.

22 Q. No, I'm not agreeing. My question wasn't
23 that. One of the issues, which you asserted that
24 you sensed counsel was ineffective, was with respect
25 to the general voir dire because the judge wanted to

1 make sure that the parties had the opportunity to ask
2 questions. That is his obligation under the law, isn't
3 it?

4 A. The way I read the general voir dire is that
5 the judge certainly did not give counsel the opportunity
6 after each one of these jurors stood up and said they
7 had a particular problem with this or that and were
8 excused. What would happen, if -- if my recollection of
9 reading that portion of the -- the material is correct,
10 he would go down, and he would excuse several jurors,
11 and then he would make the point, "Now, counsel, if you
12 object to any of this, you let me know, or if you want
13 to ask anybody any questions, you let me know," and, in
14 fact, on a couple of occasions coun- -- the -- the
15 defense attorney said, "Yeah, let's go back to a couple
16 of people," and they'd go back to a couple of people and
17 review those, those two, so -- so when I said he was
18 giving them the opportunity for every juror, I was
19 talking about individual voir dire. If you're talking
20 about general voir dire, the judge was not asking them
21 what their position was on every one of those jurors
22 that he excused. He -- he wasn't -- when he would
23 decide if somebody was expressing a -- a concern, he
24 would on many occasions, he'd just say, "I'm going to
25 excuse this person." He would not look to Solicitor

1 Bailey or to the defense counsel and ask them if they
2 wanted to ask him any questions.

3 Q. With respect to the inquiry concerning, first,
4 Mr. Bailey's question about whether a sixteen-year-old
5 would be sentenced to death or could be sentenced to
6 death in juror -- in the juror's eyes, you would concede
7 that if a juror was unable to sentence a sixteen-year-
8 old to death, regardless of the other evidence in the
9 case, that they would be excludable for cause, wouldn't
10 you?

11 A. The question is whether or not that question
12 on the facts of the individual case can be asked and not
13 objected to.

14 Q. Please -- please answer my question. You
15 would concede that if a juror said that they could not
16 sentence a sixteen-year-old to death, despite the facts
17 or circumstances and the other evidence in the case,
18 that person is excludable for cause?

19 A. If a juror says, "I cannot sentence a sixteen-
20 year-old to death," and the solicitor in his case says,
21 "Well, I've got a sixteen-year-old defendant," then I
22 believe he could move to have that juror struck for
23 cause.

24 Q. Okay, and, in fact, a similar situation was
25 done in State versus Thomas Lee Davis, a case that

1 you're familiar with, with respect to whether a juror
2 could give a death sentence to an individual who
3 suffered under mental retardation. The Court found that
4 that individual should have been excluded and was
5 properly excluded for cause, correct?

6 A. In -- yes, in that case. I mean, the -- the
7 example, Mr. Zelenka, I guess, that we could -- could --
8 that I would allude to, if you will allow me, in
9 Greenville we had the killing of a policeman. Now, we
10 were not allowed to ask the jurors if the killing of a
11 policeman would call for an automatic death penalty in
12 every case. We -- we -- we could not ask that to the
13 jurors. The judge wouldn't allow us to. He said that
14 was a case specific, qualifying on the facts of the case
15 in front of you, and he wouldn't allow us to ask that
16 question.

17 Q. Okay. Did the Supreme Court rule on that?

18 A. No, he -- he -- no; he -- he got a life
19 sentence, but the point is that the question in voir
20 dire was -- the -- it is a common fact that qualifying
21 on the facts of an individual case is not allowed, or
22 if it's going to be allowed, it's allowed for both
23 sides.

24 Q. Okay, but -- but since you conceded that that
25 person should have been struck for cause, how would that

1 information have gotten to the jury unless either the
2 solicitor asked or the defense counsel asked?

3 A. And it may very well have been the opinion
4 of Judge Cottingham that in order to determine if
5 these people were truly qualified, they had to be
6 asked that question. I -- I'm not saying -- I'm saying
7 if the question is asked, and the objection is made,
8 which it should have been, then the judge issues a
9 ruling, either sustained or overruled. If he overrules
10 the objection, then it is incumbent upon the defense
11 to then ask mitigating questions that do the same
12 thing.

13 Q. All right. In Solicitor Bailey's closing
14 argument he corrected to the jury the amount of time
15 that Mr. Henry Daniel Owens was facing. Isn't that
16 correct?

17 A. I don't recall the -- which -- are you talking
18 about penalty or -- or guilt or -- I mean, if you could
19 show me what you're talking about, I'd be glad to
20 comment on it.

21 MR. ZELENKA: The Court's indulgence.

22 THE COURT: Certainly.

23 CROSS-EXAMINATION RESUMES BY MR. ZELENKA:

24 Q. You don't remember reading that?

25 A. I do remember. I -- I read the whole thing,

1 but I'm -- what I'm saying is that I don't recall
2 whether or not -- I know that when the -- the -- the
3 jury was told that the defendant faced up to fifteen
4 years in prison.

5 Q. Okay. Did you review page 1259, lines 13
6 through 18?

7 A. Yes, and -- and this was a -- a -- this was
8 part of his argument, which, of course, wouldn't --
9 wouldn't have necessarily constituted evidence in -- in
10 any form, but he -- he -- it certainly is in the record
11 that he made that statement to the jury.

12 Q. All right.

13 A. The solicitor did.

14 Q. You would concede that -- that manners of
15 impeachment, the way questions are asked, are -- are
16 matters of strategy with respect to each individual
17 lawyer. Isn't that correct?

18 A. The method of questioning a witness is a
19 matter of strategy. Is that your question?

20 Q. Yes.

21 A. In general, that's right.

22 Q. So, the -- the manner of strategy and the way
23 he sought to develop that Mr. Owens was a family member
24 of Kelsey Pierce, you can't question that -- that
25 manner. Isn't that correct?

1 A. I -- I believe my comments on Mr. Blume's
2 questions about that was that I -- I just felt like that
3 was something that he could have gone into at greater --
4 with -- with a little more force.

5 Q. Now, what does that mean, with a little bit
6 more force? More higher tone?

7 A. No, no.

8 Q. Shouting it out? I'm not understanding.

9 A. All right.

10 Q. Please explain.

11 A. The -- the two areas that I identified
12 with Daniel Owens was the question of the deal with
13 the government and the question of his relationship
14 essentially with Kelsey Pierce, the co-defendant.
15 I felt like the fact that Kelsey Pierce was his nephew
16 and the fact that Kelsey Pierce owed him a lot of
17 money, if I recall the quote, were factors that needed
18 to be more forcefully pursued by the cross-examining
19 attorney. I'm not saying that he didn't ask him
20 anything about it, and his style, of course, was up to
21 him. I'm just saying I would have more forcefully
22 pursued that because it indicated a bias.

23 Q. Tell me what you would have done.

24 A. What I would have done, I would have asked
25 the question, "And -- and the co-defendant in this

1 case is your nephew. You've known him all your
2 life. You have family connections with this person,"
3 you know. Those types of questions should have
4 been pursued, at least in my opinion. The -- I just
5 felt like that left a lot to be desired. Now, I do
6 not dispute the fact that that would have been a choice
7 of some sense in terms of whether that bias had been
8 established. I don't feel that way about the deal
9 with the government though. I think that -- that
10 that was -- I think the jury was misled on that
11 information, and they certainly never were aware of
12 the fact that the man faced a life sentence before his
13 testimony.

14 Q. Okay. With respect to the victim in the
15 case, Kelly Hoffman, you would concede that the State
16 had the opportunity to rehabilitate Ms. Hoffman after
17 she had been impeached by Mr. Newsom. Isn't that
18 correct?

19 A. If he chose to impeach her on a prior
20 inconsistent statement -- is that what you're referring
21 to?

22 Q. Yes.

23 A. The State would have the right to rehabilitate
24 her. That's right.

25 Q. And that did happen in this case. Isn't that

1 correct?

2 A. I recall, if I'm not mistaken -- and -- and
3 I'll be glad to look again at the transcript -- if I'm
4 not mistaken, when the defense counsel began his cross-
5 examination, the State essentially at that time offered,
6 and I believe the defense actually joined in the offer,
7 to play the tape for the jury, play the audiotape, and
8 that -- and, I mean, that to me is just a very -- that
9 was a serious error.

10 Q. Have you listened to the audiotape?

11 A. I have not heard -- I've read the transcript
12 of it, but I certainly can imagine the impact of that
13 audiotape. I've had cases that had videotapes of -- of
14 homicides, and I've had cases that went to trial that
15 had audiotapes of victims just prior to being shot, and
16 those are devastating pieces of evidence from the
17 government's point of view. I mean, they are very
18 impacting.

19 Q. Okay.

20 A. And I would feel like the worst thing you
21 could let the jury hear if you're defending the case
22 is the words of somebody who had just been shot,
23 especially because I got the impression from the
24 transcript now, only the words on the page, but I got
25 the impression that this young girl was very seriously

1 injured, and -- and her ability to communicate was
2 seriously impaired.

3 Q. Okay, but then the jury could make that
4 determination based upon reviewing the tape itself --
5 isn't that correct -- about the impairment that you're
6 assuming---

7 A. They---

8 Q. ---her ability to speak?

9 A. They certainly would have heard it, and it
10 would have been a devastating thing in terms -- a bad
11 thing for the defense of the case, and it was
12 unnecessary in my opinion.

13 Q. But Mr. Newsom may have considered it a good
14 thing -- isn't that correct -- and may have, he thought,
15 assisting his impeachment based upon his strategy in the
16 case?

17 A. I can't imagine that. Re- -- reading the
18 transcript I cannot imagine how it could possibly have
19 ever been considered a good thing.

20 Q. Okay. Well, you knew Mr. Newsom had already
21 conceded that his client was involved in the event and
22 had actually shot Kelly Hoffman. You were aware of
23 that?

24 A. I understand that he had conceded involvement,
25 yes.

1 Q. Okay. Also, with respect to your concerns
2 about his selection of experts, one of the experts that
3 you claim should have been more inquired into, I guess,
4 was a prison adaptability expert?

5 A. The -- the -- what I think could have been
6 done there would have been the witnesses that were
7 presented, for example, either the psychiatrist or a
8 child devel- -- developmental neuropsychologist, for
9 example, should have dealt with the issue of pris- -- of
10 -- of elements of prison adaptability in their
11 testimony. The reason, I think I mentioned on direct,
12 that -- that had been brought out by two Department of
13 -- I can't remember whether they -- they weren't
14 Department of Corrections people -- they were like
15 county jail people -- where the defendant had been
16 housed prior to trial, and they testified to two
17 separate incidences that in my opinion would have scared
18 the daylights out of that jury, and -- and it -- those
19 -- those incidences were simply left as though nobody
20 had heard them, and that is the kind of risk that I just
21 don't think has any strategic bases. You can't base
22 that upon some strategy that you've got a bunch of deaf
23 jurors.

24 Q. Okay, but then the defense counsel, isn't it
25 true, inquired of those individuals whether he had been

1 a good prisoner?

2 A. Oh, yeah. The cross-examination was as good
3 as, I guess, it could have been under the circumstances.

4 Q. Well, he said, they each said, that he had
5 been a good prisoner?

6 A. Right.

7 Q. And was not a problem. Isn't that
8 correct?

9 A. I think the record speaks for itself, but
10 generally that's what I recall reading.

11 Q. Okay, and with respect to mental retardation
12 the defense put in sufficient evidence that allowed
13 Judge Cottingham to give the mitigating circumstance
14 instruction in this case. Is that not, also,
15 correct?

16 A. Judge Cottingham did instruct the jury on that
17 as a mitigator, so -- so -- and he would not have if
18 there had been no evidence of it. The -- the impression
19 I had is that the jury needed to be -- needed to be
20 given from an expert in that field -- for example, the
21 cross-examination of Solicitor Bailey speaks for itself
22 with regard to Dr. Morgan. "You're not a -- a mental
23 retardation expert," so, I mean, those questions were
24 appropriate. What the defense needed to have was, in
25 response to that question he needed to have a mitigat-

1 -- a mental retardation expert who could say, "Yes, I am
2 one."

3 Q. Okay. A couple of final questions, Mr.
4 Mauldin. With respect to your selection of jurors, you
5 generally are -- are just seeking to find as many jurors
6 who would be opposed to the death penalty in your
7 particular case. Isn't that correct?

8 A. Could you repeat the question?

9 Q. You're -- you're trying to find as many jurors
10 who would be opposed to the death penalty in most of
11 your cases. Isn't that correct?

12 A. Well, I think, if you find a juror who is
13 opposed to the death penalty, that juror is going to
14 be struck for cause. I -- I don't know if that's an
15 answer to your question, but that juror is not
16 qualified.

17 Q. But as I understand what you're trying to find
18 is a juror who is opposed to the death penalty but can
19 consider the facts and circumstances of the case to be
20 qualified?

21 A. Well, I guess in -- I guess that would --
22 would be wonderful if we could find those jurors. Those
23 jurors are generally struck for cause though. If they
24 are opposed to the death penalty, then we certainly do
25 everything we can to attempt to rehabilitate them and

1 save them for the jury panel. I mean, that, in this
2 case that was never done that I recall. I don't recall
3 this defense counsel trying to save any of the jurors,
4 except ask a question or two and just sit down, but
5 -- but your goal, if you have a juror who appears to
6 be opposed to the death penalty on the surface, you
7 attempt to ask that juror questions that -- that would
8 qualify that juror. That -- that -- that is a -- one of
9 our stated goals from the defense point of view. I
10 assume the prosecutor's point of view is exactly the
11 opposite.

12 Q. And in -- in doing that goal, your -- your
13 primary goal is to get at least one juror that fits in
14 that scenario. Isn't that correct?

15 A. Well, I mean, the jurors are struck for cause
16 if they -- if you can't rehabilitate them.

17 Q. No, I mean those jurors who have a personal
18 opposition but -- for the death penalty -- but can make
19 a determination, were basically qualified?

20 A. If you can get a juror like that qualified,
21 which is very difficult on -- in the -- the first fact.
22 The second fact is that's exactly who the prosecutor
23 ends up striking with his preemptory challenges. I
24 mean, we -- you know, usually in a situation like
25 that we're both -- we -- we know what we're doing

1 on both -- at both sides of the table, and -- and in
2 my -- my method is to rate the jurors, and the
3 prosecutor rates the jurors just the same, and the
4 ones that are the best for me are the first to go from
5 him, his side.

6 Q. Okay. What are the---

7 A. And vice-versa.

8 Q. All I'm basically trying to ask you is what is
9 the juror that is best for you after jury selection?
10 What is that type of juror?

11 A. A qualified juror?

12 Q. Yes.

13 A. Are we assuming this juror is qualified?

14 Q. Yes.

15 A. All right. The best juror for me would be a
16 juror who is reluctant to give the death penalty, except
17 in the absolute worst of cases. That -- that would be
18 the best juror that I could hope for.

19 Q. Okay, and under our system, if you have one of
20 those jurors, despite the -- the existence of the rest
21 of the jury pool, that is giving you a better chance to
22 get a life sentence -- is that not correct -- because
23 they may hang?

24 A. If I have one of those jurors who is
25 reluctant to give the death penalty, except in the

1 worst possible case, that fact does improve my chances
2 than if I had none. Now, obviously if I had two,
3 it's better. If I had three, it's better, and --
4 and, you know, we -- I don't know if that answers your
5 question.

6 Q. But your goal is to at least to get one of
7 those types of jurors on the jury panel. Isn't that
8 correct?

9 A. My goal is to get jurors on my -- in my jury
10 box who are reluctant to give the death penalty, except
11 in the most horrendous of cases. Otherwise, they're not
12 going to be qualified. If -- if -- if they're just --
13 if they're not going to give the death penalty in any
14 case, they're not going to be qualified in our state,
15 and so if that's my goal, then I'm setting myself up
16 for failure.

17 Q. But isn't then, also, your goal to make
18 sure the solicitor doesn't know who those particular
19 jurors are so that they can enter a preemptory
20 challenge?

21 A. In what I consider to be effective voir
22 dire, both the solicitor and I know who both -- who
23 all the jurors are. In the case we have before us,
24 they didn't have a clue on three-fourths of those
25 jurors.

1 Q. But you don't know what Mr. Newsom knew based
2 upon his independent research---

3 A. I don't---

4 Q. ---other than what you have in the record.
5 Isn't that correct?

6 A. I -- I have not heard him testify. I read
7 his deposition to the -- and I have what was in the
8 record, and so that's what I've based my opinions
9 on.

10 MR. ZELENKA: The Court's indulgence.

11 THE COURT: Yes, sir.

12 MR. ZELENKA: No further questions.

13 THE COURT: All right.

14 MR. BLUME: Just two or three.

15 THE COURT: Yes, sir.

16 REDIRECT EXAMINATION BY MR. BLUME:

17 Q. Mr. Mauldin, I want to ask you this. In your
18 opinion would any confident defense lawyer make a
19 decision whether to take a juror or not based upon their
20 answers to the three categories, which are usually given
21 by a judge at the beginning of individual voir dire?

22 A. None.

23 Q. Why?

24 A. In my experience you have as many jurors
25 who end up changing from one number to the other as

1 you do those that stay the same from that preliminary
2 question, if -- if I'm understanding your question
3 correctly. They're given a -- a form that essentially
4 lists out the -- the characteristics of three different
5 types of people in a capital case. They don't know
6 anything about the -- the -- the law in South Carolina.
7 They haven't had any questions to them at that point.
8 They come in, and they just say what they might
9 think comes off the top of their head based on --
10 off that piece of paper. You will find in many, many
11 voir dire transcripts, you'll find jurors that come
12 in and say that they are -- they'll consider the facts,
13 but Juror No. 3, for example, who end up being automatic
14 death penalty jurors, as soon as you go through the
15 process of what is called stripping, which is taking
16 away self-defense, accident, mistake, other -- what
17 are considered technical defenses, so that they end
18 up going from a No. 3 to a No. 1. That's the reason
19 why we have sequestered individualized voir dire by
20 counsel.

21 Q. And that's why it's important to make sure
22 that the juror understands that you're talking about
23 murder and what murder in this state means?

24 A. That's right. I mean, if -- if -- you've got
25 a lot of people who will say, "I'll have to listen

1 to the facts. I'll have to listen to the facts,"
2 but once they are informed by the Court and by both
3 attorneys in -- in good voir dire what happens is is
4 both attorneys talk to the jurors about the fact that
5 it's a bifurcated system, that when you go into the
6 second phase, you as a juror have already participated
7 and have already voted that this defendant is guilty of
8 first-degree murder. He's a convicted murderer at that
9 point. If you don't ask those, just at least those
10 simple questions, then they've got absolutely no clue
11 about what's going on.

12 Q. And then it's important to understand and to
13 ask, the defense lawyer themselves to get -- ask, what
14 this person's views are on the death penalty for a
15 person who has killed another human being intentionally
16 with malice aforethought?

17 A. Absolutely.

18 Q. And essentially if you don't ask, you don't
19 know. Is that correct in your opinion?

20 A. The -- the problem that exists in this
21 transcript is that the great majority of these jurors,
22 you can read this transcript, and you still don't know
23 how they feel about the death penalty much less to be
24 selecting a jury. There were many, many jurors where no
25 questions were asked by the -- the defense, and that's

1 just hard to imagine.

2 Q. And one final question on a different
3 matter. There -- there were some question about
4 adaptability, and the question on cross-examination
5 was, "Well, but weren't the individual officers cross-
6 examined and indicated that Herman was not a problem,
7 was generally nonviolent, was a follower?" I mean,
8 that kind of thing, but I ask you is -- in your opinion
9 would that have been the type of information that had
10 it been provided to the experts would have given them
11 at least some basis and the beginning of a basis to
12 form an opinion about adaptability and to testify about
13 it?

14 A. Well, I mean, that's why you call the expert,
15 so that he can hear the information, see the records,
16 and determine whether or not this person is adaptable to
17 prison life. I mean, that's the whole point of the
18 presentation. Now, the -- the concern here was that
19 there was a void. You had testimony during the
20 sentencing phase that involved tampering with or trying
21 to damage the locks at the jail, and -- and I can't --
22 that is a dangerous presentation in terms -- for -- for
23 the defense to just simply ignore. They've got to get
24 up and say something about that or present an expert
25 that says, "This individual shows the characteristics