

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Dec 15 2022
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE
TERRY, and RICHARD BERNARD MOORE,..... Respondents-Appellants,

v.

BRYAN P. STIRLING, in his official capacity as the Director
of the South Carolina Department of Corrections; SOUTH
CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY
MCMASTER, in his official capacity as Governor of the State
of South Carolina, ... Appellants-Respondents.

RECORD ON APPEAL
VOLUME III

Daniel C. Plyler
Austin T. Reed
SMITH | ROBINSON
2530 Devine Street
Columbia, SC 29205

*Counsel for Director Stirling
and SCDC*

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Legal Counsel
Erica Wells Shedd
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, SC 29201

Counsel for Governor McMaster

Lindsey S. Vann
Emily Paavola
Hannah L. Freedman
Brendan Van Winkle
Allison Franz
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume
CORNELL LAW SCHOOL
158 Myron Taylor Hall Ithaca,
NY 14853

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606

John Christopher Mills
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202

Elizabeth Franklin-Best
ELIZABETH FRANKLIN-BEST, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204

Counsel for Respondents-Appellants

TABLE OF CONTENTS

Volume I

Orders and Judgments

September 6, 2022 Order	1
June 11, 2021 Order	40
July 1, 2022 Order	49
July 5, 2022 Order	56

Pleadings

Complaint (May 17, 2021).....	59
Exhibit A to Complaint (filed Sept. 28, 2021)	92
Exhibit B to Complaint (filed Sept. 28, 2021).....	93
Third Amended Complaint & Exhibits (Apr. 11, 2022).....	94
Answer to Third Amended Complaint (Apr. 29, 2022).....	227

Transcripts and Motions

Transcript of Hearing on Motion for Preliminary Injunction (June 7, 2021)	246
Motion to Dismiss (Mar. 15, 2022).....	307
Response to Motion to Dismiss & Exhibits (Mar. 22, 2022)	350

Volume II

Transcript of Hearing on Motion to Dismiss (Apr. 14, 2022)	399
Motion for Protective Order & Exhibits (June 9, 2022)	462
Response in Opposition to Motion for Protective Order and Motion to Compel Discovery Exhibits (June 14, 2022)	530
Transcript of Hearing on Discovery Motions (June 23, 2022).....	540
Motion for Protective Order (July 19, 2022)	610
Motion for Ruling on Plaintiffs' Motion to Compel and for Clarification of the Scope of Discovery Order (July 19, 2022).....	615

Motion to Exclude Wikswo Expert Testimony (July 21, 2022).....	625
Response in Opposition to Motion for Protective Order (July 29, 2022).....	861
Defendants’ Pretrial Brief (July 30, 2022).....	865

Volume III

Trial Transcript.....	874
Pretrial Motions	879
Plaintiffs’ Opening Statement	1041
Defendants’ Opening Statement.....	1047
Examination of Bryan Stirling	1059
Direct Examination by Mr. Kedrick	1059
Cross-Examination by Mr. Plyler	1092
Cross-Examination by Mr. Limehouse.....	1095
Examination of Colie Rushton	1098
Direct Examination by Mr. Kedrick	1098
Cross-Examination by Mr. Plyler	1120
Examination of John Peter Wikswo.....	1141
Direct Examination by Ms. Freedman.....	1141
Voir Dire by Mr. Plyler	1153
Direct Examination by Ms. Freedman.....	1167
Cross-Examination by Mr. Plyler	1215
Redirect Examination by Ms. Freedman	1302

Volume IV

Examination of Jonathan Arden.....	1314
Direct Examination by Ms. Vann	1314
Cross-Examination by Mr. Plyler	1367

Redirect Examination by Ms. Vann.....	1401
Recross-Examination by Mr. Plyler.....	1406
Examination of Jorge Alvarez.....	1416
Direct Examination by Mr. Plyler.....	1416
Cross-Examination by Mr. Kendrick.....	1426
Redirect Examination by Mr. Plyler	1433
Examination of Ronald Keith Wright	1438
Direct Examination by Mr. Plyler.....	1438
Cross-Examination by Ms. Freedman	1458
Examination of D'Michelle DuPre	1474
Direct Examination by Mr. Plyler.....	1474
Cross-Examination by Mr. Kendrick.....	1483
Redirect Examination by Mr. Plyler	1496
Plaintiffs' Closing Argument	1501
Governor McMaster's Closing Argument	1515
Stirling and SCDC's Closing Argument.....	1539
Plaintiffs' Rebuttal	1547

Exhibits

Plaintiffs' Exhibit 6	1556
Plaintiffs' Exhibit 8	1557
Plaintiffs' Exhibit 9	1559
Plaintiffs' Exhibit 10	1561
Plaintiffs' Exhibit 11	1562
Plaintiffs' Exhibit 12	1563
Plaintiffs' Exhibit 13	1566

Plaintiffs' Exhibit 16	1643
Defendants' Exhibit 1	1648

Sealed Volume V

Transcripts and Motions

Trial Transcript	1657
Pretrial Motions	1662
Examination of Witness X.....	1695
Direct Examination by Mr. Kedrick	1695
Cross-Examination by Mr. Plyler	1700

Exhibits

Plaintiffs' Exhibit 1	1702
Plaintiffs' Exhibit 2	1706
Plaintiffs' Exhibit 3	1711
Plaintiffs' Exhibit 4	1712
Plaintiffs' Exhibit 5	1726
Plaintiffs' Exhibit 7	1743
Plaintiffs' Exhibit 14	1753
Plaintiffs' Exhibit 15	1757
Plaintiffs' Exhibit 17	1762
Plaintiffs' Exhibit 18	1774

1 State of South Carolina) Court of Common Pleas
 2 County of Richland) Fifth Judicial Circuit
 3
 4 Freddie Eugene Owens, Brad) Transcript of Record
 5 Keith Sigmon, Gary DuBose,)
 6 Terry, and Richard Bernard)
 7 Moore,)
 8) 2021-CP-40-02306
 9 Plaintiffs,)
 10)
 11 vs.)
 12)
 13 Bryan P. Stirling, in his)
 14 official capacity as the)
 15 Director of the SC Department)
 16 of Corrections, and Henry D.)
 17 McMaster, in his official)
 18 capacity as the Governor of)
 19 South Carolina,)
 20)
 21 Defendants.)
 22)
 23 August 1st-4th, 2022
 24 Columbia, South Carolina
 25
 B E F O R E:
 The Honorable Jocelyn Newman, Judge
 A P P E A R A N C E S:
 Lindsey S. Vann, Esquire
 Hannah L. Freedman, Esquire
 J. Christopher Mills, Esquire
 Joshua S. Kendrick, Esquire
 On behalf of the Plaintiffs
 Daniel C. Plyler, Esquire
 Austin Reed, Esquire
 On behalf of Bryan Stirling/SC Department of Corrections
 Thomas A. Limehouse, Jr., Esquire
 W. Grayson Lambert, Esquire
 On behalf of Henry McMaster D. McMaster, Governor
 Reported by: Stacy S. Johnson,
 Circuit Court Reporter

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
Pretrial Motions	6
Opening Statements	
By Mr. Kendrick	200
By Mr. Plyler	206
Bryan Stirling	
Direct Examination by Mr. Kendrick	218
Cross-Examination by Mr. Plyler	251
Cross-Examination by Mr. Kendrick	254
Colie Rushton	
Direct Examination by Mr. Kendrick	257
Cross-Examination by Mr. Plyler	279
Redacted - S.C. Code 24-3-580	
Examination by Mr. Kendrick (In-Camera)	284
Examination by Mr. Plyler (In-Camera)	287
John Peter Wikswo	
Direct Examination by Ms. Freedman	305
Voir Dire Examination by Mr. Plyler	317
Continued Direct Examination by Ms. Freedman	331
Cross-Examination by Mr. Plyler	379
Redirect Examination by Ms. Freedman	466
Jonathan Arden	
Direct Examination by Ms. Vann	478
Cross-Examination by Mr. Plyler	531
Redirect Examination by Ms. Vann	565
Recross Examination by Mr. Plyler	570
Jorge Alvarez	
Direct Examination by Mr. Plyler	580
Cross-Examination by Mr. Kendrick	590
Redirect Examination by Mr. Plyler	597
Ronald Keith Wright	
Direct Examination by Mr. Plyler	602
Cross-Examination by Ms. Freedman	622
D'Melissa DuPre	
Direct Examination by Mr. Plyler	638
Cross-Examination by Mr. Kendrick	647
Redirect Examination by Mr. Plyler	660

1	Closing Arguments	
	By Mr. Kendrick	665
2	By Mr. Lambert	679
	By Mr. Plyler	703
3	By Mr. Kendrick	711
4		
	Certificate of Reporter	719
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

<u>E X H I B I T S</u>				
			<u>ID.</u>	<u>EVD.</u>
1	Court's 1	Packet Re: Motion to Exclude	172	
2	Court's 2	John P. Wikswo Deposition	469	
3	Court's 3	Jonathan Arden Deposition	575	
4	Plaintiff's 1	Autopsy Report (Sealed)	217	304
5	Plaintiff's 2	Autopsy Report (Sealed)	217	304
6	Plaintiff's 3	Autopsy Report (Sealed)	217	304
7	Plaintiff's 4	Autopsy Report (Sealed)	217	304
8	Plaintiff's 5	Autopsy Report (Sealed)	217	304
9	Plaintiff's 6	Photograph	222	223
10	Plaintiff's 7	Electrocution Protocols (Sealed)	230	230
11	Plaintiff's 8	Letter/Report of 6/23/21	232	233
12	Plaintiff's 9	Letter/Report of 4/6/22	232	233
13	Plaintiff's 10	Electric Chair Test 6/16/21	232	233
14	Plaintiff's 11	Photograph	242	243
15	Plaintiff's 12	Ballistic Information Sheet	269	270
16	Plaintiff's 13	John P. Wikswo CV	313	314
17	Plaintiff's 14	Photographs (Sealed)	375	505
18	Plaintiff's 15	Photographs (Sealed)	477	525
19	Plaintiff's 16	Jonathan Arden CV	481	482
20	Plaintiff's 17	Autopsy Report (Sealed)	576	576
21	Plaintiff's 18	Autopsy Report (Sealed)	576	576
22	Plaintiff's 19	Article Review/Chart	624	
23				
24				
25				

1	Defendant's 1	Medina Autopsy Review	398	407
2	Defendant's 2	Journal Article	407	
3	Defendant's 3	Jorge Alvarez CV	577	582
4	Defendant's 4	Ronald Keith Wright CV	601	603
5	Defendant's 5	D'Michelle DuPre CV	637	665
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (The following proceedings were held August 1, 2022,
2 beginning at 9:49 PM.)

3 BAILIFF: Court come to order. All rise, please.
4 You may be seated.

5 THE COURT: Good morning.

6 MR. PLYLER: Good morning.

7 MR. KENDRICK: Good morning.

8 THE COURT: You-all give me just a moment to get
9 myself organized.

10 All right, folks. We are here in the matter of
11 Freddie Eugene Owens versus Bryan Stirling for a nonjury
12 trial. I know that there are a number of pre-trial
13 motions.

14 Also, before I forget, as to the media, I know I
15 haven't sent back any approvals, but I only have
16 requests from the State Newspaper; a visual and a
17 reporter. I have no other media requests from anyone
18 else.

19 Is anyone else from the media present?

20 Yes. Tell me which media entity.

21 REPORTER: The Greenville News.

22 THE COURT: Okay. But you don't intend to take
23 photos or --

24 REPORTER: No.

25 THE COURT: Okay. You're just sort of tapping

1 along on your laptop?

2 REPORTER: Yes.

3 THE COURT: No recording of any kind?

4 REPORTER: No.

5 THE COURT: Good enough.

6 All right. So I know there are a number of
7 motions that I've not ruled on. I want to start with
8 summary judgment and just go ahead and deny that. That's
9 why we're here for a trial.

10 Essentially, this Court, and to some extent the
11 Supreme Court, have decided that there clearly is some
12 genuine issue of material fact. That's why it was
13 scheduled for a trial and so I don't intend to entertain
14 summary judgment in that form. Summary judgment is
15 denied. We're going to proceed with a trial.

16 Now I know there's some other discovery motions
17 that are outstanding and I am happy to take them in
18 whichever order you-all believe is necessary.

19 MR. LAMBERT: Your Honor, if we might, we filed a
20 motion to sever --

21 THE COURT REPORTER: I'm sorry. Excuse me. Could
22 you please announce yourself? And I can't even see you.

23 MR. LAMBERT: Sure. And I can lean forward as best
24 I can.

25 Unless you'd like me to come around if that's easier,

1 Your Honor.

2 THE COURT: We're in such a tight spot. Yeah, it
3 would help for her to be able to see you to --

4 MR. LAMBERT: Sure. Would you like me to put the
5 podium back over there?

6 THE COURT: Just as long as we can get --

7 MR. LAMBER: I'm Grayson Lambert on behalf of
8 Governor McMaster.

9 Your Honor, we filed a motion to sever and strike
10 under Rule 40(j) plaintiff Gary Terry's as-applied
11 challenges. The plaintiffs have consented to that. In
12 the -- with the aim of trying to get the easy stuff done
13 first, we'd ask that you grant that. And I think the
14 plaintiffs would join in asking for that.

15 THE COURT: Is that correct?

16 MS. FREEDMAN: Yes, Your Honor.

17 THE COURT: And if you will give your name for the
18 record as well.

19 MS. FREEDMAN: I'm Hannah Freedman for the plaintiff.

20 THE COURT: Okay. So that is granted by consent.

21 MR. LAMBERT: Thank you, Your Honor.

22 THE COURT: Okay. Moving on.

23 MR. PLYLER: Your Honor, I think -- I think the
24 next -- I'm Daniel Plyler. I represent two of the
25 defendants; Director Stirling and the Department of

1 Corrections.

2 I think the next one that would probably be the
3 easiest to take up was the motion that was filed by
4 the defendants to strike two lately -- late-identified
5 experts.

6 THE COURT: What was the date of that filing?

7 MR. PLYLER: That's an excellent question, Judge.
8 Off the top of my head, I don't know, but I want to say
9 it was -- it was still June when we filed it.

10 THE COURT: The June 29th motion?

11 MR. PLYLER: 29th.

12 THE COURT: Got it. Yes, sir.

13 MR. PLYLER: Your Honor, we have a -- a binder of
14 the pending motions if you want just to have them
15 tabulated.

16 THE COURT: Absolutely. That would be great.

17 MR. PLYLER: And obviously one of them -- may I
18 approach?

19 THE COURT: Yes.

20 MR. PLYLER: One of them you've already ruled on
21 -- well, two of them you've already ruled on.

22 THE COURT: That will help with my shuffling of
23 papers.

24 MR. PLYLER: So Tab 5 will be the -- would be that
25 motion, Your Honor.

1 THE COURT: Yes, sir.

2 MR. PLYLER: It's set out pretty clearly in the
3 -- in the motion itself. I'm -- I'm happy to answer
4 questions, but I would just reiterate that, you know
5 -- we -- we received an order in April from the South
6 Carolina Supreme Court stating that this case had to be
7 tried -- completed to try -- I mean, completed within
8 ninety days.

9 By my math, and I think everybody agreed with me
10 though I'm not a mathematician, means August 4th is when
11 this has got to be done period. You issued a discovery
12 -- I mean, excuse me, a scheduling order that includes a
13 deadline to complete written discovery and even said in
14 that order that not only do all responses to written
15 discovery have to be provided by June 17th, that any
16 motions related to discovery needed to be filed in time
17 so it could be ruled on and -- and decided by June 17th.

18 And I know you were thinking more traditional
19 discovery motions. Well, this is one of those. The
20 plaintiffs originally filed this case, if I'm not
21 mistaken, in May of 2021, so we are sitting here today,
22 what, almost eighteen months, sixteen months past when
23 they -- no, fifteen months past when they filed this
24 case.

25 When the filed the case, they already -- they had

1 listed three potential experts in their complaint, one
2 of which they've never mentioned again, Mr. --
3 Dr. Petersohn I think is how you say his name. The
4 other two were Dr. Wikswo and Dr. Arden.

5 We -- we then served our written discovery after
6 getting the third amended complaint, after getting the
7 order from the South Carolina Supreme Court and your
8 scheduling order, we went ahead and served written
9 discovery and asked them to identify any witness they
10 planned on calling at the trial of this case. In
11 response to that, they named Dr. Wikswo and Dr. Arden.
12 That was it.

13 June 17th comes and goes and then approximately
14 ten days after that -- excuse me, eleven days after that,
15 they send us a, quote, supplemental response wanting to
16 add two new experts to the case.

17 Now one of them, by severing Terry's as-applied
18 claim I believe is no longer being offered, and that --
19 that was the oncologist and, quite frankly, his name
20 escapes me.

21 The other one is a -- a history professor from
22 USC by the name of Mark Smith. Mr. Smith was never
23 identified to us within the discovery period that
24 -- that Your Honor allowed. He wasn't, you know,
25 disclosed to us until -- I'm trying to do the math

1 backwards, but essentially thirty-two, thirty-three
2 days ago. We already had to try to accomplish two fact
3 witness depositions. And we were gonna have six expert
4 depositions, it ended up being five, and we've actually
5 withdrawn one of our experts because, quite frankly,
6 she's just not available this week.

7 So we had a lot to do in that timeframe, but we
8 clearly did not have time to deal with a new expert named,
9 you know, eleven days after the -- the timeline to file
10 responses to written discovery requests had expired.

11 And, Your Honor, I know in traditional litigation
12 eleven days may not seem like much, but between the time
13 we got your order and the deadline to complete discovery,
14 I think it was like thirty-five days, maybe thirty-six
15 days, so, you know, that's like a 33 percent error there
16 if you want to think about it that way before they finally
17 tried to identify this person.

18 Additionally, Your Honor, quite frankly, I'm not
19 sure what a history professor has to offer. They did not
20 say in -- in the description that he is some expert on
21 firing squad protocols across the country. I've looked
22 him up on USC's website. There's no mention of firing
23 squad or judicial executions or any work he's done
24 specific to those issues. In conversations with
25 plaintiff counsel, apparently he's a civil war expert

1 and he's gonna talk about firing squads in the civil war
2 era, which, quite frankly, is muskets and maybe the very
3 early beginnings of rifling and wouldn't even be remotely
4 comparative to what -- you know, firearms nowadays and
5 whatnot.

6 So in addition to it being incredibly late notice,
7 which I think should require -- I mean, the case law's
8 pretty clear the -- the remedy for this is you don't get
9 to use him. I don't think he has anything relevant.
10 Plus we were prejudiced because we never had the
11 opportunity to do any discovery on him. I don't have
12 any -- you know, at least with Wikswo and Arden I have
13 reports. I travelled all over the country to dispose
14 them. That's not the same with Mr. Smith.

15 So, you know, long story short, he needs to be
16 excluded from this trial. He's not relevant and he's
17 late noticed and the remedy is exclusion.

18 Thank you, Your Honor.

19 THE COURT: Mr. Kendrick.

20 MR. KENDRICK: Thank you, Judge. Josh Kendrick on
21 behalf of the plaintiff.

22 Your Honor, I think that the case law is clear.
23 I've found a few, but I'm just looking at the one that
24 popped up. Barnett, 355 S.C. 588, and then -- right.

25 So essentially what they're talking about, number

1 one, that the rules are designed for hearings on the
2 merits, so the exclusion of a witness is a pretty dire
3 sanction and -- and probably wouldn't normally be granted.

4 The five factors that we find from Barnett are the
5 type of witness involved, the content of the evidence,
6 the nature of the failure or neglect to furnish the
7 witness's name, the degree of surprise, prejudice to the
8 opposing party.

9 So essentially they're correct. We named this
10 person after the scheduling order ended, but we named
11 him prior to any depositions being taken and I think
12 scheduled in that short period of time. So there's --
13 he's in Columbia. He works at USC, he's available, so
14 it wouldn't have been very difficult to depose him.

15 And I think that from a relevance standpoint, they
16 have raised in their pleadings what I would assume would
17 be a defense, sort of -- I'm gonna call it a semi
18 originalist view of some of these things that we're
19 dealing with, that this idea that things that were
20 accepted at these sort of various times when we look
21 at constitutional interpretation aren't accepted now,
22 and what Dr. Smith has done is extensively studied
23 the civil war and when you hear that there have been
24 hundreds of firing squad executions or that firing squad
25 executions were common at a particular time, that was

1 actually during the civil war when they were done in a
2 military arena, and there's very specific purpose for
3 that, there's a very different sort of hierarchy, there's
4 a very different acceptance level and they have a very --
5 a different purpose.

6 So I think that's relevant because we brought up
7 sort of this view that we need to look at the constitution
8 as the way it was written at these particular times and
9 it's relevant in some of those particular times that the
10 firing squad was actually not in wide use at all. It was
11 used really with only significant numbers in civil war,
12 but even as it goes it was a rarely used device amongst
13 civil war soldiers.

14 It's not long testimony, it's not complicated
15 testimony, but we run into this problem with sort of the
16 defense having to do with this -- I'm gonna call it a
17 semi originalist view because we don't think originalist
18 is correct because it changes. You know, obviously it's
19 appropriate if you take that view to kind of go at these
20 different -- different points. I do not believe that
21 is the correct way to interpret our constitution or any
22 constitution, but in the interest of trying to get a
23 ruling in our favor I would like to try to win the case
24 even under their interpretation rules whether I agree
25 with them or not.

1 That's what Dr. Smith does. It -- it bears
2 directly on whether the firing squad is historically
3 just an unusual way of executing someone and I think his
4 testimony is useful for that. I also think this is a
5 bench trial. Your Honor can hear the testimony and
6 weight it however you feel. I also believe that -- you
7 know, we've met with Dr. Smith. He said he is available
8 this week.

9 I mean, again, at some point after these motions
10 I'm gonna talk to you about some scheduling issues. I'm
11 gonna call them issues, they are not problems, Judge. We
12 have worked very hard together, but we have experts from
13 all over the place. We may not find ourselves, you know,
14 depending on how you let us do things working until late
15 tonight, so we could depose him late this afternoon or
16 this evening, which is what I assume they want. I don't
17 know that that's necessary.

18 But the long and short of it is, Your Honor, I
19 think it's pretty drastic to take a witness out of play,
20 especially because we didn't name him last week, we
21 named him in a time period where there was -- it
22 certainly would have been reasonable to depose him and,
23 you know, that didn't happen, but...

24 THE COURT: What is the reason for the delayed
25 disclosure?

1 MR. KENDRICK: We just didn't find him. I mean,
2 we -- we thought about him and kind of -- it's not the
3 best excuse in the world, I completely concede that, but
4 it wasn't actively concealing him. It was more along
5 the lines of is there an expert that can address these
6 issues. Someone on my side went out, did some research,
7 found him, looked into whether he could testify to these
8 matters and -- and we named him, so.

9 One second, Your Honor.

10 THE COURT: Yes, sir.

11 MR. KENDRICK: So, you know, once -- once he was
12 named, Your Honor, he was certainly available and that
13 wasn't, you know, pursued. So I think that, again, it's
14 a pretty drastic remedy to just strike a witness and I
15 don't think it's the appropriate remedy in this case. I
16 think the case law is pretty clear on that.

17 I don't have anything else to add.

18 THE COURT: Okay. Mr. Plyler.

19 MR. PLYLER: Very briefly, Your Honor.

20 I know you've tried a bunch of cases. I have.
21 I've never had an expert dropped on me thirty days
22 before the trial started and the Court allowed that
23 person to testify because the rules are the rules.

24 There's a prejudice here. Quite frankly, I don't
25 want to depose Mr. Smith. I want to get ready for the

1 next three days of this trial. These are important
2 issues that need to be heard as Your Honor said. We've
3 got plenty of experts that we need to get ready. There's
4 a lot to do. So it's not like the rest of my afternoon
5 just happened to be clear. Just like in the past thirty
6 days, in addition to this case, I do have other cases
7 and clients, I have other court appearances that require
8 mediations, depositions. It's not like we just had days
9 laying around where we were like oh, I guess we could go
10 depose Mr. Smith today, but we just chose not to. I mean,
11 that's not what happened.

12 They had an obligation. They had years to prepare
13 their case. We've had thirteen months -- or fifteen
14 months since the original filing. And the third amended
15 complaint, the operative complaint, we've only had it
16 since April, okay? So it's not like we -- we were
17 sitting here, you know, on our hands trying to let the
18 clock run out as they're trying to describe it. That's
19 just not true. If they thought this was important to
20 their case, just like when they had identified
21 Dr. Wikswo, Dr. Arden, Dr. Petersohn, they could have
22 identified that expert at that time. They could have
23 identified that expert at any point in the fifteen
24 months that their litigation has been pending up until
25 the discovery deadline, which was June 17th. They chose

1 not to do it. To say well, we just didn't find him --
2 it's not like they went and found some, you know, unique
3 neurosurgeon, there's only two of them in the whole
4 world. This is a historian, a civil war historian.
5 Every college in the United States that I know of has
6 that pre-civil war era history class that about every
7 freshman has to take, so it's not like this guy was just
8 -- he's the only one in the world who can do this. That
9 -- that argument falls flat.

10 Why don't you -- I'm not sure I understand your
11 point, so I'll let him address it.

12 MR. LAMBERT: Your Honor, if I may briefly in terms
13 of Mr. Kendrick's point -- let me move so the court
14 reporter can see.

15 THE COURT: Right. Sorry.

16 MR. LAMBERT: I'll climb over everything.

17 Your Honor, again, Grayson Lambert, for the -- the
18 Governor. This historical defense first came up in our
19 opposition to the motion for preliminary injunction that
20 we filed June 3, 2021. The plaintiffs had more than a
21 year between that date and the June the 20th -- excuse
22 me, the June 17, 2022, discovery deadline. This was not
23 something we sent them scrambling to look for at the last
24 minute, so I think that very much cuts against the late
25 disclosure of the expert.

1 MR. PLYLER: And that's it, Your Honor. Unless you
2 have questions for us, that's all we have.

3 THE COURT: I do because I'm trying to evaluate the
4 prejudice to -- I mean, obviously the degree of surprise
5 -- I'm going through the factors that the Court must
6 weigh. The prejudice to the opposing party is where I'm
7 having trouble. Obviously there is some measure of
8 prejudice when you don't have the opportunity to depose
9 a witness or -- or find a competing witness as it were,
10 but because this is a civil war expert and not, for
11 example, in a medical malpractice case, you know, a
12 medical expert that's going to talk about some -- that's
13 going to evaluate the records or specifically what
14 happened in that case and render an opinion based on
15 some science. I think that the bar for prejudice is --
16 is a little higher here to get over because it's a civil
17 war expert. I'm trying to sort of envision what if the
18 expert had been disclosed sooner, how would that change
19 things? What were you prevented from being able to do
20 and how impactful is that to this case?

21 MR. PLYLER: Sure, Your Honor. I'll happily
22 address that. Let's -- let's talk about rebuttal
23 witness first. Because we knew about Dr. Wikswo and
24 Dr. Arden because they attached the exhibits -- or
25 their statements to the complaint. We went through

1 the process of trying to find our own competing experts
2 and because we had that time we were able within the
3 June 17th deadline to identify our experts.

4 You know, we -- we were handcuffed from the
5 beginning. We didn't have years to prepare our case
6 like they did. So to get that on June 28th, I wouldn't
7 have even been allowed without leave of court to name a
8 rebuttal expert, I would have had to try to find time to
9 depose this man. I understand you're talking about a
10 historical era, but that also means that whatever source
11 materials he's dealing are gonna be a little complicated,
12 they may not be admissible, there may be all sorts of
13 problems with the source materials, which kind of leads
14 into the next motion that you're probably gonna be taking
15 up. I mean, that's a significant issue. I didn't have
16 time to subpoena his records. I have no idea what exactly
17 he's likely to testify to.

18 And -- I'm sorry, it's hard to -- it's hard to think
19 when somebody's talking over there.

20 THE COURT: Well, let's not start this early.

21 MR. PLYLER: I'm sorry, Judge.

22 THE COURT: We've just gotten off the ground --

23 MR. PLYLER: I agree.

24 THE COURT: -- and we're supposed to be very cordial
25 to one another.

1 MR. PLYLER: But the point is there is prejudice
2 to us and then to suggest that that remedy is well, you
3 -- you can go this evening and go depose him. I don't
4 know how that cures -- it compounds the prejudice because
5 now I'm not freed up to prepare for the next day of trial.

6 So I just -- I understand there's a test, but I've
7 always -- and I've been litigating a while now. When you
8 wait until essentially a month before trial to name an
9 expert, that's too late. You know, court orders -- and
10 you've heard this said before, they're not just pieces
11 of paper. You can't just ignore the deadline. There's
12 consequences for ignoring the deadline and the normal
13 consequence for ignoring the deadline with regards to
14 identifying a witness is you don't get to use that
15 witness. That's all we we're asking, just that the rules
16 be followed.

17 Thank you, Judge.

18 THE COURT: Mr. Kendrick.

19 MR. KENDRICK: Just really brief, Your Honor.

20 If you'd look at page 8 of our response, I think
21 we go through some of the case law where really
22 preclusion of a witness has not been done in a case
23 like this. And further, you know, I have some sympathy
24 for the situation because we didn't know your ruling and
25 that's the only reason I brought up deposing this guy.

1 I think we've all tried cases where we didn't depose
2 particular witnesses and there's no need for that.
3 Either you can or can't.

4 So, I mean, I think that we all -- that's sort of
5 one solution to their concern about not knowing what he's
6 gonna say. But, again, I think it just goes back to the
7 fact that if you look at those cases we cite on page 8
8 of our response, it's just pretty -- pretty egregious
9 discovery behavior, it's pretty intentional. There's
10 times where people attempted to sort of block the other
11 side from doing their job, and that's not what happened
12 here. I mean, I think it was -- I've listened to what
13 they're saying and I think they've pointed out that we
14 could have done a better job finding this guy, but there's
15 not another situation that's analogous that would show we
16 engaged in bad faith, and I think that's sort of where you
17 would need to go to preclude the witness. I think it's
18 certainly appropriate to let him testify.

19 THE COURT: Well, I disagree on last point. I don't
20 know that the Court needs to find bad faith in order to
21 exclude the witness.

22 Going back to the factors that the Court must
23 evaluate, I mean, bad faith is not one of them; although
24 the nature of the failure or neglect or refusal to furnish
25 the witness's name, I mean, I guess that could -- that

1 element could touch on bad faith certainly.

2 In this case though, this is a difficult situation
3 because, right, never do -- are witnesses, expert
4 witnesses in particular, disclosed only thirty days
5 before trial, but typically you're not on a 90-day
6 timeline. That cuts both ways though because I think
7 on a truncated timeline the deadlines become even more
8 important so that the case can move along and everyone is
9 able to litigate in a manner that they're -- that they
10 choose to.

11 And so considering the type of witness involved, the
12 content of evidence that you tell me will be emanating
13 from that witness, the fact that he was identified late
14 -- or identified by plaintiff's counsel late because he
15 was just found, when a search could have been going on
16 for a year before this, and then the other factors, the
17 degree of surprise, the prejudice to the opposing party,
18 really plaintiffs are in control of -- of the case and
19 the -- the evidence that is proffered, right, so you know
20 where you're going with your case, you are the driving
21 factor as plaintiff, defense get to respond, but I think
22 as the driving force being put on notice that there's
23 this semi originalist view more than a year ago, then a
24 witness should have been identified more than a year ago
25 or at least by the deadline in order to rebut that.

1 I just think that the deadlines become much more
2 important. And generally the Court tries to sort of
3 split the baby when this comes up, we continue the case
4 and, okay, go depose the expert and we'll see you back
5 in two weeks, but that's not possible in this case
6 because of the timeline set forth by the Supreme Court.

7 For all those reasons, I just think the prejudice
8 to the defense is significant. The deadlines in the
9 scheduling order are more important perhaps than normal.
10 For all those reasons, I'm granting the motion to exclude
11 the testimony of Mark Smith.

12 And let me just check with you, Mr. Kendrick. The
13 other proposed expert was Gabriel Pushkus? Was that --

14 MR. KENDRICK: That -- that expert was directly
15 related to claim that was severed.

16 THE COURT: Okay.

17 MR. KENDRICK: But, I guess, just for the record,
18 Your Honor, I need to ask if you would be willing to
19 entertain a proffer from Dr. Smith before you exclude
20 him or -- and even if you do exclude him. And I --

21 THE COURT: I'm hesitant to do that because
22 proffers typically occur in the absence of the finder
23 of fact, right? I am the finder of fact, so -- yeah,
24 had he been deposed, then maybe there would be a
25 transcript to offer as an exhibit that I just would

1 not review, but the danger of confusing the issues and
2 clouding the Court's judgment, I don't know that the
3 proffer is appropriate.

4 MR. KENDRICK: And that's all I had. Your Honor,
5 I've asked and you've ruled and you understand that
6 probably in a case like this I'm gonna be have to be
7 very hyperaware of the record that I create.

8 THE COURT: Oh, absolutely.

9 MR. KENDRICK: I understand your ruling denying my
10 request.

11 THE COURT: And that's why I'm trying to figure out
12 how best to handle this because I don't want to deprive
13 you of including that in the record, of course, the
14 proffered testimony so that the appellate court can make
15 a ruling as to whether I made the right decision.

16 Mr. Plyler, you wanted to jump in?

17 MR. PLYLER: Yeah, and just to help with this and
18 to help build the record on our end.

19 If your decision here was about the admissibility
20 of his testimony, the relevance of his testimony, things
21 like that, if you were making the decision based on the
22 actual testimony he wanted to offer, then a proffer might
23 be the appropriate way to handle it. That's not what
24 the decision here is. The decision is you didn't name
25 him timely. It doesn't matter what he has to say, so a

1 proffer would be inappropriate in that situation.

2 And I believe you're right. You can't -- I know
3 judges are more capable of separating the hat you wear
4 or the robe you wear as the finder of the law, as well
5 as the seat you sit in as the finder of fact. I mean,
6 I know you're more than capable of doing that, but this
7 would just be a situation where it's not even necessary
8 for you to have to do the exercise because that's not
9 the basis of the ruling.

10 THE COURT: Yeah, I tend to agree with that.

11 MR. KENDRICK: And we accept your ruling, Your
12 Honor. I wasn't arguing.

13 THE COURT: Yes, sir.

14 And just to clarify, I agree with Mr. Plyler, that
15 he's right that really my decision on the motion was not
16 based on the substance of the testimony. At least not
17 any more than necessary to evaluate these five factors.

18 Okay. Next motion.

19 MR. PLYLER: Your Honor, I think it's gonna be
20 the Court's druthers on this one. The way I see it,
21 there's essentially two remaining motions. One is our
22 motion to exclude and/or limit the testimony of Professor
23 Jonathan -- or, excuse me, John Wikswo. The other one
24 is this interrelated issue of a motion for protective
25 order that we filed following the depositions of

1 Mr. Stirling and Mr. Rushton, their motion to compel on
2 that same issue, as well as their asking for greater
3 clarification or details of your previously issued motion
4 for protective order.

5 In my mind, I've always kind of thought about that
6 as one motion, even though I think it is three on the
7 record. So I think we have those two issues. I think
8 it's the Court's druthers as to which one we take up
9 next. I'm happy to -- to argue the motion to exclude
10 at this time or to talk about the -- the protective order
11 issues, Your Honor.

12 THE COURT: Let's go with excluding testimony.

13 MR. PLYLER: Okay.

14 All right, Your Honor. We filed a motion to exclude
15 any testimony from Dr. John Wikswo. He's a professor in
16 like four different things; physics, bio -- biomedical
17 engineering -- or, excuse me, what is it?

18 THE COURT: Biomedical engineering.

19 MR. PLYLER: Thank you. Biomedical engineering
20 and -- and different categories of physics as it relates
21 to biological matter essentially. He talks about it in
22 the term of living state physics, which is -- he said he
23 coined that term before there was even biomedical
24 engineering and stuff.

25 I mean, he's an extremely qualified and intelligent

1 person in his fields of expertise and if he was only
2 being offered to, for instance, explain electricity or
3 to explain based on studies he conducted or been a part
4 of, you know, how electricity interacts with certain
5 human issues, and the reason I say it that way, Your
6 Honor, he's not a physician, he has no medical degrees,
7 he doesn't treat people, he's never done human studies
8 is what he said in his deposition. When he talks about
9 the application of electricity to human tissues, for
10 instance, he did study on measuring the magnetic field
11 of an isolated neuron. That's not a human study.
12 That's running, you know, experiments on human tissues.

13 His -- primarily his opinions that are directly
14 relevant to this case that the plaintiffs are trying to
15 make lack any sort of reliability.

16 And I -- you know, Your Honor, I'd like to go
17 through in some detail, even though I think it's laid
18 out in our motion pretty extensively, just how unreliable
19 with respect to -- I guess you'd call it a method. I
20 don't even know if you could call this a method. I
21 mean, he -- he admitted in multiple places that there
22 is no scientific method here.

23 A lot of his opinions that he wants to offer
24 specific to judicial executions in South Carolina came
25 from his review of, quote, anecdotal evidence, primarily

1 old newspaper clippings, that were compiled by Justice 360
2 and the Cornell Death Penalty Clinic that's run by John
3 Blume. They weren't even compiled by him. He couldn't
4 offer anything about what was the process for compiling
5 this information, did certain newspaper articles get left
6 out, did we only look at certain newspaper sources, was
7 there any effort to talk to actual witness from -- you
8 know, the actual witness who is attributed in a quote,
9 did anybody try to talk to them, did anybody look at
10 reporter bias, did anybody look at witness bias, did
11 anybody look at sensationalism, which -- I mean, I
12 understand we have media here in the courtroom, but we
13 all know that's part of media. There's sensationalism.
14 They've got to grab attention with a headline.

15 But, importantly, Dr. Wikswo took no part in that.
16 He also took no part -- if you look at his affidavit,
17 and he testified to this in his deposition, he -- he --
18 the way he said it is for which there is any reliable
19 information. So it wasn't even the whole body of
20 anecdotal evidence that apparently he's relying on, it's
21 this subset of that information that, quote, had reliable
22 information.

23 So I asked him and -- I mean, well, what was your
24 criteria for figuring out what was reliable and what
25 wasn't? He said I didn't make that criteria, Justice 360

1 did that. So he can't even say what was the exclusion
2 criteria or inclusion criteria for the term "reliable
3 evidence". And then he -- he literally makes a leap from
4 that that based on his review of a spreadsheet that was
5 prepared by Justice 360, not by him, which included a
6 column that said notes and purportedly that was a summary
7 of what this anecdotal information said.

8 And I've gone back and tried to verify and, quite
9 frankly, it ain't real accurate. And if we need to
10 get into some of those specifics, we can. It just
11 undermines just how unreliable this entire process was,
12 how unreliable the method that he's talking about that
13 he then compiled data allegedly and tries to make
14 opinions based off of, just how unreliable it is.

15 He -- he makes the leap that 30 percent of
16 executions, electrocutions, within South Carolina for,
17 quote, which there is any reliable information, were
18 botched. He could not tell me what the criteria was to
19 determine whether it was botched or not, he could not
20 tell me what the criteria was for whether this was
21 reliable information or not, he could not tell me what
22 the criteria was for determining this is the anecdotal
23 evidence we should be looking at as opposed to other
24 anecdotal evidence.

25 In fact, Judge, as far as I can tell he didn't do

1 anything to actually review the source materials himself.

2 And I can put all this up on the screen and will if
3 Your Honor wants to see it.

4 There's an e-mail from June 29th -- excuse me,
5 March 29th of 2021, approximately twenty-nine days before
6 he signs his affidavit that they made an exhibit in this
7 case, and in that e-mail he said I don't have time to
8 look at all the newspaper articles. He literally says
9 that in the e-mail, but he attaches a draft of his
10 affidavit to that e-mail and the draft of his affidavit
11 says one of the things I reviewed were all these press
12 articles that were provided to me by Justice 360. So
13 he's already put that in his affidavit and in the same
14 e-mail he says he hasn't time to even look at the
15 newspaper articles.

16 THE COURT: I would like to see that.

17 MR. PLYLER: Okay. I was hoping you'd say that.

18 If you'd wouldn't mind --

19 MR. MILLS: The affidavit or the draft affidavit?

20 MR. PLYLER: Give me just a second, Chris. I'll
21 be with you.

22 I get to use all my fun toys, Judge.

23 THE COURT: Exactly.

24 MR. KENDRICK: Judge, do you mind if I stand over
25 here?

1 THE COURT: Not at all.

2 MR. PLYLER: So, Judge, I'm gonna do my best here
3 to make this as legible as I can.

4 Now you can see this is from John Wikswo, dated
5 March 29th, to Mr. Blume, Ms. Freedman, Ms. Franz, and
6 copied himself, and Bran -- Brendan Van Winkle, who's
7 also with Justice 360, and I'll highlight, I can't
8 review all the newspaper articles at this time, okay?

9 And then this was the attached draft of his
10 affidavit. Let's see. It says Affidavit of John P.
11 Wikswo and -- sorry, I have a cheat sheet here to get
12 me to the right pages. This is page 4 of that affidavit.
13 Actually we'll look at page 3 so you can see the lead-up.

14 In paragraph 10 of the draft affidavit from March,
15 it says in addition to the information I reviewed about
16 judicial electrocutions generally, attorneys from Justice
17 360 asked me to review the following information specific
18 to South Carolina's electrocution process. It says A, B,
19 C, D, E, F, and then if you go to -- all the way down to
20 H, it says newspaper and other accounts of South Carolina
21 judicial executions and other events from 19 -- 1893
22 through 1996.

23 So in his draft, and if you -- just to confirm I'm
24 not making up that this was his March draft, in the
25 notary line it actually had already been changed to

1 March of 2021.

2 So he -- I'm convinced he didn't even review the
3 articles and in his subpoena response he actually only
4 provided me -- I want to say it's about fifteen to twenty
5 -- a listing of fifteen to twenty articles. The source
6 materials which I later got ahold of is over two hundred
7 and twenty newspaper articles. There are blatant errors.

8 For instance -- and I tread cautiously here, Judge,
9 because I -- we're not here to argue the specifics of
10 anybody's execution. We're not even here to argue the
11 specifics of the convictions and sentences handed down
12 for the plaintiffs. That's not what this case is about,
13 but obviously they're trying to make an issue of all
14 these historical executions over the past hundred plus
15 years in South Carolina.

16 One of the ones in their chart that they list as
17 botched was the execution of George Stinney. And I know
18 Your Honor is probably familiar Mr. Stinney. Obviously
19 it is a complicated and difficult situation for us,
20 especially those that work in the law because we
21 understand how many problems there were with that
22 judicial process involving Mr. Stinney and we know that
23 seventy years after his execution a judge vacated his
24 sentence. Now that vacation of his sentence did not
25 include any sort of finding regarding whether he was

1 innocent or guilty of the crime, it had more to do with
2 his age and clear errors. The man was executed within
3 a year of his crimes. It's unheard of today that
4 something like that would happen. So I am in no way
5 trying to belittle, make light of, gloss over
6 Mr. Stinney's situation. It is a conversation I would
7 welcome to have with you-all on a different forum.

8 The issues there are not directly related to this
9 case, but what is directly related to this case is in
10 their spreadsheet, and he said in his deposition and at
11 the time I could not fathom what he was talking about,
12 that there was this evidence that someone had remained
13 alive after the execution in South Carolina and what I --
14 what I figured out is he was talking about Mr. Stinney.

15 And the reason he said that is on page -- this is
16 the spreadsheet that Justice 360 put together. It was
17 first provided to Mr. -- excuse me, Professor Wikswo,
18 February 19th of 2021. There are some different -- I'll
19 call them layouts of this particular spreadsheet. There
20 was a time they added some additional columns, but this
21 is the original spreadsheet.

22 Mr. Stinney is listed for some reason out of order.
23 It's on page 7 and as you'll see right there in the
24 middle of the screen it says George Stinney, Junior.
25 In the notes -- and, again, this is apparently the

1 summary of what the newspaper articles said. In the
2 notes it says in that last sentence he was still alive
3 when his body was loaded onto the hearse, which was
4 shocking to me because I reviewed all the newspaper
5 articles and there's no mention of that anywhere in any
6 newspaper article that was either produced to me by
7 Mr. Wikswo or that was later produced through the
8 discovery. There's none. There are three newspaper
9 articles.

10 Give me just a second, Judge. There were three
11 newspaper articles that were provided from 1944. 1944
12 is the year Mr. Stinney was executed. And if Your Honor
13 is familiar with this, and I've become a bit of history
14 buff, which was not a hobby of mine before this, but it
15 was in a time when they would have multiple executions
16 in one day, which is also basically unheard of at this
17 point. He was executed the same day as another man by
18 the name of Hamilton. So there were two articles of
19 the three; one referenced Mr. Stinney directly, and I'm
20 putting this up on the screen, and as you'll see, you
21 know, it's from 1944 so please excuse the language
22 because I don't use some of these words, but, you know,
23 that's the way they talked. But as you get down into
24 the article, it talks about hard to strap him into the
25 chair, guards had difficulty strapping the boy's slight

1 -- the think that's supposed to say frame into position
2 in the wooden chair built for adults, as the father of
3 the two girls he basically murdered were watching. He
4 made no comment when asked if he had anything to say
5 before the switch was closed.

6 Then you go on -- you know, it goes on to say
7 Stinney never denied that he had beaten to death with a
8 14-inch railroad spike two -- I'm sorry. I'll try to
9 make it bigger so you can see. That's that paragraph I'm
10 reading from. But nowhere in here does it say anything
11 about he allegedly was alive when he was put into the
12 hearse. And if you notice on the spreadsheet, Your Honor,
13 that wasn't in quotes. I can go back to it in a minute.
14 There was a portion of it put in quotes and then there's
15 a portion that's not in quotes.

16 And we know because he admitted that Justice 360
17 is an anti-death penalty advocacy group. They have a
18 bias. In fact, in front of the Fourth Circuit earlier
19 this year, they describe themselves as mission-driven
20 litigators and that people were trampling on their First
21 Amendment rights through the issuance of confidentiality
22 orders. They have a bias, they have a purpose and,
23 quite frankly, they're the ones that put together that
24 chart, not Dr. Wikswo.

25 So this is the other article from 1944 that was the

1 same day that's actually about Mr. Hamilton primarily,
2 but Mr. Stinney is mentioned right here. Fourteen,
3 tried and convicted. He was followed by Bruce Hamilton
4 the day of the execution. The second paragraph, the
5 master switch on the electric chair was pulled shortly
6 after 7:30 AM. Stinney was pronounced dead in three
7 minutes and forty-five seconds. It talks about his
8 crime, but there is nothing in here allegedly that he
9 had sort of any signs of life.

10 And the reason I keep bringing that up, Judge, the
11 criteria that Dr. Wikswo says he is using was whether or
12 not the execution was botched based on this review of the
13 anecdotal evidence. The only thing in the spreadsheet
14 that could even remotely be considered evidence of -- of
15 this execution being botched is that line; that he was
16 allegedly still alive when he was loaded into the hearse,
17 but that's not even source material that was even provided
18 to Dr. Wikswo. I'm not sure where it comes from. I can't
19 depose Dr. Wikswo about it because he didn't create the
20 chart and the materials he said he relied on, which I'm
21 not even sure he actually reviewed them based on that
22 e-mail, and during his deposition he said I reviewed
23 much of the articles. The only person that we could
24 actually depose about any of that would be Justice 360
25 because they're the ones that came up with all these

1 criteria, they're the ones that put this into the
2 spreadsheet and listed this execution as botched, but
3 the source materials that were provided don't have any
4 evidence of that. That's how unreliable all this is.

5 He then goes on in his deposition -- like I said,
6 he tried -- he's trying to use this information, this
7 completely unreliable information, from a completely
8 unreliable method, to try to make the argument that
9 30 percent of all electrocutions in South Carolina have
10 been botched. That's -- that's the argument he's wanting
11 to make. That's the opinion he wants to offer in this
12 case. He agreed with me that he had no scientific method
13 to support that. He even said no scientific method can
14 support any of the anecdotal accounts. That was page 175
15 of his deposition, lines 3 through 7.

16 As I already said, he didn't do anything to compile
17 this information. This isn't based on an independent
18 study that he had conducted in his, quote, field of
19 expertise, he didn't do anything to try to decide what
20 was or was not reliable, he didn't do anything to try
21 to decide what was or was not botched. He didn't review
22 the source materials as far as we can tell, and if he
23 did, he could -- there's no source material provided for
24 this line that I just pointed out.

25 And that's just one, Judge. They list twenty in

1 this chart. Based on my count they list twenty as being
2 botched. Twenty. There's 248 listed on the chart. Now
3 I ain't no math major, but that's less than ten percent.
4 But yet Dr. Wikswo says well, it's 30 percent based on
5 his calculations of the, quote, reliable information,
6 but, no, I can't tell you what reliable information is
7 or isn't or how it was done. In fact, he went onto say
8 in his deposition it was provided to me.

9 So that's one example. That's not even getting into
10 all the issues of speculation in his -- in his opinions.
11 He used the term "some period of time". Some period of
12 time. He used it -- Grayson says he used it five, I
13 swear he used it more than that, but I could be wrong.
14 Some period of time. His answer to that was this is a,
15 quote, not yet specified period of time. That's page 112
16 of his deposition. And, Your Honor, his deposition was
17 included as an exhibit to the motion.

18 He admitted that he doesn't know how long that
19 period of time is, he admitted that he can't measure that
20 period of time, that nobody can measure that period of
21 time. I asked him could it be ten seconds or less, he
22 said I don't know. I said could it be five seconds or
23 less, he said I don't know. I said could it be two
24 seconds or less, he said I don't know.

25 I found an earlier report that he issued in 1998

1 in Florida when he was part of the Jones versus State
2 litigation, and I don't know if Your Honor's reviewed
3 any of this yet, we're gonna hear about it a lot during
4 this trial, but that was following two well-publicized
5 executions in Florida with the executions of a Mr. Tafero
6 and the execution of a Mr. Medina, okay, and Dr. Wikswo
7 says he was hired by what they call a Capital Collateral
8 -- it's Capital Collateral Resource, I believe. As far
9 as I can understand, it's either a governmental or quasi
10 governmental entity established in Florida that represent
11 condemned inmates. They're called the Capital Collateral.
12 You'll see them as CCR in some of these things.

13 He was hired by them to review the Medina execution,
14 the autopsy results from it, and then a challenge that
15 was filed the same year as Mr. Medina's death by a man
16 named Jones. He actually provided testimony because
17 Mr. Jones was claiming the electric chair would be cruel
18 and unusual and, therefore, you can't sentence me to
19 that.

20 Well, the Florida Supreme Court disagreed, they
21 found it wasn't cruel and unusual, but what I found
22 really interesting is in his report from that case, and
23 this was produced to us in the -- in the discovery, on
24 paragraph 12, it's on page 23 of his report, he says
25 the pathologists who examined Medina's body concurred

1 that the burns occurred postmortem.

2 Now obviously I'm not a doctor, but that means after
3 death. As far as I can tell people don't feel things
4 after death. He then goes on to say -- and, remember,
5 he's a physicist. He admitted in his depositions he's
6 not a pathologist, he's not a medical examiner, he can't
7 look at burns and tell me if they happened before the
8 person died or after they died. He admitted to that in
9 his deposition.

10 But in this report in Florida he says the onset of
11 the burns would begin with the flow of the electrical
12 current since the power dissipation is continuous
13 throughout the electrocution if death occurred in the
14 first half cycle of the electricity, which is one
15 one-hundred and twentieth of a second or eight
16 milliseconds.

17 So in his report he's suggesting that some period
18 of time that he's guessing about could be as short as
19 eight milliseconds, Judge. That's the reason they can't
20 measure it. I'm not sure you can even stop a stopwatch
21 that fast. I'm sure there's computers out there that
22 can measure to those sort of increments, but eight
23 milliseconds is -- it's like a butterfly -- it's like a
24 hummingbird wing. You know, that's how fast this is
25 beating. But he -- he literally has speculated throughout

1 his report in every meaningful opinion he wants to give
2 some period of time.

3 Substantial risk. He uses the term "substantial
4 risk" in two places in his affidavit, paragraph 5 and
5 paragraph 15, so I asked him about it in his deposition.
6 He said well, that -- I can't define what substantial
7 risk is, I can't quantify it, I don't have a scientific
8 method for it, but it would be, quote, the probability
9 of a botched execution. The probability of a botched
10 execution. That would be the substantial risk.

11 And the reason I bring that up, Your Honor's
12 already heard this, you're gonna hear it again in
13 the next series of motions because it's obviously
14 something you've already ruled on, they said in their
15 interrogatories as we're trying to limit the issues and
16 figure out what we're supposed to be here talking to
17 about this week, that under no circumstances could
18 electrocution ever be constitutional. It doesn't matter
19 how perfectly you carry it out, it doesn't matter what
20 sort of new device or new way that you decide to, it
21 doesn't matter. Under all circumstances it's
22 unconstitutional, right? A botched execution. He didn't
23 say when it was done properly or if it was done perfectly.
24 The substantial risk is the probability of it being
25 botched. He also went onto say he'd never done any

1 research into how often these things were botched.

2 Now he did provide an article, and I find -- I'm
3 sorry, Judge, I find this really interesting because
4 I've developed -- I've built of a library at this point
5 of books I would never read before just because of this
6 case.

7 This is the foremost article -- or, excuse me,
8 publication on botched executions. It's called Gruesome
9 Spectacles: Botched Executions and America's Death
10 Penalty. It's written by a man named Austin Sarat and
11 published by Stanford. This is it, okay? That ain't an
12 article he cited me. I asked him. I said have you ever
13 heard of Austin Sarat? Have you ever looked at any of
14 his work? I don't know that I've even heard of the man
15 is what he said in his deposition.

16 What he did say he had reviewed is an article written
17 by a guy named Radelet, which is directly from the Death
18 Penalty Information website, okay? He said he reviewed
19 this specifically for his opinions in this case. Well,
20 that -- this is his article. This is the first page
21 of it. The chart right there, like the first meaningful
22 text, is cited to source Austin Sarat's Gruesome
23 Spectacles: Botched Executions and America's Death
24 Penalty.

25 These are the findings of Mr. Sarat. Electrocutions,

1 he reviewed 4,374. Conclusion, eighty-four have been
2 botched, which gives us a 1.92 percent botch rate.
3 1.92 percent. So by extrapolation his substantial risk
4 is the 1.92 percent that this is gonna be botched.
5 That's not reliable. That's not credible. It's not
6 even work he performed, and he got it wrong.

7 He can't explain the basis for any of the opinions
8 that are actually meaningful to this case, that directly
9 go to the electrocution process in South Carolina,
10 because he's never done the work. Most of what he's
11 relying on was done by an anti-death penalty advocacy
12 group and he didn't even go back to check their work,
13 didn't look into the works that was done on, quote,
14 botched, but wants to use the incidents of botched
15 executions as a basis for his opinions. That doesn't
16 meet the reliability requirements.

17 May on occasion. That's a term that shows up a
18 bunch in his opinions. It may on occasion. Your Honor,
19 it took him twelve pages if I'm not mistaken and three
20 amendments to define the word "death". He didn't even
21 know we had a statute in South Carolina that codifies,
22 that says what death is in South Carolina. He literally
23 said that for him -- for somebody to be dead, it would
24 have to be the cessation of all physiological processes
25 beyond even clinical intervention to recover. That is

1 his definition of death, okay?

2 It got real interesting when I asked him about so
3 if somebody's heart is still beating they're still alive.
4 What if that heart's been transplanted into somebody
5 else? Under his definition, the person walking around
6 is dead or kind of alive and the person that's in the
7 ground we took the heart from is also still alive, but
8 he wants to offer opinions about the death penalty and
9 when someone would die and what they might experience
10 between the application of the method and the actual
11 death and he does it to try to confuse the factfinders
12 because he's so well-educated and can talk about the
13 electric gradients and volts and all this other stuff
14 about the physics of electricity running off into
15 technical land thinking we won't follow, but when you
16 press him on the actual opinions in this case, he has
17 no basis for it.

18 And it's pretty simple why, Judge. He doesn't have
19 expertise to talk about something like consciousness.
20 He even admitted in his deposition he's not a certified
21 expert in consciousness, but some of my work has gone
22 into the mechanisms that might support the phenomenon of
23 consciousness, all right? I'm not even sure what that
24 means, but I did find an e-mail where he was talking to
25 another doctor at Vanderbilt that actually works in the

1 medical field and was trying to get some information
2 from her about what consciousness is. That was two days
3 before the deposition. So two days before the deposition
4 he's checking in with someone who might actually be an
5 expert on the idea on consciousness hoping that he might
6 learn something to tell me when I depose him two days
7 later because he's not an expert. His information and
8 method isn't reliable.

9 The same thing with pain. He even said I'm not
10 sure there's any research about the assessment -- the
11 assessment and reporting of pain. When I said -- I said
12 are you sure? You've never been to a doctor and they
13 ask how you're feeling? Oh, you're talking about the
14 scale from one to ten? And I'm like yeah. You didn't
15 realize they actually did research on that to try to
16 figure out how's the best way for us to get from our
17 patients this information to try to make a decision about
18 the pain they're experiencing? Because pain's not as
19 simple as I stubbed my toe and it hurts. It's just not
20 that simple and doctors and experts in that field know.
21 There's a psychology that goes along with pain, there's
22 a physiology that goes along with pain, and he doesn't
23 have any of that expertise, but yet he wants to offer
24 that there's some period of time where they might feel
25 this pain that I can't describe because I don't have

1 that expertise and it's probably gonna happen in
2 30 percent of the executions in South Carolina.

3 That's how unreliable all his testimony is. That's
4 why he should be excluded. That's why we filed the
5 motion. If -- if you aren't gonna exclude him and,
6 quite frankly, I don't -- I just don't see how if --
7 if we exercise the gatekeeping function that we're
8 required to exercise -- and you can look at Graves.
9 The Graves case is cited there. That's one of the
10 more prominent civil cases on this issue. I know they
11 want to talk about Council. Council, as I understand,
12 is a criminal case. This is a civil case. When you
13 look at that case, he doesn't meet any of the Graves
14 requirements.

15 Now if you want him to come in here and just explain
16 to all of us how electricity works, that's fine, go ahead,
17 but when you start applying it to what somebody's gonna
18 feel or experience, that's outside of his expertise and
19 just -- in all -- in all candor it is.

20 So I've gone on longer than my cocounsel had
21 probably wanted me to. I think some of that, if you
22 do let him in, they wanted me to save for cross and I
23 guess we'll just hear it a second time at that point,
24 but, Your Honor, I don't know I've ever -- and I've been
25 doing this a long time -- I don't know that I've never

1 seen an expert who could not explain at all the methods
2 that underlie the bases of his opinions until I went and
3 deposed Dr. Wikswo, so it's just -- you can't let him
4 testify in this case.

5 Thank you, Your Honor.

6 THE COURT: All right. Let's take five minutes
7 before I hear your response. A five-minute break.

8 (Recess taken at 10:49 AM.)

9 (Back on the record at 10:59 AM.)

10 BAILIFF: Order in the court. All rise.
11 You may be seated.

12 MR. PLYLER: And, Your Honor, I'm gonna at some
13 point make the documents I referred to as a Court
14 exhibit just for posterity of the record, and we'll
15 work on that, but I didn't want to interrupt to the
16 process at this point.

17 Thank you, Judge.

18 THE COURT: All right. And just so I know -- this
19 is off topic, but would you-all be for comfortable in a
20 larger courtroom?

21 MR. PLYLER: Yes.

22 MR. LAMBERT: Yes. And --

23 THE COURT: I think there's -- okay. We had some
24 logistical issues this morning, but it's possible that
25 either this afternoon or tomorrow morning we could move

1 upstairs to 3A, 3B, the bigger courtrooms. They just
2 were not available this morning for us to get started.
3 So I figured that would be the answer, but I wanted to
4 ask.

5 Okey-dokey.

6 Yes, ma'am.

7 MS. FREEDMAN: Good morning.

8 THE COURT: Good morning.

9 MS. FREEDMAN: Hannah Freedman, again, for the
10 plaintiff.

11 So I just want to take maybe a little bit of a step
12 back and go back to the legal standards that are actually
13 governing the question of when an witness should -- an
14 expert should or should not be permitted to testify.

15 So obviously there are the three factors that come
16 in under Rule 702. They've only raised the issue of
17 reliability, so we've got to look to Council for that
18 five-factor test about whether the expert's testimony
19 is or is not sufficiently reliable to be admitted.

20 Sorry, four factors. And so I think the sort of
21 basic upshot from Council and the cases that have
22 followed it is that when you're talking about an expert
23 who's going to offer scientific-type evidence, the real
24 question is does the expert's area of expertise match
25 the kind of testimony they're going to give. So if the

1 opinion they're gonna offer is sort of in the wheelhouse
2 of that expert's area of expertise, then, in general,
3 other -- you know, the rest of the questions would go to
4 the weight of the testimony as opposed to admissibility.
5 And so that comes from another -- a number of cases, but
6 Watson is at least one of them.

7 So I want to just sort of start by outlining our
8 three theories under which we have alleged that
9 electrocution is unconstitutional. So the first is that
10 in all cases of electrocution the actual process by
11 which it occurs is almost certain to cause a painful and
12 excruciating death that will take a long enough time to
13 violate the State constitutional prohibition on cruel,
14 unusual or corporal punishment. So that's theory one.

15 Theory two is that in South Carolina based on the
16 best available information that's available to us that
17 we've been able to ascertain there's sufficiently high
18 risk that an electrocution will not go according to plan
19 and that renders the South Carolina electric chair
20 unconstitutional because in any given case there is a
21 very high risk that individual person who's subject to
22 the method will die a torturous death.

23 And then the third theory is that under the South
24 Carolina Constitution this prohibition on corporal
25 punishment extends to the mutilation and desecration of

1 the body and the electric chair does that.

2 So those are kind of our three theories of the
3 case and Dr. Wikswo is prepared to testify of -- on the
4 evidence that bears on all three of those theories.

5 So with respect to the first body of evidence, I
6 think that -- you know, Dr. Wikswo is very proud that
7 he is an inter-disciplinarian and so what that means is
8 he is tenured in three departments. I've literally
9 never heard of anybody else like that and his study
10 really started with the study of the heart. So he is
11 a physicist, but his study of physics is really about
12 the physics of human systems and living systems. So his
13 primary interest is not just sort of what is electricity
14 and how can we use it in theses industrial applications,
15 his interest is in how does a nerve operate, how does a
16 muscle operate? Those things rely on electrical processes
17 that are happening within the body and so he's prepared
18 to testify on the one hand about what you can expect to
19 have happen in a judicial electrocution, what is going
20 to a happen on a physics level to a body that is
21 subjected to a strong high voltage current, so that's
22 what he's prepared to testify about.

23 And I think we can get into sort of the bases for
24 his testimony, but he has looked at, you know, about
25 fifty years' worth of research articles that he has both

1 participated in himself and he has reviewed the work of
2 his peers. He is also chaired in -- I'm sorry, he's
3 tenured in the Department of Physiology, which is housed
4 in the medical school. So he's not medical doctor, we
5 would agree with that and he would, too, I don't think
6 he wants to be, but he is an expert on the physiology of
7 the human body and the processes by which the human body
8 interacts with electricity, and so I think he's prepared
9 to explain that sort of first set of theories.

10 On the second question of the sort of rate at which
11 executions in South Carolina go wrong, I think it's
12 important to note at the outset that we're looking at
13 the best reliable information that's available to us,
14 but there's a whole bunch of other information that
15 Dr. Wikswo would love to rely on, that their expert
16 would love to rely on, that Dr. Arden, our other expert
17 would love to rely on, and the experts in every other
18 case involving judicial electrocutions have relied on,
19 and that is the autopsy reports. The autopsy reports
20 and the accompanying documents are in the sole and
21 exclusive possession and control of the defendants and
22 without those we are simply forced to rely on the next
23 best sort of information, which is anecdotal evidence,
24 and that's what exists. That's simply a matter of fact.

25 Without the autopsy reports, all we can rely on

1 are these sort of objective measures that Dr. Wikswo
2 identified. Those are things like the heart rhythm and
3 beating, there's things like smoke, flames, sparks. And,
4 no, they're right. We can't necessarily account for
5 observer bias in every single one of those cases, but
6 what we can do is do what we did. We compiled a list
7 of every judicial electrocution, we researched as
8 thoroughly as we could the history of those executions
9 using historical newspaper articles, using some other
10 collateral sources, including this book which references
11 the Stinney execution, and I'd just like to, if I may,
12 just read from a portion of --

13 MR. PLYLER: Your Honor, I have a problem with that
14 because that's never been produced. This is -- this is
15 not something that we've ever been put on notice of by
16 them that this was relied on any way through anything in
17 this case.

18 THE COURT: Ms. Freedman.

19 MS. FREEDMAN: We may not have named every single
20 document, and that would be a fault on our part, but
21 this book contains citations to volumes of newspapers
22 articles, and I just want -- this goes back to the
23 point I was just making. The Stinney incident quote
24 was never reported publicly and so that tells me that
25 the information that underlies our position about that

1 execution in particular is in their possession. If
2 those documents exist, it's in the possession of the
3 Department of Corrections.

4 And so at the end of the day the point is that did
5 Dr. Wikswo's draft affidavit in March of 2021 before we
6 had filed the complaint, did that say that he had not
7 yet had time to review all the newspaper articles? Yes.
8 And when I saw that, that troubled me, so I asked him
9 emphatically and repeatedly to read all of the newspaper
10 articles, at which point he did, and so he has reviewed
11 all the newspaper articles. He might not remember each
12 and every one of them by name, he might not be able to
13 cite to them, but that -- that is the nature of this
14 work.

15 And so I think at the end of the day on that
16 second question of the rate at which executions in
17 South Carolina have gone wrong, we are relying on the
18 best available information to us, and I think if the
19 defendants are willing to give us the autopsy reports,
20 we can dispose of this question right now.

21 THE COURT: Well, isn't it the difference between
22 him -- you know, maybe he needs the autopsy reports, I
23 don't know, but isn't it the difference between him
24 rendering an opinion on what has actually happened in a
25 number of executions versus him evaluating what you,

1 Justice 360, tells him happened, which is not necessarily
2 accurate and, therefore, not reliable?

3 MS. FREEDMAN: Sure. I understand that. So I
4 think probably it would help to just explain to the
5 Court a little about how this document came to be.

6 So we met with Dr. Wikswo --

7 MR. PLYLER: Your Honor, I -- if I may, just
8 briefly, the problem is Dr. Wikswo couldn't tell us how
9 this, quote, document came to be. Her explaining it
10 now to you is of no benefit. The problem is, was
11 Dr. Wikswo's method and basis reliable, something that's
12 normally used by someone like him in this field, and
13 he's even said, no, it wasn't a scientific method, I
14 need to set the criteria. And clearly he didn't review
15 these things, and I'll get to that in reply, because
16 when you look at his typed response to our subpoena,
17 there are, like I said, maybe fifteen or twenty newspaper
18 articles he said he reviewed. None of them are dated
19 1944, just as an example, for Mr. Stinney.

20 So her -- if she wants to take the stand and let
21 me cross-examine her on all this, fine, but she's not
22 the expert and what she knows about how this was
23 prepared isn't relevant to the question.

24 THE COURT: That's a fair point. I mean, we're --
25 we're talking about what he knows and what he can testify

1 to, not what you know.

2 MS. FREEDMAN: Well, as much as I would love to be
3 subjected to cross by Mr. Plyler, I think this is a
4 perfect source of cross for Dr. Wikswo. So if Dr. Wikswo
5 is on the stand, he can ask him these questions. You can
6 explore that topic with him on the stand and that goes
7 to the weight of his opinion as opposed to whether it is
8 admissible in the first instance or not.

9 The underlying materials are themselves what they
10 are, they exist, and I can -- I'd be glad, like I said,
11 to explain how this document came to be, and it happened
12 a long time ago that we prepared this. We prepared it
13 in conjunction with Dr. Wikswo. I'm not sure he
14 remembers the details of it. Again, that sounds to me
15 like a credibility issue, but basically what happened
16 is we met with him. He asked for autopsy reports, we
17 didn't have any, so we asked him what the next best
18 source of information would be, he said do you have
19 documents describing -- you know, contemporaneous
20 accounts of what happened, we said we can find those,
21 so we went on a mission to find them. We looked at
22 these newspaper articles. We asked him what we should
23 be looking for in those newspaper articles, he gave us
24 a list of criteria, the criteria were these objective
25 variables that he described as evidence that an execution

1 had gone wrong, things like the heart resuming beating,
2 smoke, sparks, flames, and then for the executions --
3 Mr. Plyler's correct that we weren't calculating the
4 percentage of executions that had gone wrong based on
5 the total amount -- 249 total electrocution executions
6 in South Carolina. That was based on the number of
7 executions for which there was any support, for which
8 there was any information about the process by which the
9 execution happened. And so for a huge percentage of
10 them there is no publically available information that
11 we were able to obtain, so we just excluded those.

12 And so Dr. Wikswo's opinion is based on these
13 objective variables that he defined for us. He
14 instructed us to go look for them and then he himself
15 reviewed all of the newspaper articles to make sure that
16 we just weren't making this up.

17 THE COURT: Well, I think that's the question. Did
18 he or didn't he?

19 MR. PLYLER: And, Your Honor, I -- this is his
20 written response to our subpoena. This is his document.
21 Exhibit 4 to his deposition. He said -- he put in --
22 like if I scroll up just a little bit, he actually like
23 cut and pasted the different items that we listed in our
24 subpoena. So like 6 was one of the items in our subpoena,
25 so he cut and pasted that in there. A complete list of

1 all written materials, notes, memoranda, test -- test
2 results, examinations or other materials reviewed by you
3 in preparation of your opinion and you go down to the
4 next page he talks about these -- these documents that
5 have to do with protocols, the CV of our expert, Ron --
6 Dr. Wright, excerpts from medical records Gary Terry, and
7 then I have read the following news accounts regarding
8 executions in South Carolina. Someone from '86, some
9 from the early -- like nineteen teens. As you can, Your
10 Honor -- I mean, I can sit here and count them. So
11 that's it on that page. And then that's on the second
12 page, okay? You can go back and verify it, but none of
13 them was 1944 as an article he ever actually reviewed.

14 Also, Ms. Freedman here says that this was a
15 collaborative effort. Well, this is a February e-mail.
16 Now the -- the contract that was signed by Mr. Wikswo
17 with John Blume's clinic was signed -- if I get the date
18 wrong, correct me, February 19th of 2021. That's when
19 he actually signed the contract to start doing work in
20 this case. This is his response to Mr. Blume on
21 February 22nd.

22 Do you see that?

23 THE COURT: Yes.

24 MR. PLYLER: It says the spreadsheet is very useful,
25 okay? If you go down to Mr. Blume's e-mail, which was

1 sent 8:56 AM on February 19th, first there's this we put
2 together a summary of how we think the process is gonna
3 work, but you give your review for it and let us know if
4 we're right, okay?

5 I have that and it's -- it was great cross -- great
6 cross-examining him in his deposition, it shows it's not
7 reliable, and I'll happily do it again with him if this
8 goes against us, but that would only be if he gets past
9 this gatekeeping function.

10 But he also says in the botched folder, there is
11 an Excel spreadsheet which documents what we know about
12 every South Carolina execution by electrocution from
13 1912 -- from the 1912 purchase of the chair from the
14 Adams Company to the present. That doesn't sound like
15 hey, here's that spreadsheet we put together based on a
16 collaboration with you of all the things you wanted us to
17 do. No, it was put together by the anti death penalty
18 advocacy groups. They are the ones who made decision
19 about what is or isn't relevant in their opinions.
20 Again, she just said well, there were some we couldn't
21 find. We don't know what the fucking process was and
22 Dr. Wikswo can't tell us, so we don't know if they just
23 didn't look in the right places, but his idea that there
24 are newspaper articles for, I don't know, half of these,
25 but not for another half, strikes me as a bit odd. And

1 Dr. Wikswo can't testify to it, but wants to offer a
2 statistical analysis of it.

3 And then just to make this point a little further,
4 Your Honor, there's a March 1st e-mail thread. This is
5 an e-mail from John Blume on March 1st, okay, and this
6 is what he said. We did the spreadsheet ourselves, but
7 everything in there is corroborated by news accounts of
8 the executions or this book, Next Stop Eternity.

9 Here's an interesting thing, Judge. That book's
10 never been provided to us, was not listed in any way
11 whatsoever by Dr. Wikswo, but yet Mr. Freedman's here
12 with a copy of it wanting to read to you about it here
13 today. Maybe she should have given that copy to
14 Dr. Wikswo. Maybe she should have insured he actually
15 looked at these materials and made his own informed
16 decisions on it since he's the one that wants to come
17 testify.

18 And this idea of what goes to the weight, we only
19 get to that if he gets past the gate. And this isn't
20 some trivial process. You can't just say oh, just
21 throw everything in here and I'll give it the weight it
22 deserves and we'll send everything up to the appellate
23 courts and let them figure it out. They're the one on
24 a mission, they're the ones with fifteen months that
25 they've had to prepare this litigation, they've worked

1 with Dr. Wikswo before, they know what his process
2 allegedly is, they could have gotten it right, and they
3 didn't.

4 And just because nobody's ever challenged him on
5 these things, does not mean that it's right. Just
6 because we did things wrong previously does not mean
7 we get to continue doing things wrong in the future;
8 otherwise, these men wouldn't be on Death Row for twenty
9 years. They would have been there less than a year like
10 Mr. Stinney.

11 This idea that they --

12 THE COURT: Well --

13 MR. PLYLER: I'm sorry. Thank you, Judge.

14 THE COURT: -- this was supposed to be an objection
15 and you've launched into argument.

16 MR. PLYLER: I apologize. I get very fired up.

17 THE COURT: So much so that I've forgotten exactly
18 what the objection was or what you were objecting to.

19 Where are we going, Ms. Freedman?

20 MR. PLYLER: I thought she had rested and I was
21 replying. I apologize.

22 THE COURT: No, it was -- it went from an
23 interruption into argument, an objection to something
24 she said and I've forgotten what it was.

25 Go ahead.

1 MS. FREEDMAN: That's okay. Water under the bridge.

2 One thing I was just gonna say is that I think in
3 this context I think the standards are -- of course,
4 there's a gatekeeping function. That's true in any civil
5 trial when there's expert testimony, but I think one of
6 the primary reasons that the gatekeeping function is so
7 essential in most civil trials is that there's jury
8 present. The risk of undue prejudice to the jury is
9 manifest and so you are both the factfinder and the
10 person most qualified to decide, you know, the legal
11 issues that are at issue in this case and so at the end
12 of day the issues of prejudice aren't really there the
13 way they would be if there were a jury here. You're
14 not gonna be misled by this unreliable -- supposedly
15 unreliable testimony. If you determine at the end of
16 the day that Dr. Wikswo is not credible about the sources
17 he relied on, if he's not credible about having reviewed
18 them, if he's not credible about whatever, you can put
19 that out of your mind and move on, you can find him not
20 credible on those things.

21 And the second thing I wanted to say is that we're
22 here on instructions from the Court to put together
23 essentially a complete record for their review and I
24 think one of the really important things in this case
25 is we don't want to be back in here in eighteen months

1 doing this all over again, and so for the sake of just
2 moving things along, making this expeditious, I think
3 the Court could either, you know, wait to rule on
4 this motion until after he's testified, sort of
5 conditionally admit his testimony and then rule on the
6 motion afterwards. Or Your Honor could also, if you do
7 decide to grant their motion with respect to any or all
8 of his testimony, give us an opportunity to proffer his
9 testimony just so that the record is complete and the
10 Supreme Court has something to go on when we make our
11 legal arguments on the inevitable appeal.

12 And let me just check.

13 And I guess just sort of a final point to -- to
14 sort of go back to where I started, we have offered him
15 to testify about -- on evidence that bears on these
16 three different theories and they fit in different
17 boxes. So even if the Court finds that this evidence
18 about the botch rate or the failure rate of South
19 Carolina's executions, if that's unreliable, we would
20 ask to proffer his testimony on that topic, but his
21 testimony on the effects of electricity on the human
22 body, on how the electric chair operates, on the
23 electric processes that are involved in the electric
24 chair and what happens to the human body when the
25 current flows through it, those are things squarely

1 within his expertise. He is almost -- sort of the
2 preeminent expert on those topics and he should be
3 permitted to testify about those things.

4 So if the Court has questions, I'll be glad to
5 answer them.

6 THE COURT: Anything else? Mr. Plyler, anything
7 else?

8 MR. PLYLER: One -- I'm just gonna have one point
9 and then I'm gonna sit down.

10 She makes it sound like there's not another issue
11 here when we look at the gatekeeping function, but I
12 represent defendants that are being accused of something,
13 I represent the State, I represent SCDC and its director,
14 okay, and they're being accused of something, and when
15 you file a lawsuit accusing somebody of something, their
16 due process rights matter and one of their due process
17 rights would be the ability to actually cross-examine
18 someone who is making the allegations against them.

19 We have been deprived of that right because
20 Dr. Wikswo didn't prepare any of these materials so I
21 can't even ask him, because he can't answer, anything
22 about the reliability of these documents that undermine
23 his opinions he wants to try to give in this Court and
24 because I can't do that, I can't actually cross-examine
25 the person making the allegations against us, so that's

1 the other part of this that I'd just like the Court to
2 keep in mind as it exercises its gatekeeping functions.

3 Thank you, Judge.

4 THE COURT: Yes, sir.

5 Having considered all of that, I am going to deny
6 the motion to exclude the testimony of Dr. -- is it
7 Dr. Wikswo?

8 MS. FREEDMAN: Yes, ma'am.

9 THE COURT: Dr. Wikswo. And I say this with the
10 explanation, Ms. Freedman's points -- one of her last
11 points is sort of well-taken that this Court sits as
12 even -- as a finder of fact sits in a different position
13 than a jury does and, frankly, having heard these
14 arguments, I think that highlights the need for the
15 Court to pay extra particular attention to each and every
16 word that Dr. Wikswo says, so each of the points that you
17 have made, Mr. Plyler, in your argument are certainly
18 healthy fodder for cross-examination and, you know, the
19 Court will take note of each and every answer given to
20 those questions and the topics raised in that
21 cross-examination because I think that this Court can
22 sit in a better position than maybe a juror does to
23 determine whether he's really opining on what happened
24 or what somebody told him happened and what they told
25 him is not necessarily accurate.

1 And so that's almost like, you know, I give you a
2 novel to read and ask you to opine about it and give me
3 your expert opinion without telling you that it's a
4 novel, you know, without -- and I'm not suggesting that
5 the spreadsheet is pure fantasy, but to analogize, it's
6 sort of similar to that. You give them a script and
7 they think it's a real set of events and they'll give
8 you an opinion, but at the end you say, you know, well,
9 that was a novel, that was completely made up, and so
10 then what is the value of that opinion if it's not based
11 on true events.

12 Again, I'm not saying that this is completely of
13 fantasy, but I think that this Court can make those
14 determinations when evaluating the testimony of
15 Dr. Wikswo. So for those reasons the motion is denied.
16 Also, you know, I'm hesitant to exclude the testimony
17 of a witness.

18 Go ahead.

19 MR. PLYLER: I was just gonna say thank you, Your
20 Honor.

21 THE COURT: Okay. Yes.

22 All right. Next.

23 MR. PLYLER: I think that brings us to the last
24 set of these motions, Your Honor.

25 THE COURT: Yes, sir.

1 MR. PLYLER: If you want to go first, Josh,
2 that's fine.

3 MR. KENDRICK: Judge, we can go in whatever
4 order you want. I think I'm the one that's probably
5 complaining, so maybe that means I should be the one
6 to go first.

7 THE COURT: Absolutely.

8 MR. KENDRICK: And I'll try to lay it out for you
9 because there's some interrelated issues.

10 So we had filed a motion to compel and my cocounsel
11 has that. Essentially what we wanted -- and I'm sorry,
12 Judge. I have my whole head in one area and I forgot
13 about this kind of first matter.

14 MR. PLYLER: Which motion is it?

15 MR. MILLS: Motion to compel.

16 MR. PLYLER: The first one filed?

17 MR. KENDRICK: I just want -- and, Your Honor,
18 I'm sorry, I just want to make sure I -- I correctly
19 state -- essentially when you issued the discovery order
20 I think we then filed after that a motion seeking some
21 clarification and asking to compel information, and I
22 just want to make sure that I don't -- number one, I
23 want to make sure I don't go into more than we need to.

24 MR. PLYLER: Your Honor, I think what he's referring
25 to is we filed a motion for protective order, they filed

1 a response and in that response a motion to compel.

2 MR. KENDRICK: Right. So what we had asked Your
3 Honor to compel would be the production of autopsy
4 records from South Carolina executions and incident
5 reports from South Carolina executions. And it's
6 correct it was filed in conjunction with a response to
7 the protective order.

8 And -- and I'm gonna say this and I'm gonna go
9 ahead and put it out here that I know that Mr. Plyler
10 and I disagree on this schedule because we actually
11 talked about it very civilly in the deposition so it's
12 not like something we're fighting about like two mean
13 guys, it was just something that we disagree on.

14 They made a motion that I took to mean there were
15 three things they didn't want to give up, which would
16 be lethal injection information, protocols, execution
17 team members' identification. There's also a footnote
18 in their motion that said that they were incorporating
19 by reference all of their objections to any of the
20 discovery that had been served on them.

21 Your order said that the motion was denied as to
22 protocols, granted as to lethal injection, members of
23 the execution team, and you had a sever line in there,
24 and what happened -- and I'm kind of giving you some
25 lead-up to why we care about this. What happened is

1 that we went to Department of Corrections on July 14th
2 and took the depositions of Director Stirling and
3 Assistant -- or Deputy Director Rushton, who we attempted
4 to ask a series of questions, and I kind of go -- I guess
5 I need to get into sort of how this is going to play out
6 in the courtroom because that's ultimately what matters,
7 and I'm gonna go through maybe your three points.

8 So, first of all, the lethal injection availability
9 is at issue in this trial, but we have not been allowed
10 to ask any questions about it. While I understand your
11 ruling on proffering, for example, Dr. Smith, I think
12 I'm in a very different position when I call Director
13 Stirling as my first witness. I do not believe that I
14 can not ask about that series of questions, understanding
15 it draws an objection and a ruling one by one and maybe
16 -- it might be a -- sort of an excruciating way to go
17 through it, but I don't believe I can show up in the
18 next court and say well, let me tell you what I was gonna
19 do and they're gonna say you should have done. So -- so
20 we have -- we have that matter just to kind of tip you
21 off that it's coming.

22 When we were deposing Director Stirling, what I
23 wanted to know about, first of all, was the existence
24 of the autopsies and the incident reports with the idea
25 being that maybe they don't have them and then isn't

1 really an issue, then Mr. Plyler pointed out quite
2 correctly that if they didn't have them, they would have
3 said that in their discovery responses as opposed to
4 move for a protective order.

5 So I have a number of questions that are centered
6 on those documents and I have to ask those questions and
7 I think we have to go through them one by one with
8 objection and ruling, and I tell you that again so you
9 kind of know what's coming.

10 And this is sort of the procedural lead-up because
11 I also have a number of questions about an actual
12 execution and who's witnessed it and what had happened,
13 who had firsthand knowledge of it, and those questions
14 were shut down before I could get there.

15 Mr. Plyler and I agreed on the record that, you
16 know, I had preserved it to come in here where I would
17 have come and talked to you and he said well, he didn't
18 try to do it at the deposition, so he can't argue it now.
19 I don't think we can make that same agreement to go to
20 the Supreme Court. I think I have to ask each question
21 and get a ruling and, you know, be shut down, if you
22 will, which kind of leads me to sort of my protective
23 order in conjunction with the motion to compel.

24 We think that information is relevant. We think
25 that that information is the very best evidence of

1 what has happened in an execution. We think that
2 information is critical as to how you would consider
3 this case and one of the things that -- that we've taken
4 a few dings about is this idea that we have said in a
5 discovery response that we think electrocution is always
6 unconstitutional, and we did, Judge, but you don't have
7 to think that and we don't have to have you think that
8 to win, but it would have been a lie to say something
9 else.

10 But what we think is not the same analysis you
11 make. In other words, you're not bound by my statement
12 to say well, I'm only gonna win if I agree with them.
13 There's a -- there's gradations of it, if you will.

14 And I think I'm losing you, so I --

15 THE COURT: You're not.

16 MR. KENDRICK: Well, I -- I struggle with an
17 analogy, but there are times when I make a statement in
18 a courtroom and I think the one that seems to be the
19 most relevant to the kind of work that we all typically
20 do would be if I move to suppress a search because there
21 was no search warrant. And then I personally, and
22 this is my originalist view, I think that is a correct
23 statement of the law. No search warrant, no search.

24 Now I'm wrong, right? And the reason I'm wrong is
25 because -- not because the State has come in and said

1 you never need a search warrant, right? The opposite is
2 true. They said there's all kinds of different degrees
3 leading up to even sometimes having a search warrant is
4 not enough, so the law has developed from these factual
5 investigations, these factual disputes, these adversarial
6 processes. So in this case you might say I don't agree
7 with them, but I don't think I'm gonna take the opposite
8 position, which is electrocution and shooting someone is
9 always constitutional, right, and that -- that seems to
10 be where we have found ourselves because I cannot ask
11 them -- and I'm gonna go -- we're gonna look backwards
12 and forwards for a minute because we have two sort of
13 tracks when it comes to the electric chair and the firing
14 squad.

15 So the electric chair, we know that it has
16 happened, we know people have seen it in the Department
17 of Corrections. We know records exist that tell us how
18 it went, but we're not allowed to look at them. We're
19 not allowed to see them, we're not allowed to ask any
20 questions about them solely to avoid identifying someone
21 who is now, will be or may have been on the execution
22 team, but we haven't even gone into how we could have
23 protected those identities or figured out a different
24 way to do it, redacted things. We're just essentially
25 not allowed to look at the outcome of an electrocution.

1 So that kind of leads you to say okay, well, I have
2 a protocol in front of me and I'm gonna hear competing
3 expert testimony and one expert for the State is gonna
4 say that the behavior of electricity in the body
5 immediately causes unconsciousness and death and one
6 expert for the defense is going to say that isn't true
7 and it doesn't account for the behavior of electricity.

8 You're not the first court that's been faced with
9 this. That's exactly why Dawson in Georgia outlawed the
10 electric chair. That's exactly why Mata in Nebraska
11 outlawed the electric chair. In fact, the experts in
12 Mata are the ones here. Nebraska had Wright and the
13 challengers had Wikswo.

14 So this is not something that's never been done
15 before, but you're sort of left with a theoretical idea
16 of maybe there's a way to do it constitutionally, but
17 how are you gonna know if that's the way it's gonna be
18 done because there -- there is no way for them to do
19 anything other than say we're gonna hit the three-cycle
20 phase button and it's gonna shoot this electricity to the
21 person and our expert's gonna say -- very well-founded
22 scientific theories say that doesn't kill immediately,
23 that doesn't cut off consciousness, that causes a painful
24 death. Their expert is gonna say the opposite. And I
25 feel confident that there wouldn't be any reason why you

1 would decide differently from Nebraska, but you might,
2 but I'm caught up by the fact that we could just answer
3 the questions by looking at what happened in the past.

4 All this talk about the chart, all this talk about
5 what Justice 360 has or hasn't gathered, all this talk
6 about what these experts have looked at, they have the
7 information. We can't get it.

8 So -- so there's a couple of things. Number one,
9 I think it's critical that we get that information and,
10 Judge, we -- we're all working on a short timeline, but
11 I think that information has to be turned over and I
12 think it has to be used in this trial. And if that
13 means we have to all go to the Supreme Court or you go or
14 we'll go with you, whoever goes, and says Supreme Court,
15 look, new -- new situation. You've got to give us more
16 time. And, I mean, I think it's critical. I think that
17 I can't fathom a reason why you would hold back the
18 records from an electrocution that you claim is a humane
19 and immediate way to kill someone.

20 Now our expert's gonna look at very similar
21 protocols. The Georgia protocol that got outlawed is
22 almost the same as ours, Nebraska is pretty close. Our
23 expert's gonna show you pictures from states where they
24 do a very similar protocol and he's gonna explain to you
25 what the markings on the body means, the behavior of

1 electricity, how it -- how it works in a circuit and when
2 the system we're discussing is a human body what that
3 means as compared a low bank or your typical metal, but,
4 you know, we're gonna make our case that way, Judge.

5 And I will tell you I don't ever -- I don't ever
6 complain too much, definitely not to judges, and I'm not
7 complaining to you. We're gonna make our case and I
8 think our case is gonna be good, but the information
9 that would answer the questions exist within the
10 Department of Corrections and we could look at it and
11 we could tell.

12 So there is another -- there's another point I
13 think that's relevant to that. I think you should
14 consider taking that information in-camera and making
15 a determination as to whether there is any reason under
16 the law why we would not be able to see that information
17 under the same confidentiality order that we've been
18 provided the protocols. I think that's -- you know, I
19 think that's just -- I think we should see it and it's
20 just that simple, Judge. You're talking about, you know,
21 they win the case if they show us this stuff and the
22 expert says well, it looks pretty peaceful to me and it
23 doesn't seem to cause any charring or burning or damage
24 and seems like there was an immediate consciousness loss,
25 but I think we know -- we know why the fight keeps us

1 from doing it.

2 That kind of goes to the motion to compel, Your
3 Honor. So that's the reason we need it. You know,
4 we're talking about best evidence. We're talking about
5 the fact that, you know -- and I'm a grownup, it doesn't
6 hurt my feelings, but, you know, we're being accused of
7 I think some level of bad faith in creating these records,
8 but where is the in between? So -- so if we don't get
9 these autopsies, if we don't get these incident reports,
10 tell me what the next step is. Wikswo gets the articles?
11 I mean, I don't think, you know, we'll get into that.
12 I'm not gonna rehash that, but there's not another
13 source of information because it doesn't exist because
14 the Department of Corrections has it and they keep it
15 confidential.

16 And we got into sort of this idea during the
17 deposition and I think it would be instructive for me
18 to figure out where it started. So the question I asked
19 was -- I was asking him about whether he knew what had
20 happened in a prior execution and what would he look at,
21 he would look at reports, he hasn't really thought about
22 it, and I said do you know if there's a person who would
23 know the answer to that question. In other words, is
24 there someone at the department other than the director
25 who's been appointed by the Governor who might know where

1 I could get information on executions and Mr. Plyler made
2 the fact that I was getting into the protective order
3 and I said, you know, we can ask about protocols, we
4 can't ask about lethal injection, we can't ask about
5 members of the execution.

6 Assuming you read the deposition, I will tell you
7 there is a part where I politely said I don't agree with
8 your order and I don't, but that's okay, that's part of
9 litigation, you can't rule for both of us.

10 But essentially we know the records exist, we know
11 you could force them to turn them over, we know they
12 would give us the very best evidence as to whether the
13 execution has been successfully done in the past. At
14 the same time, I think we know what they will reveal if
15 they're concealed from us.

16 But as we got into what I was trying to ask Director
17 Stirling, what I'm trying to find out, I think there's
18 two tracks. What I think I'm -- maybe ^{Redacted - S.C. Code 24-3-580} is the
19 better witness for this. I personally believe that
20 ^{Redacted - S.C. Code 24-3-580} has viewed an execution and is electrocution.

21 MR. PLYLER: Your Honor, we're getting dangerously
22 close to a violation of 23-4-580, and if I misquoted
23 that statute, I apologize.

24 Say it.

25 MR. LAMBERT: 24-3-580.

1 MR. PLYLER: 24-3-580. Dangerously close. For
2 someone to say in open court with media present something
3 like that, I think is a violation of that statute. I'm
4 just pointing that out.

5 MR. KENDRICK: So -- so I think a couple of things,
6 Judge.

7 THE COURT: Yes, sir.

8 MR. KENDRICK: So Mr. Rushton has the remedy against
9 me if he wants to address that I violated the statute,
10 but I think that I based my belief on records that I got
11 off of PACER that were given to you and --

12 MR. PLYLER: Your Honor, we ask that this -- that
13 what he's getting into now be sealed. We ask that of
14 you because here's the problem. What he's relying on is
15 information from before that shield statute was put into
16 effect. It's from 2008, the statute's from 2010. The
17 statute says to disclose a current or former member, so
18 it has a retroactive effect. And while they don't
19 apparently care, they are violating 24-3-580 right now
20 by doing that.

21 MR. KENDRICK: I think I probably need to say for
22 the record, Your Honor, that I do not at all believe
23 I am violating the statute.

24 THE COURT: All right. Let's pause so that I can
25 make a determination.

1 Redacted - S.C. Code 24-3-580

2
3
4
5
6
7
8 (Recess taken at 12:18 PM.)

9 (Back on the record at 12:27 PM.)

10 (The following proceedings were held in open court.)

11 BAILIFF: Remain seated. Come to order, please.

12 THE COURT: All right. We're gonna return to
13 Mr. Kendrick arguing the merits of this motion to compel.
14 You were talking about autopsies.

15 MR. KENDRICK: Yes, and I think I can be very brief,
16 Your Honor.

17 So I'm not sure -- I mean, the case we pled is that
18 the electrocution of people as done under the South
19 Carolina Constitution, as done by South Carolina, is
20 unconstitutional, so I guess maybe what they're saying
21 is somehow by the answer of well, it's always
22 unconstitutional, I'm not sure that that changes what
23 I'm trying to do here. The autopsies would give us direct
24 evidence of South Carolina's -- sort of the results of
25 their protocol.

1 We have an expert who is imminently qualified in
2 the behavior of electricity in the biological systems.
3 He's able to do that with pictures we do have from other
4 states and autopsies we do have from other states, and I
5 certainly think we can make our case that way because at
6 the end of the day he can explain, you know, if there are
7 differences in the protocols how that might affect his
8 opinions, you know, when there's differences in voltage
9 and phases and timing. I -- I don't think it ultimately
10 makes a huge difference, but for Your Honor's purposes,
11 I mean, the real question here -- and they are right in
12 we think that when you put somebody in the electric chair
13 that's unconstitutional, but we don't think it's that
14 because it's like this philosophy we've created, you know,
15 or mission, it's because we believe it violates cruel,
16 nor unusual, nor corporal, and we believe that we can
17 show physical evidence of that through two experts. You
18 know, we have Dr. Wikswo, who, like I said, understands
19 the way electricity behaves, and then we have Dr. Arden,
20 who's a forensic pathologist who can sort of explain the
21 results he's seen. He's imminently qualified to look
22 the autopsies.

23 So I think when -- and I'm sure I will be corrected,
24 so I do not in any way mean to misstate this, but I think
25 when we got the motion for protective order, you know,

1 the argument was kind of on these three main subjects
2 that we've discussed. There was certainly an objection
3 to the autopsies and the records and I think we probably
4 followed the procedure by moving to compel those and I
5 don't think Your Honor has ruled on it. We are prepared
6 -- you know, if you were to give us the autopsies, I
7 think we have to discuss what the next step would be,
8 but we want them.

9 And I -- I don't know that we've pivoted in the
10 case, Your Honor. We simply say that what these autopsies
11 would reveal is that over the course of time the -- they
12 support one of the theories and one of the things our
13 experts say, which is that electricity does not produce
14 instantaneous death and that as a result of that and the
15 understanding of the behavior of electricity in the body
16 that it's very likely or certain that there would be
17 extreme pain and terror, and then as an additional matter
18 the electrocution protocols create damage to the body
19 that we believe would fall under the prohibition on
20 corporal punishment, but many courts, including Dawson
21 and Mata without describing or considering corporal
22 have said that the lead up to death is not the only
23 thing that matters, there's also a consideration of the
24 mutilation or damage to the body after death and they
25 have used that to support in those two states saying the

1 electric chair is no longer a modern day way to execute
2 somebody. So the autopsies are direct evidence of those
3 things and we think that our two experts would be able
4 to look at them and it would support our case.

5 So, you know, that's it. That's our argument, Your
6 Honor.

7 THE COURT: Okay. Mr. Plyler.

8 MR. PLYLER: Thank you, Your Honor.

9 I would note, first off, this is not a separate
10 motion to compel, it was a response to my motion for
11 protective order and to compel. It's the opposite side
12 of the same coin. Your Honor already ruled on it. And
13 the idea that this wasn't part of that motion is, quite
14 frankly, ridiculous. You already ruled on it and your --
15 your ruling was solid.

16 Here's the problem with what their argument is at
17 this point. He said Wikswo would be able to tell you
18 all this great stuff about his review of these autopsy
19 reports. First, he's only reviewed forty by his own
20 testimony in his entire career and he's been looking at
21 judicial executions since like 1990 or '91. Forty.

22 Okay. For instance, the other -- the pathologists
23 that are gonna testify in this case have performed
24 thousands of them. In his deposition at page 207 --
25 and, again, Your Honor has a copy of this already, but

1 I'll put it up on the screen, my question to him starting
2 at line 5, is there something that you believe you would
3 see on an autopsy report in South Carolina that would
4 change your opinion to -- well, in that case, yeah, it's
5 instantaneous and painless in South Carolina. Do you
6 think there's anything that could be produced in autopsy
7 reports that would show that and he says an autopsy
8 report of a successful electrocution without deep burns.
9 And then I said and you already testified earlier you're
10 not qualified to say what was a premortem versus a
11 postmortem burn, correct? I don't necessarily endorse
12 the distinction. And what he meant was the distinction
13 between premortem and postmortem. There's a whole
14 colloquy about that that I won't bore you with. I said
15 but you're not qualified to say one way or another, are
16 you? And he said no.

17 So I'm not sure how Dr. Wikswo is supposedly gonna
18 look at these autopsy reports. He's not a medical
19 examiner, he's not a forensic pathologist and he's
20 testified that he can't say what happened premortem or
21 postmortem with regard to the burns. So Wikswo I don't
22 think gets anything from those, which leaves Arden,
23 right?

24 With Arden -- what was the page again?

25 If you'll give me just a moment, Your Honor.

1 I'm sorry. I don't have it where I can pull it
2 up to the screen, so I'll just go the boring route of
3 reading it to you.

4 So on page 70 of his deposition -- and, again,
5 this is about this idea of burns on the cadaver, on the
6 body. So but just looking at an autopsy, when it comes
7 to burns, especially electrical burns, is there some
8 objective finding you can make that would say this was
9 premortem and that was postmortem or is that just not
10 distinguishable in an autopsy? And he goes with the
11 proviso that I believe the circumstance that you are
12 asking that we are talking about is someone who is
13 burned either shortly before or after death. In other
14 words, we're not talking about someone with a burn with
15 survival time, medical care kind of thing, so within
16 the limitations of burns concerning -- occurring shortly
17 before or shortly after death, the anatomical examination
18 of the burn does not permit distinguishing antemortem
19 versus postmortem.

20 So even Dr. Arden, their forensic pathologist, says
21 you can't tell the difference because we're talking
22 about a situation where this person is gonna experience
23 this process and die, not go receive care in a hospital
24 setting, you know, that sort of stuff.

25 So looking at the autopsy reports is gonna serve

1 no purpose and -- except, and I can get into this if
2 we need to. For instance, with Dr. Arden they attached,
3 oddly enough, just two photographs from Mr. Tafero's
4 execution. Well, in the discovery response, there's
5 about ten photographs. One of the photographs was
6 before the autopsy even started, but they didn't include
7 that one. They only included the one that actually
8 showed the surgical incision across the top of his head.
9 The only purpose of that could be some sort of -- what's
10 the word I'm looking for -- sensationalism of this
11 process. Look how gruesome this looks, but that's the
12 sort of gruesome thing you're gonna see in every single
13 autopsy because to do an autopsy we've got to open the
14 person up, okay? And if they really were interested in
15 the technical review of the autopsy, you know, why didn't
16 they get the -- why didn't he use the photograph from
17 before the autopsy was performed? That's because it
18 doesn't make their point.

19 So you've already ruled on this and said we don't
20 have to get into discovery on this. This idea now that
21 well, our experts are gonna be able to look at it and
22 discern all this great information that we're missing,
23 quite frankly, is not true. And I think with Wikswo,
24 he's not qualified to do that. With Arden, he is
25 qualified, he can perform these autopsies. I mean,

1 we're not questioning the man's qualifications with
2 regards to forensic pathology and being a medical
3 examiner, but he readily admits you can't tell the
4 difference. The burn I'm seeing on that body could
5 have happened after he died.

6 So I -- I don't see why at this point in the
7 process Your Honor should essentially reverse yourself
8 on an earlier ruling on protection on this issue and
9 they've not made a showing here that would support you
10 changing that ruling at this stage three and a half
11 hours into the trial.

12 I believe -- I mean, with the -- I'm not saying the
13 interruptions. With the way this argument has preceded,
14 I'm -- my concern is that I haven't addressed all of the
15 issues for the record.

16 At first he was -- he did mention autopsies, but
17 then he started talking about other things like any
18 other documents there might be at the Department of
19 Corrections on historical documents of executions. I
20 don't know -- I really don't know to be honest with you
21 what all documentation the Department might have or
22 not. Like, for instances, I don't know if there's a
23 roster of the execution team members, which clearly
24 shouldn't be allowed to be disclosed under the statute
25 and what we already discussed, but would seem to be

1 included in what he just asked for.

2 So if we're talking about the autopsies, I feel
3 like I've addressed that. I will say there are not
4 autopsies for every execution because historically it
5 wasn't required for every execution. I'm pretty sure,
6 but sometimes I get confused with all the other states
7 I've now reviewed on this issue, that there's an option
8 for the -- the condemned or the family member to say I
9 don't want to be autopsied in which case there would be
10 no autopsy.

11 So I don't even know how much information the
12 Department has like on this particular issue. So, you
13 know, I -- just in full candor to the Court making sure
14 all these issues have been fully explained on the record,
15 but to the extent there's anything more than autopsies
16 he was asking about, which I think was covered in your
17 protective order that's already issued in the case, if
18 you have a specific question about it, I'd love the
19 opportunity to address it and, quite frankly, I can't
20 remember what he asked -- you know, in addition to
21 autopsies whatever -- what else he was asking for.

22 THE COURT: Well, right now I'm focussed on
23 autopsies.

24 MR. PLYLER: Okay.

25 THE COURT: And if Mr. Kendrick is asking for more

1 than that, then please educate me.

2 MR. KENDRICK: Well, to clarify, I think what we
3 said was any kind of incident reports, but I don't know
4 because that was -- when we were in the -- I was asking
5 Director Stirling if these things existed with the intent
6 of getting into, you know, tell me what gets generated.
7 Like does someone sit down and type out here's what
8 happens during an execution and that questioning was
9 stopped under the protective order.

10 So that -- I guess I don't have a specific knowledge
11 of what, but what I would be asking for would be if the
12 Department has some way of recording the observations
13 that are related to the elect -- stuff carried out.

14 So I'd look at like in our -- in our motion that
15 we filed on June 14th and that would just -- on the last
16 page, page 10, we said all documents, correspondence,
17 photographs, contemporaneous records, notes, audio
18 recordings related to electrocution executions carried
19 out, and we actually limited it to since 1977.

20 So, you know, I don't know what they would call
21 it because I wasn't -- I really couldn't ask any more
22 questions, but I just -- I know that oftentimes when
23 government takes action, they then issue a report. And
24 I certainly know that those reports may very well contain
25 things that you have ruled are protected.

1 MR. PLYLER: And, Your Honor, I can short circuit
2 that. There are no reports. This isn't like if a riot
3 happened and they do incident reports. They don't do
4 that. In fact, witnesses have to sign a witness
5 statement, but all it says is that they were present.
6 And a lot of that has to do with the protections of the
7 public knowing that the person who we said was gonna be
8 executed was actually the person that was executed and
9 that type stuff.

10 So I don't -- this idea that there's some sort of
11 like afteraction report, if there is I ain't never heard
12 of it and I don't think -- and I know audio he's asking
13 because apparently Georgia audio-recorded some back in
14 the eighties. As far as I know, South Carolina's never
15 done that, so those documents to my knowledge don't even
16 exist.

17 And, quite frankly, I don't know if he's talking
18 about the deposition he took of Director Stirling, but I
19 don't remember those specific questions being asked.

20 If I'm missing something and he wants me to point
21 -- or point me to it, I'm happy to address it, but I
22 don't recall that specific question being asked.

23 THE COURT: Okay. So incident reports do not
24 exist. I'm focussed back on the autopsies and let me
25 just say while Mr. Kendrick is looking for whatever that

1 I don't know that the Court has ruled upon this specific
2 issue. My initial thought was in line with yours,
3 Mr. Plyler, that this has been laid to rest, although I
4 don't recall considering autopsies at the time of that
5 hearing on the other discovery motions.

6 I will also note that in the defendant's motion for
7 protective order, the word "autopsy" is not mentioned,
8 so that sort of buttresses my recollection.

9 MR. PLYLER: The exhibit had our answers, our
10 discovery requests, and we said all objections. We
11 specifically objected to that request. We just didn't
12 -- we were more hyper-focused, but I understand the
13 Court has a limited amount of attention and you can't
14 read -- you can't dissect everything that gets filed
15 when there's hundreds of pages, so the arguments that
16 we felt needed to be fully briefed, we fully briefed,
17 and we reserved all the other objections.

18 THE COURT: I understand. I'm just saying -- I'm
19 telling you what was in my mind and what the intent of
20 my ruling was, so whether it's -- I don't recall
21 considering it. If I did, this would be potentially
22 reversing myself; if not, this is the first ruling on
23 it.

24 Go ahead, Mr. Kendrick.

25 MR. KENDRICK: Well, just to clarify one thing,

1 what -- and I can -- this is might -- I don't know if
2 I wrote on this or not. I'm happy to send you a copy
3 of this deposition, but I asked Director Stirling if he
4 knew about any reports related to the executions and he
5 said he doesn't know, he's not really thought about it,
6 and I said is there a person who would know the answer
7 to that question, and he said yes, and then at that
8 point we got into the discussion about the -- the
9 discovery order and what I said was, you know, my
10 explanation for these questions and why I think he
11 should at least ask the last question on the table is if
12 he tells me the reports exist, clearly this witness isn't
13 gonna be able to tell me the contents because he said he
14 never looked at them, but if I know they exist, they're
15 on the record and we can move on and deal with on appeal
16 the scope of the judge's orders, and I think probably
17 what was unsaid was that we could have then tried to do
18 additional discovery based on that answer and what had
19 come up, but if they don't exist, then I don't really
20 care one way or the other, and the response I got from
21 the Department of Corrections was our objection's
22 letting you know they do exist; otherwise, we would have
23 just said we didn't have any.

24 MR. PLYLER: Your Honor --

25 MR. KENDRICK: And we were specifically talking at

1 that point about what I was referring to as reports and
2 the way I described them I said is there -- is there a
3 way to look at what happened in the prior executions
4 before -- because we all agree that with Director Stirling
5 there have been no executions under his tenure, so, but,
6 you know, could you go in a filing cabinet and say, huh,
7 I wonder happened the last time we did this, is there
8 some observation. I mean, there doesn't seem to be any
9 doubt that is what I was asking about because I said is
10 there a way for you to review what has happened in prior
11 executions before your time.

12 I'm sorry.

13 THE COURT: Thank you. I was gonna let you finish
14 your sentence, but --

15 MR. KENDRICK: I don't need to finish.

16 THE COURT: -- but, no, I only interrupt because
17 we're going back to historically what you asked of him
18 and didn't, I wasn't there, that's not what my decision
19 is based on. My decision's based on whether it's
20 appropriate for disclosure of these autopsies. That is
21 my decision, not whether you asked for them before or
22 whether, you know -- and, of course, SCDC can only
23 disclose what they have. If there isn't an autopsy for
24 everyone, then you don't disclose one for everyone. You
25 can't create something that doesn't exist.

1 So I want to really focus on the merits of whether
2 they should be disclosed, not how many times you asked
3 for them or the context.

4 Yes, sir.

5 MR. KENDRICK: Can I clarify?

6 THE COURT: Sure.

7 MR. KENDRICK: Because what I'm saying is you asked
8 me if we were talking about more than autopsies and I
9 said yes and I'm just gonna call them incident reports
10 for our ease because that's what I was asking the director
11 about and it sounds like there's a position today that
12 those reports don't exist.

13 THE COURT: Exactly.

14 MR. KENDRICK: But there was a position from the
15 director that there are reports that do exist and I just
16 want to make sure I understand whether -- which one of
17 those positions is accurate.

18 MR. PLYLER: And I -- may I?

19 THE COURT: Yes.

20 MR. PLYLER: In the deposition, he used the term
21 "reports", not incident reports. Incident reports are
22 a specific thing to the Department of Corrections.
23 Anybody who's done prison litigation and all knows what
24 they are. There are no incident reports and that's what
25 I said earlier. When you use the term "reports", that

1 could mean a whole bunch of stuff. It could mean those
2 witness affidavits saying they were there, it could mean
3 a sign-in, sign-out log sheet.

4 It's so encompassing to say reports. Yeah, there
5 may be materials that document in some way that an
6 execution occurred. What I have been told by my client
7 is there's nothing that says these are the exact details
8 of the execution, so and so said they saw this, so and
9 so said they saw that. That doesn't exist.

10 Now I'm sure there's like a -- they usually do a
11 death report on any inmate that dies in prison and that
12 death report says the time of death, you know, so there's
13 that sort of stuff, but in terms of an incident report
14 describing details of what happened, I am not aware of
15 the existence of any of those, so hopefully that clarifies
16 the issue.

17 MR. KENDRICK: I'm not trying to be disingenuous or
18 difficult. I just -- I asked the question about is there
19 a way for you to look at how -- what has happened in a
20 prior execution and I got a yes and then we -- we started
21 -- you know, I said how would you review that, what
22 would you look at, and the director said I think I
23 would look at a report, I don't know. So I maybe
24 adopted report from him or maybe he adopted report from
25 me, but I don't think there was confusion of what we were

1 talking about. We were talking about some historical
2 record, so. But be that as it may, I mean, you've -- you
3 know, I guess --

4 THE COURT: We're good.

5 MR. KENDRICK: Okay.

6 THE COURT: Autopsies. I don't think that was
7 covered. That was not my intent to cover that in the
8 previous discovery order. I am going to grant the
9 motion to disclose autopsies of previous executions
10 within twenty-four hours since here we are, you know.

11 MR. PLYLER: Under a confidentiality order, Your
12 Honor, or no?

13 THE COURT: Yes, under the confidentiality order.
14 Absolutely.

15 That's only the autopsies. I don't know what other
16 reports could exist and Mr. Kendrick can't articulate
17 what those are. I'm not gonna ask Director Stirling
18 what specifically he was referring to at that time. He
19 may have been talking about any number of things, I have
20 no idea, but I will accept Mr. Plyler's representation
21 that there are no incident reports or other descriptive
22 documents like that.

23 So the autopsies within twenty-four hours and that's
24 it.

25 What else do we need to discuss?

1 MR. KENDRICK: I guess I've got to figure out,
2 Your Honor, sort of the progression of our case. So
3 we --

4 THE COURT: I just want to make sure there are no
5 other pre-trial issues.

6 MR. KENDRICK: I don't have any, Your Honor, but I
7 -- I could be wrong. I have a list of things and it
8 seems I have a check by everything.

9 THE COURT: Me, too. I just want to make sure I'm
10 not overlooking something because clearly I overlooked
11 autopsies in that last thing, so.

12 MR. KENDRICK: You're checked off with what --

13 MR. PLYLER: Your Honor, there was -- I mean,
14 because -- and he's referenced a lot of this. They're
15 so intertwined. That's why earlier I tried to say kind
16 of like they're one motion, but he's separated them out
17 differently than he's arguing them. So just for the
18 Court's edification and clarification, you know, they
19 took the deposition of Mr. Stirling and Mr. Rushton.
20 Because of the rulings and the way we understood the
21 protective order we had to object to a lot of questions
22 and in compliance with the rules we immediately -- or
23 when was it? Within five days filed a motion for
24 protective order on those specific questions, we outlined
25 the reasoning, we cited to the depositions. I mean, I

1 -- I just ask that it be granted.

2 From what I remember -- if Your Honor's ruling now
3 clarifying autopsy reports and that autopsies will be
4 produced, neither one of those witnesses would have had
5 anything to offer about it. It would be no different
6 than you and I looking at an autopsy report, so I'm not
7 sure that really affects this motion for protective
8 order that we filed and I think based on your rulings
9 in-camera, I think a lot of those questions are already
10 covered by your previous rulings, but to the extent they
11 need to be addressed and they did file the flip side of
12 that coin, a motion to compel, so those two motions are
13 out there as well that probably need specific rulings so
14 we're all singing from the same sheet of music as my
15 grandmother would say.

16 THE COURT: Except that I don't know what those
17 questions were.

18 MR. PLYLER: I'm sorry, Your Honor. It's in the
19 notebook that we handed up. The pending motions
20 notebook.

21 THE COURT: Where?

22 MR. PLYLER: I'm getting you the number right now.
23 It would be 9, Tab 9.

24 THE COURT: But it's not that -- okay.

25 I'm sorry. Maybe I overlooked something.

1 MR. PLYLER: We didn't submit the transcripts
2 themselves.

3 THE COURT: Okay. That's what I was looking for.

4 MR. PLYLER: And it may be because we -- yeah, we
5 didn't have the transcripts at that time.

6 THE COURT: Right. There are a couple of examples
7 of questions.

8 MR. PLYLER: Right. We were able to summarize it
9 essentially, but we were working from notes. We didn't
10 have the transcripts at this time. Yeah, the transcripts
11 weren't available five days after the depositions. So I
12 apologize if that wasn't as clear I should have made it.

13 THE COURT: Well, I think as to observations, this
14 is sort of the middle of the third paragraph on page 3
15 of the motion. To provide an example, plaintiff
16 counsel asked the witness, et cetera. It talks about
17 observations. I believe that's been covered.

18 I'm granting a protective order as to that question
19 or that line of questioning. I think we've discussed
20 that already.

21 And that's the only example. I assume that's the
22 line of questioning we've been talking about that begins
23 on the bottom of page 3 and --

24 MR. PLYLER: Yeah, I was just looking for plaintiff's
25 motion to see if they --

1 (Discussion between counsel.)

2 MR. PLYLER: Your Honor, it might be easier from an
3 efficiency standpoint if he just -- if they tell us if
4 there were certain questions they still think they're
5 entitled to answers to that haven't already been covered
6 instead of -- I don't want to sit here and spin wheels
7 on it.

8 MR. KENDRICK: No. No. Your Honor, I think what
9 you put a pin in is what --

10 THE COURT: Exactly.

11 MR. KENDRICK: I think that's the answer.

12 THE COURT: Exactly.

13 MR. KENDRICK: So there's -- and what I have done,
14 I will tell you, is in the outline I was intending to
15 use with the witness that I'm responsible for, I have
16 put a big red box around anything that I think is under
17 that and I will tell you I've been overly conservative,
18 so if it even approaches the doorway of that, I put the
19 red box around it because I do not want to break any
20 rules. So until you rule or I have a definitive mark,
21 I'm not gonna talk about what I've marked because I
22 think that further -- we don't want to hear that right
23 now.

24 So that is the crux of the protective order is that
25 I want to be able to ask the questions and I've already

1 told you in-camera what those questions generally involve.

2 THE COURT: Right.

3 MR. KENDRICK: There's -- you know, there's another
4 series of questions that involve the availability of
5 the lethal injection drugs that you have ruled on a
6 protective order, so I think just however you determine
7 that we can preserve our issue -- even if you say you
8 don't get to preserve it, you should have done it a
9 different way, you know, I'll ask you to kind of do the
10 same thing with that. I think that's all we've got.

11 THE COURT: Okay. I think that's right. So
12 whatever portion of that the Court's not ruled on is
13 what I put a pin in.

14 MR. KENDRICK: Yes.

15 THE COURT: Anything else?

16 MR. KENDRICK: I don't want to talk about that
17 because you've heard that ad nauseam, but I have one
18 other, I guess, just scheduling issue.

19 THE COURT: Yes.

20 MR. KENDRICK: If we -- and I don't know how
21 difficult it will be to get us the autopsies, but
22 assuming that twenty-four hours from your ruling gets
23 them to us tomorrow afternoon, you know, our witness --
24 I don't mind telling you the order. I've got two SCDC
25 employees to call this afternoon and we intended to call

1 Wikswo tomorrow and then our other expert, Arden -- we
2 had intended to call Wikswo first and that would be kind
3 of tomorrow and then our other expert is Dr. Arden. He
4 is in trial in Mississippi and he cannot be here until
5 Wednesday morning, so I had -- I had sort of tried to
6 say okay, let me make my witnesses work so it naturally
7 flows into him getting here Tuesday night, so he's not a
8 problem, but, you know, to the extent Wikswo does want
9 to look at those autopsies, I don't know how you want
10 to handle that. I hate to break up testimony. And it
11 may be that they say we've got them right here, we'll
12 just mark them and give them to you and then we wouldn't
13 have to wait until that, but I guess I just need to bring
14 that up to you and the idea that if we got them at 12:55
15 tomorrow afternoon, it could be that Wikswo is done
16 testifying and --

17 MR. PLYLER: Your Honor, we're not gonna play any
18 games.

19 THE COURT: Oh, I know.

20 MR. PLYLER: We're gonna make --

21 MR. KENDRICK: I didn't mean that. I'm sorry I
22 said it that way.

23 MR. PLYLER: We're gonna make every effort to have
24 them to them this evening. That's our intention.

25 MR. KENDRICK: That's great. Thank you.

1 THE COURT: Okay. It's not a problem until it's a
2 problem.

3 MR. LAMBERT: Your Honor, one more thing. I'm
4 gonna walk around. The plaintiffs in their pretrial
5 brief and by e-mail to us said they were going to
6 voluntarily dismiss their first claim for a due process
7 violation on a retroactive legislation. If they're
8 willing to do that still, I'd ask that we do that and
9 just clean that up before we get any further.

10 MR. KENDRICK: Oh, yeah. Of course. We told them
11 that because we intended to, but sorry I didn't bring it
12 up.

13 MR. LAMBERT: Well, I thought of it and just wanted
14 to --

15 MR. KENDRICK: Maybe I wanted to get to the easy
16 stuff first and get all warmed up, Judge. I'm sorry
17 about that.

18 THE COURT: Okay.

19 MR. KENDRICK: We're fine with that.

20 THE COURT: All right. So all that remains is my
21 ruling on the issue I put a pin in and then we can
22 begin with witness testimony? Yes? Fabulous.

23 It's already 1:00. I mean, frankly, give me until
24 2:30. I'll see you-all at 2:30.

25 MR. KENDRICK: Thank you, Your Honor.

1 THE COURT: After lunch I'll see you-all in 3A.
2 We'll move to 3A.

3 (Whereupon, a luncheon recess was taken 12:57 PM.)

4 (Back on the record at 2:30 PM.)

5 BAILIFF: Court come to order. All rise, please.
6 You may be seated.

7 THE COURT: I understand we've been joined by
8 someone from the Post and Courier.

9 REPORTER: Yes, ma'am.

10 THE COURT: Okay. I'm aware that you're here.
11 It's fine. We're good to go. I just got a phone call
12 and just hadn't had time -- a chance to sign the form,
13 but...

14 Anyone else from the media who hasn't made
15 themselves known? Yes? No? Good.

16 All right. So returning to the matter that we put
17 a pin in earlier, you know, I was sort of agonizing over
18 it and then I realized I was probably getting too far
19 into the weeds. I'm going to allow the testimony to be
20 proffered in a manner that is suitable to the witness.

21 And I don't know, Mr. Plyler, if this is something
22 you've discussed already or not discussed with the
23 potential witness, but I am open to suggestions whether
24 that needs to be done in chambers, you know, just to
25 talk about logistics and security or otherwise, but I'm

1 -- I'm open to suggestions. I was getting too far into
2 the weeds trying to figure out the road map myself, but
3 I'm no security specialist either --

4 MR. PLYLER: Okay.

5 THE COURT: -- but I will allow the in-camera
6 testimony on those specific issues as -- as I believe
7 comports with the statute. The remainder of the
8 testimony of that witness will be done in open court,
9 of course, but those specific issues -- yes, sir.

10 MR. PLYLER: My understanding is the witness we
11 were discussing is not -- they weren't on intending on
12 calling that person first is my understanding.

13 MR. KENDRICK: Right.

14 THE COURT: Right. Yeah, when we get to that --

15 MR. PLYLER: I'm sorry, Your Honor. I thought you
16 were asking for an answer from me now.

17 THE COURT: No, no, no. I'm just telling you I'm
18 gonna put the ball back into court to suggest how it
19 should be done, whether that's tomorrow or the witness
20 testifies on Wednesday, but I will work with you and
21 with security to handle the logistics of that in a way
22 that is suitable to -- to defense counsel and to the
23 witness, but the spirit of -- the motion itself is
24 granted to allow the proffer of the testimony in-camera.

25 MR. PLYLER: And when you say in -- in-camera, you

1 mean under seal?

2 THE COURT: Under seal, yes.

3 MR. PLYLER: Okay. Thank you, Your Honor.

4 Yes.

5 MR. KENDRICK: Just quickly, Your Honor, since I
6 have not been -- I don't mean to be presumptuous. I
7 assume we're getting ready to start?

8 THE COURT: We are.

9 MR. KENDRICK: So there is a series of questions
10 that I have to Director Stirling relating to the
11 availability of the lethal injection drugs. That's not
12 -- that's not secret; that is, your protective order
13 granted -- prevented us from asking those questions.
14 I'm not sure the best way to do that because I do think
15 that those are -- are slightly different in that I think
16 they don't want to even have him answer those, so how
17 would you like for me to at least place the substance
18 of my inquiry on the record? Or you may tell me that's
19 not appropriate at all.

20 I -- I would personally like to have a record of
21 what I was going to ask him and it is about ten questions
22 roughly, ten to fifteen, and I think that your order,
23 which I would love it if you'd reconsider it, but I'm
24 not asking, you know -- and to the extent I am asking, I
25 already know what you're gonna say. I would like to put

1 those on the record and I don't know how you want to do
2 it.

3 THE COURT: Mr. Plyler, do you want to jump in?

4 MR. PLYLER: Your Honor, I mean, it feels a little
5 like déjà vu. I feel like we've already talked about
6 this. I mean, your protective order stays in place.
7 You -- you mentioned, and I think artfully so, that when
8 you issued the original protective order the idea of
9 this autopsy question was really not at the forefront,
10 hadn't been well-argued, but what they're asking about
11 now clearly was covered by the protective order, and
12 so I'm not sure -- and I know it's a bench trial and
13 we're not talking about a jury trial, but at the same
14 time the matter has been decided by the Court, the
15 discovery order is in place.

16 To the extent they're talking about this on appeal,
17 the appeal would be that discovery decision, which is
18 well within your discretion, so I'm not sure what the
19 benefit of going through question by question -- if
20 you've already said that topic is off limits, then
21 what's the purpose except to see if I slip up and forget
22 to object to something or -- I mean, I don't understand
23 the purpose.

24 THE COURT: Well, I understood it to be more of a
25 proffer than anything, but, I guess, one question would

1 be why weren't the questions sort of proffered, all
2 right, so the Court could make a ruling.

3 MR. KENDRICK: Well, the Court made the ruling
4 early. So the Court made the ruling prior to the
5 depositions, if that's what you're talking about, but I
6 wasn't -- I didn't see any point of proffering them in
7 the depositions because those wouldn't be a part of the
8 record.

9 THE COURT: Well, I just mean to the Court in the
10 discussion of whether the protective order should be
11 granted.

12 MR. KENDRICK: I think we made the argument and I --
13 and look, Judge, if I'm -- if your answer is no, it's not
14 gonna -- I'll keep moving. I just want to make sure that
15 in a -- in a later day what I don't want to happen is
16 for someone to say you didn't keep trying.

17 Because, for example, in a -- in a motion in limine,
18 if you granted it, I wouldn't be able to just kind of put
19 that out of my head, I'd still have to, you know, make
20 the proper objection -- or I guess if you denied a motion
21 in limine, I would still then have to object at the time
22 the testimony came in in order for the Supreme Court to
23 have the error preserved, so in this case I'm worried
24 that because you made a pre-trial discovery ruling, if
25 I don't bring up any attempt to try to get into the

1 evidence in the courtroom, would the Supreme Court say
2 well, that was a pre-trial ruling related to discovery,
3 you didn't preserve it because you didn't actually try
4 to get it in at the trial, and I think, you know, to the
5 extent that -- so, to be clear, whatever you rule, Judge,
6 you rule. I don't intend to ask him these questions and
7 then wait for Mr. Plyler to object and then you rule.
8 That was one way to do it, but I think a better way to
9 think about it is to say Judge, here is the questions
10 that I would have asked him in the trial if not for your
11 order and then you'd say yes, those are all pursuant to
12 my order, and then at least the Supreme Court knows what
13 I was trying to do. It may be that what we did in the
14 back and forth would preserve the issue and I think this
15 discussion I'm having makes it clear what I was trying to
16 do. I don't think the Supreme Court's gonna say well,
17 you should have kept pushing everybody. I just need to
18 make sure I do my best.

19 THE COURT: Well, then there it is. It's on the
20 record.

21 MR. KENDRICK: Thank you, Judge.

22 MR. PLYLER: And speaking of the record, let me
23 clarify. I wasn't talking about your original protective
24 order. I was talking about the motion we took up this
25 morning with this issue of questions he was trying to

1 ask during the deposition that were objected to, we
2 filed for a protective order, he filed a motion to
3 compel. That's a separate issue and you affirmed that
4 part of it is my understanding of your ruling so far, so
5 I -- I just want to make sure for the record that the
6 record is clear I was not talking about just your original
7 protective order, I was talking about the subsequent
8 motions that were done this morning on this same topic.

9 THE COURT: Well, maybe I'm lost now.

10 MR. KENDRICK: No, to be clear, Judge, there are
11 two sort of parts of it. So I do not agree that your
12 protective order covered some of the questions that we
13 discussed earlier today, and we've resolved that, but
14 you also issued a protective order on what I call
15 Section 1 or -- I don't know. Section 1 or Section 2
16 of their motion where they said they should not be able
17 to ask about the availability and the efforts to obtain
18 lethal injection drugs. So I never intended to ask about
19 those in the depositions because that is extreme --
20 I agree that there's really no other way to read your
21 order. You said we can't ask about lethal injection and
22 they made a very specific argument, so I never did it,
23 and I think I should have been able to do, and to be
24 quite honest with you, Judge, I think -- you know, it's
25 very clear what I would have asked, which is simply the

1 efforts made to get them, you know, the frequency, the
2 diligence of that, and those we were prevented from
3 asking. And I think that what I just said probably
4 properly preserves the issue for the Supreme Court that
5 we would have wanted to delve into the true efforts to
6 ensure availability, and -- and you ruled against us and
7 I just need to make sure that if necessary down the road
8 I haven't made an error -- a preservation error that
9 would prevent us from arguing that.

10 Does that make sense?

11 THE COURT: I suppose so. I mean, it almost feels
12 like it's an attempt to request reconsideration of that
13 decision, which is very awkward timing --

14 MR. KENDRICK: No, it's not.

15 THE COURT: -- even adding information that wasn't
16 necessarily given at the time.

17 MR. KENDRICK: No, it's not an attempt to -- and
18 I'm not -- I guess maybe I'm being unclear because I
19 don't mean to necessarily ask him the questions in the
20 -- I just mean that I would -- but here's what I think
21 I would do, Judge. I think what I've just told you
22 efficiently covers what I want to ask him and I think
23 it preserves it for appeal so that if the Supreme Court
24 ever says we wish we knew what he did, I don't think I've
25 waived that issue by -- it was the subject of a ruling,

1 we are now at the time that the witness is to testify and
2 I've brought it up and you, to my understanding, ruled on
3 what I'm asking now. I feel...

4 Let me ask someone smarter than me.

5 (Discussion between counsel.)

6 MR. KENDRICK: A smarter person thinks that I've
7 preserved it, so let's leave it there.

8 THE COURT: We'll leave it there.

9 MR. KENDRICK: The second issue I want to bring up,
10 Judge, to avoid earlier problems is there are a number
11 of confidentiality orders related to protocols and such,
12 related documents. Those will be the subject of a number
13 of questions for the next witness that we will seek to
14 -- we will be able to introduce the protocols, we will
15 be able to introduce some records that are much more
16 specific about protocol details, and those are not
17 anything we've been prevented from doing, they're just
18 under confidentiality, so I want to make sure you know
19 and Mr. Plyler knows -- I mean, however you want to deal
20 with the confidentiality of that, but I'm gonna ask these
21 questions and I'm gonna say confidential things on the
22 record and enter a confidential document into the record,
23 so if something else needs to be done I wanted to bring
24 it to your attention now so it didn't appear that I tried
25 to kind of slide stuff outside of the courtroom that

1 shouldn't be there.

2 THE COURT: Mr. Plyler.

3 MR. PLYLER: Yeah, Your Honor. I'm just trying
4 to pull up the confidentiality order before I started
5 responding to it because my understanding -- my memory
6 and understanding of that order is that it had a
7 provision in there about this issue and --

8 MR. KENDRICK: We looked at it pretty carefully and
9 we just didn't see anything that made a clear --

10 MR. PLYLER: That's the third time since we got up
11 to this courtroom that I haven't had an opportunity to
12 finish my thought.

13 MR. KENDRICK: No, I thought --

14 THE COURT: You did interrupt very clearly.

15 MR. KENDRICK: Oh, I'm very sorry, Judge. I didn't
16 mean to.

17 THE COURT: Mr. Plyler.

18 MR. PLYLER: I'm pretty sure the order sets forth
19 what they're supposed to do if -- if they wanted to
20 submit it to the Court and things like that. I'm just
21 trying to flip through the order again to see that.

22 So it's on page 5 of the order. It says in the
23 event a party seeks to file any materials that are
24 subject to protection under this order of the Court,
25 the party shall take appropriate action to ensure that

1 the documents receive proper protection from public
2 disclosure, including filing a redacted document with
3 the specific written consent of parties who designated
4 the documents confidential.

5 Nobody's asked me that and I think we're the only
6 ones that designated anything confidential. Where
7 appropriate presenting the document solely for in-camera
8 review or when the preceding measures are not adequate,
9 seeking permission to file the document under seal.

10 So that was the provisions for the confidential
11 information in the order. They didn't consult with me
12 ahead of time about confidential information and what
13 they want to do with it, and I'm not blaming them, I
14 know we've all been under tight timeframes, but I've
15 asked for a week now do you-all have an exhibit list,
16 do you have something that you-all are intending to
17 offer as exhibits and this morning they -- and I'm not
18 -- it may have got prepared last night, so it wasn't
19 like we've had much time to confer on this issue, but
20 I believe the order required the first thing you need
21 to do is confer, can we redact this in some way so that
22 it would be -- so we could satisfy your protections, or
23 submitting it for an in-camera review.

24 Obviously with you being finder of law and fact in
25 this situation that may satisfy the issue or seeking

1 permission to file it under seal.

2 So, I mean, obviously I'm operating in a vacuum here
3 because I'm not sure exactly how he plans on doing it. I
4 mean, I -- in terms of generalities, you know, have you
5 reviewed the protocol, generally what does it, you know,
6 provide, do you think that's sufficient, those type of
7 questions I think are not under the confidential order.
8 I think that's fairly -- you know, fair game, but to hand
9 it to a witness and say can you read this document into
10 the record please, then what was the use to going through
11 all these efforts to have confidentiality to begin with?

12 So in this situation where they were just as aware
13 of the order as I was, it says what they're supposed to
14 do and they haven't done it and now they're basically
15 saying hey, Judge, what should we do? Well, my advice
16 is you should have followed the order, but that's just
17 me.

18 So I don't know if I'm gonna -- it sure sounds like
19 I'm gonna be doing Whac-A-Mole over here, popping up
20 every two minutes objecting to stuff, you know, either
21 where they're testing the protective order again or
22 testing the confidentiality order and all that. And I
23 don't want that sort of trial, but obviously I've got
24 to do what's in the best interest of my client.

25 So that's -- those are my thoughts on the issue.

1 Again, not having it directly in front of me and
2 understanding exactly what's trying to be accomplished,
3 maybe there is a workaround, but if it's just we have
4 information that we got under confidentiality order
5 that we want to present on the stand, well, then I think
6 they need to take the steps they're supposed to under
7 the order.

8 THE COURT: Mr. Kendrick.

9 MR. KENDRICK: All right. So -- and I Mr. Plyler
10 may be right. This may have been an oversight on my
11 part, so what I suppose I could do is get with him right
12 now and we'll figure out how to redact this stuff, you
13 know, and do it from that standpoint. I mean, I don't
14 know that I contemplated that there would be any problem
15 -- so I don't know that I contemplated that there would
16 be any problem with entering the evidence subject to the
17 confidentiality order because I just assumed it would be
18 sealed.

19 THE COURT: Right, but those two things are really
20 -- I don't want to say completely mutually exclusive,
21 but they are maybe in opposite or -- I'm not sure of
22 the right word because confidential items are to remain
23 confidential and your intent is to make a public record
24 of confidential information, and I -- those two things
25 can't happen.

1 MR. KENDRICK: Well, my intent, Your Honor, is to
2 make a record for the appellate court. I -- almost all
3 the time I have appellate court records with sealed
4 appendices that involve material that's not disclosed to
5 the public. So if I made a procedural mistake here, I
6 think there's a very simple solution because I don't
7 think anybody disagrees that we have talked about these
8 documents.

9 And, listen, I -- I guess that is a way to read the
10 order where I made a mistake, but we did not have an
11 exhibit list until about 6:00 last night. In all candor
12 to the Court, he would have known I was putting the
13 protocols into evidence and that's really about it.
14 There's not a lot left after the order that we have
15 discussed. The protocols are the clearly the
16 centerpiece of the case. So it sounds like I think --
17 I didn't mean to create a problem because really my
18 main situation, you know, when I asked -- I'm not gonna
19 ask them to publish the protocol, but I want to ask
20 them about the specifics of it because that's really
21 what we're here to talk about.

22 And I understand that that is confidential, so
23 if that's -- that's not addressed in this order
24 necessarily because I don't know how -- you know, this
25 doesn't really address trial testimony, which is what I

1 have been focussed on.

2 I mean, I guess the solution I would find is that,
3 you know, there are parts of the protocol that involve
4 what I think would be a security matter and there are
5 parts of the protocol that involve what I would, you
6 know, call the accomplishing an execution matter, and
7 it has always felt like what has been most concerning
8 about the protocols getting out is the first part, not
9 the second part, so it -- I mean, it wouldn't take me
10 very much effort to get rid of everything except for
11 the exact sequence of events that leads to the inmate's
12 death and I don't -- I mean, we just kind of generally
13 during the deposition when I started talking about
14 protocols, Mr. Plyler said that it's all under the
15 confidentiality agreement and I said yes.

16 We put the protocols in as exhibits to the
17 deposition and I never thought about actually redacting
18 the documents, so I would feel very bad if I've
19 essentially taken a part of my case and just read an
20 order the wrong way. I didn't -- we read this order
21 again today because I didn't want to just not say
22 anything and then be accused of having tried to flaunt
23 the Court's orders and I did not -- I did not read this
24 paragraph correctly, I guess. I still don't think it
25 covers testimony related to protocol and as far as me

1 being able to ask questions about sort of the steps,
2 but, I mean, I think filing a redacted document is
3 really my only option and --

4 MR. PLYLER: Your Honor, if I may?

5 MR. KENDRICK: -- we can do that now.

6 THE COURT: Yes, sir.

7 MR. PLYLER: I deposed Dr. Wikswa and I think it
8 ended up being an eight-hour deposition. I think we
9 went through a lot of breaks. I was able to talk to
10 him about these issues in generality and you've seen a
11 pretty -- you've seen excerpts from it already today.
12 It is extremely detailed. I just don't agree that
13 somehow this has to be filed with the Court, this is
14 the heart of our case, is -- is correct. I'm not trying
15 to tell him how to put his case up, but he can have his
16 experts come up and talk about the protocols in general
17 without violating the confidentiality order, as long as
18 they're not getting into the specifics of the protocol,
19 like republishing them or circulating them.

20 Also if he thought that we -- if he thought our
21 designation of it as confidential was inappropriate,
22 there was a way to challenge that under the order and
23 he could have done it. He could have asked you to
24 reconsider your motion for protective order on this
25 issue, but they didn't, and now they're essentially

1 wanting to -- I mean, the order doesn't say it's
2 confidential until we go to try the case. It says to
3 remain confidential even after the litigation.

4 THE COURT: Right, and that's, I think, where I'm
5 sort of thrown, Mr. Kendrick, by this issue and by the
6 last issue because we had a motion hearing sometime
7 ago, a decision was made, there was no request for
8 reconsideration of any of those decisions and then here
9 we are trying to do something different from what was
10 ruled upon then or trying to sort of backdoor it or
11 figure out how to get around it because it was the crux
12 of your case and -- and, you know.

13 MR. KENDRICK: I think I'm -- I think maybe --
14 maybe I'm not artfully explaining this. I don't
15 challenge the designation of confidentiality, but --

16 THE COURT: Well, you do to the extent you want to
17 put it in a public record. You want to ask the witness
18 in a public forum about the specifics of something that's
19 confidential.

20 MR. KENDRICK: I want you to see it, Judge. It's
21 not confidential to you. It's confidential in the case
22 between the parties, the litigants and you, the ultimate
23 factfinder, and I think that -- I don't think that it's
24 confidential from Your Honor. My -- my point is that
25 if there's -- if it can't be released to the public, I

1 don't want it to be released to the public. I'm not
2 challenging the designation of the confidentiality. I
3 don't disagree with your ruling on this confidentiality.
4 I mean, I might have a feeling about why the Department
5 of Corrections doesn't want to release this information,
6 but in a courtroom I don't challenge the confidentiality
7 designation and I never did during any of the depositions.

8 I -- I guess what I -- I mean, any time there are
9 documents that are confidential, and I assume that I was
10 correct and that the actual exact way in which this is
11 carried out is not necessarily -- well, that's not true
12 either because when we got into certain details about
13 things in the protocol that were not security-related,
14 those were subject to confidentiality. I don't challenge
15 that. I guess I just assumed we would have to address
16 how we talk about it in front of Your Honor as the
17 factfinder, so it may be that the courtroom is cleared
18 or -- I mean, I don't -- there's times we talk about
19 sensitive matters in courtrooms that are not really
20 for public consumption. I'm not trying -- I'm trying
21 to keep it out of the public consumption so I don't
22 follow the rules and so I -- the mechanics of the rule
23 it sounds like maybe I could have done a better job
24 with, but I'm not challenging your ruling. I think we
25 agreed to the confidentiality.

1 I'm under multiple confidentiality orders related
2 to protocols from other cases, too. So I've never
3 complained about that. I -- I settled a case with
4 Mr. Plyler where that was our solution was that we sign
5 a confidentiality order with a Federal judge.

6 THE COURT: Well, so maybe it was my -- my
7 misunderstanding of where you're going. You're asking
8 to close the courtroom because what you said is I intend
9 to ask the witness about these and offer these as
10 exhibits as though you are trying to sidestep the order
11 when really your request is how do I make sure that I
12 don't violate the order.

13 Let -- let me offer a suggestion, which we're just
14 now getting around to, closing the courtroom, that being
15 the suggestion, I suppose, but we're just -- you know,
16 ten minutes into this discussion getting around to that.

17 MR. KENDRICK: Well, so I don't know that -- I mean,
18 I'm not -- you know, I guess that's the only way to do
19 it, but, I mean, I guess that's what -- maybe I did a
20 really bad job of -- of arguing my point.

21 This is what I might propose. I don't know that
22 it will work, but if you will give me two minutes to
23 confer with Mr. Plyler, I'm gonna ask him if there's a
24 simple solution to this, and if there's not, then I will
25 -- I will tell you that, Judge.

1 (Discussion between counsel.)

2 (Pause in proceedings.)

3 MR. PLYLER: Judge, I think we can -- some of this
4 I think we can work out. My -- my understanding, and
5 what I would be willing to agree to that complies with
6 this order, is that the document they're talking about
7 be filed under seal so you as the factfinder would be
8 aware of it, it would be given a number obviously, so
9 if there's any question about was the witness talking
10 about the actual protocol or whatever, they can say I
11 reviewed plaintiff's exhibit whatever that's filed under
12 seal, but then it needs to be more of generality.

13 So they've asked us about the amount of current,
14 the number of cycles, things like that, and I'm fine with
15 that. In fact, if I'm not mistaken, there was a fairly
16 vanilla press release about some of that stuff released
17 a long time ago, but the protocols are much more detailed
18 and there are security risks and if that's all you're
19 gonna get out of it, there's no -- I mean, we could have
20 basically -- I think they're -- how many pages long?
21 Nine pages long of nothing but blank ink, you know, to
22 redact it, then if -- so if that's what they're looking
23 for is like with the firing squad, how many shooters in
24 the firing squad, how far away, you know, what caliber
25 of bullet, I don't think we have a problem with that. I

1 think that's in the press release.

2 And, quite frankly, I don't even know if that level
3 of detail is in the protocol to be honest with you, but
4 you can review the protocol as the factfinder under seal
5 in compliance with your order and this is a nonissue.
6 If that's the way we're gonna proceed, then I think it's
7 fine, but obviously that -- some of that's completely
8 dependent on you and some of that's -- if that's the
9 case they're trying to try.

10 And, quite frankly, if they can't get it in, my
11 job still is to defend these people, not handle their
12 case.

13 THE COURT: Well, and part of my difficulty as I
14 sit here is that I've never seen what we're discussing,
15 so I'm trying to rule in a vacuum. I understand that
16 there are probably sensitive sentences in there in the
17 protocols or maybe pages of sensitive information, I
18 don't know, that should remain confidential and so as I
19 see it the options are submitting as an exhibit redacted
20 versions of that or submitting it in its entirety for
21 in-camera review or -- well, I mean, I guess, along with
22 in-camera review would be marking it as an exhibit that
23 is sealed, but there may be issues of questions of the
24 witness that I don't want to go too far afield and I
25 don't know what the questions are even going to be. I

1 don't know what the protocols -- I don't know what the
2 protocols are as we sit here, you know.

3 MR. KENDRICK: Judge, I guess this is where I'm at.
4 I looked at my questions and Mr. Plyler has basically
5 said the things that he doesn't have a problem with, and
6 those are my questions, but that was part of my concern.
7 If I say are you aware that it's X, X, X caliber
8 ammunition, yes, but that's gonna come up with another
9 witness down the road that they have who's an expert
10 and I don't know how we get around talking about that.
11 So if they don't have a problem with that, then it
12 becomes a nonissue. I think that we can do whatever
13 those things which I know by heart now are what are in
14 the protocol. I just think it would be strange to talk
15 about the protocol and not have you see it. So if we
16 file it under seal, then you have it maybe just for
17 context because when I first was doing this and I was
18 hearing about a protocol and I got it, it's different
19 than what I thought it would look like. It doesn't
20 really matter what that means, it just gave me some
21 context as to what we are talking about when we talk
22 about protocols.

23 So I would prefer that -- what Mr. Plyler has put
24 on the record, I'm okay. Those are essentially the
25 questions I have about this issue and then if we file

1 the protocols as a sealed exhibit so that Your Honor can
2 see it, there's not gonna be anything in the protocol
3 where you're gonna say wow, in addition to all the stuff
4 Josh was asking about, there's this, too. I mean, the
5 other things in here are not really relevant to me and,
6 yes, I should have pulled out the tiny parts I care about
7 and made it a redacted exhibit and I didn't, and that's
8 my fault. I'm sorry. Very sorry.

9 MR. PLYLER: Your Honor, while we're talking about
10 this, you know, there's testing data that goes along with
11 this. It's been redacted. It was produced confidential,
12 you know, redacted versions of those testing sheets of
13 the chair I think we would be willing to remove the
14 confidentiality tag from because the concerns my client
15 has over it, quite frankly, were alleviated by redactions.

16 I don't know what other documents -- I mean, this is
17 -- I know we're -- I feel like a broken record. I know
18 we've been under a very tight timeframe, but I've tried
19 a lot of cases in civil court and we normally have a
20 mark-and-meet, you know, here are my exhibits, where
21 are yours, what can we agree to, what can't we agree
22 to, and a very narrow issue comes to you, but a lot of
23 these I'm hearing for the first time today.

24 THE COURT: I'm almost getting like -- I mean, it
25 sounds like -- never mind.

1 MR. KENDRICK: Let me run through it real quick
2 because I can fix that, Judge. What I intend to
3 introduce through the first witness are two pictures
4 that we got from press releases from the Department of
5 Corrections, the protocols we just discussed, and then
6 the testing information that he's talked about covers
7 the rest of our information because that would, I assume,
8 cover the inspection, the schematics of the load bank
9 thing.

10 MR. PLYLER: No.

11 MR. KENDRICK: It does not?

12 MR. PLYLER: No. The schematic of the system is
13 something that's a security issue we would not want --
14 you know, it's one thing for an expert to say I reviewed
15 the schematic and I don't have a problem, like the system
16 appears appropriately set up.

17 MR. KENDRICK: We don't care about that. Let me
18 withdraw that.

19 MR. PLYLER: But to make it an issue in this trial,
20 okay, so now you know where to go cut wires and, you
21 know, sabotage things, come on.

22 MR. KENDRICK: We won't put it in, Judge. I won't
23 seek to put it. So that leaves us with the two testing
24 letters, the protocol and --

25 MR. PLYLER: Can I see the way you have them?

1 Because there was one version that -- it would have to
2 be the redacted version.

3 (Discussion between counsel.)

4 MR. KENDRICK: Judge, I think we've solved the
5 matter. So the things they have an issue with we're
6 not gonna try to put in, the protocol under seal, the
7 testing information we had just needed one additional
8 redaction. It looks like there was a name left in
9 there, so what I would propose is that we will use it
10 today as an exhibit and if Your Honor does not mind, I
11 will redact it this evening and we can replace it with
12 Mr. Plyler's consent.

13 MR. PLYLER: I carry a redactor with me everywhere
14 I go for just this occasion. I'm sorry, Your Honor. I
15 try to add just little levity. But for use today --

16 MR. KENDRICK: Ms. Freedman has been kind enough to
17 redact it.

18 MR. PLYLER: You can replace exhibit with the more
19 comprehensively redacted version. For use today, I'd
20 like to have it.

21 MR. KENDRICK: I think we're fine though, Judge. I
22 reviewed my questions while we were sitting here talking
23 and I do not see any questions that go out of the bounds
24 of what Mr. Plyler has agreed to on the record. If I see
25 one that I didn't see, I will not read it.

1 THE COURT: Okay. Anything else before we get
2 started?

3 MR. PLYLER: Yes. I know I'm testing your
4 patience, but I'll be honest. Somebody asked me a
5 question about your ruling and I was like that's a great
6 question, I wished you'd asked me about that earlier
7 because I didn't get that clarification.

8 I completely understand your ruling about autopsies
9 and reports. The clarification is are we talking about
10 autopsies of people that were executed by electrocution
11 or any autopsy reports from that timeframe?

12 THE COURT: Good question.

13 MR. PLYLER: I honestly don't have it up in front
14 of me what their clarified discovery request was, but
15 I'm sure I can find it real fast.

16 THE COURT: Well, I assumed we were talking about
17 electrocution. I don't know how far back the autopsy
18 reports that you have go and, you know, no one's been
19 executed in a period of time. I don't know what's
20 available even.

21 MR. PLYLER: Right, and what I would gather when
22 they filed the motion, and I'm trying to remember exact
23 words, but it was like -- it was a response to our motion
24 for protective order and then later wanting -- trying to
25 clarify it and in there they said, you know, we limit it

1 from 1976 forward, if I'm not mistaken. What I don't
2 recall is if it's categorized.

3 I would say to the extent this is what Your Honor
4 is ruling that it be limited to electrocution, but I --
5 I just need that clarification so I know what to make
6 people go find.

7 THE COURT: Mr. Kendrick.

8 MR. KENDRICK: I'll let Ms. Freedman.

9 THE COURT: Ms. Freedman.

10 MS. FREEDMAN: Yes. Thank you.

11 So I think the -- we would ask for all electrocution
12 autopsies. The clarification we're offering is we weren't
13 totally sure about their basis for objection to providing
14 the autopsies, so in the event that it was because they
15 were unduly burdensome we were trying to move the process
16 along and so I think it is relevant for our case that we
17 receive all electrocution autopsies.

18 I think we would also seek all lethal injection
19 autopsies since 1976, but if the Court is gonna, you
20 know, sort of follow the prior discovery order we would
21 understand that. We just want to preserve that for the
22 record as well.

23 THE COURT: So all electrocution autopsies and now
24 the limitation was in an effort to compromise, but now
25 you want all of them?

1 MS. FREEDMAN: Yes, Your Honor.

2 THE COURT: So you're about back to the original
3 request.

4 MS. FREEDMAN: We didn't understand the basis for
5 their objection and so we were trying to sort of
6 accommodate -- we wanted whatever we could get so that
7 we weren't gonna get stuff turned over like newspaper
8 articles. So if there are autopsies that go back
9 further, those are gonna be relevant, I think, to our
10 case and we would ask for all of them.

11 MR. PLYLER: Well, Your Honor, the chair was
12 significantly redesigned in 1961 and the whole system
13 was significantly redesigned after it was moved from
14 CCI to the Broad River campus where it currently sits
15 with the whole new electrical system and everything.
16 Obviously pre-19 -- what did I say? It was '89 when
17 it was moved to Broad River. Pre-1977 -- what was the
18 case, the Supreme Court case that put a moratorium?

19 MR. LAMBERT: Furman and Gregg.

20 MR. PLYLER: Yeah, Furman and Gregg. Furman was
21 the -- whichever one opened it back up. Pretty much
22 anything before that I just don't see how it's relevant
23 to the case. We're getting back into the history of this
24 to an extent where it's like that's not even the same
25 chair. It might be the same wooden pieces, but it's not

1 the same electrical system, what's the purpose, and I
2 don't know how burdensome it's gonna be to go find that
3 far back and I've got by my calculation twenty-two hours
4 to comply with that order at this point. I believe the
5 more recent ones are gonna be pretty easy to get together.

6 What I don't know is -- you know, what I don't want
7 to do is turn around and hand these things over and then
8 through some questioning it turns out there was another
9 document just in a different storage facility and I
10 didn't get it to you within the twenty-four hours and
11 now I'm sitting here going sorry, Judge, I did the best I
12 could. We're not trying to hide the ball. We're trying
13 to figure out how at this point five hours into the trial
14 we're gonna comply with this discovery request, which,
15 quite frankly, I don't have any Internet access. I don't
16 know how some of these people are doing it, but I'm not
17 even able to get onto my file and start e-mailing my
18 paralegal. Austin, I hope, is here handling that. So I
19 don't even know how far along in the process they are
20 at this point. We've asked them to start gathering
21 them.

22 So I just -- I feel like if it was -- what was
23 in the motion response, 1976 to present and it's
24 electrocution autopsies, then the likelihood of us
25 successfully complying with the order is tremendously

1 more likely. It also creates a burden issue of --
2 I mean, according to their report there were 248
3 executions by electrocution in South Carolina since
4 1912. That's a -- if there are autopsies for all of
5 them, which I don't know, I doubt there is, but if
6 there was that's gonna be a lot of stuff for everybody
7 to review in the next -- I don't even know how many
8 hours because we probably won't get it to them until
9 tonight.

10 THE COURT: Right. But I'm gonna order that you
11 make the effort. Now they're only the electrocution
12 autopsies going back to -- through all the 248, as
13 many of those as can be found. I mean, ideally all of
14 them, but if you were to show up tomorrow and say hey,
15 everything from, I don't know, prior to 1940 is in a
16 storage facility in Saskatchewan, then I would understand
17 that that could not be produced in the timeframe.

18 MS. FREEDMAN: All I have to say, Your Honor, is we
19 would just appreciate it if they could hand them over
20 to us as they become available to them. Our expert and
21 I are ready to stay up as late as we need to to review
22 them and we'll do what we can to be ready for tomorrow,
23 so.

24 THE COURT: I'm not gonna control the manner of
25 that. That's --

1 MS. FREEDMAN: I'm just saying to the extent that
2 they receive one batch from the recent -- most recent
3 ones today, we would be more than happy if it makes it
4 easier. We're not trying to sort of play a gotcha game
5 with them if they, you know, failed to disclose a couple
6 of them and they find them later. That would be fine.

7 THE COURT: I'm hear you. I'm not gonna order that.

8 MS. FREEDMAN: Understood.

9 THE COURT: If they further request, you know, but
10 I'm not gonna say that as they open each file folder and
11 find one they need to immediately scan it and send it to
12 you.

13 MS. FREEDMAN: No, no. Of course not. Understood.
14 We're trying to make it as easy on them as possible.

15 THE COURT: Sure. Anything else?

16 All right, you-all.

17 MR. PLYLER: I'll be honest, Judge, I'm little
18 surprised we don't have water pitchers anymore in court.
19 I assume that's because of COVID, but tomorrow if we
20 could be allowed to bring in some extra bottles of water,
21 that would be -- that's very much just a housekeeping
22 comfort sort of situation, but if that's okay with Your
23 Honor I believe talking with Mr. Bowen that that would
24 be allowable.

25 THE COURT: Yes. I'm fine with that.

1 MR. PLYLER: Okay. Thank you, Judge.

2 And the last thing, Wednesday -- and I'm just
3 trying to take care of all the pre-trial things that I
4 can before we get to the next stage of the trial.

5 My understanding is we can get WebEx on that
6 computer, that TV. In fact, Jason, I think it is?
7 Justin?

8 THE CLERK: Justin.

9 MR. PLYLER: With courtroom -- with the clerk of
10 the court's office was helping me navigate that, but I
11 think it requires you to actually open up your virtual
12 courtroom. Somehow there's a mechanism that I'm not
13 aware of for how that happens. We don't anticipate
14 having anybody testifying remotely until Wednesday
15 based on the schedule that has been explained to us by
16 plaintiff's counsel, but there will be two witnesses.
17 One that may be, you know, on the longer end of the
18 testimony that you hear. Like Wikswo and Arden I think
19 are probably gonna be the ones to talk the most for you
20 and then other ones would, I'd assume, be pretty quick
21 and he would have loved to be here in person, but he
22 would have to cancel a bunch of heart surgeries to do
23 that and thankfully we were able to work this out so
24 that he didn't have to cancel surgeries.

25 Those are the only housekeeping matters I can think

1 of. I already talked to the court reporter. Just for
2 the record, the documents that were referred to in our
3 motion to exclude Dr. Wikswo, which I'm not asking you
4 to reconsider any of that, that's not where I'm going
5 with this, but I plan on making the documents that I
6 presented a court exhibit. I'm just gonna make it one
7 batch of documents as Court Exhibit Number 1 and we'll
8 have -- we'll -- if I can swing it, we'll do it this
9 evening; if not, first thing in the morning I'll hand
10 that up, but just so that it's easier to keep the record
11 straight, Court Exhibit Number 1 would be those documents
12 that were referenced in the motion so that nobody can
13 question what was presented to and not presented to you
14 later.

15 THE COURT: Okay.

16 MR. PLYLER: And lastly, Judge, are you intending
17 on taking up opening statements or how did you want to
18 proceed?

19 THE COURT: Sure. I'm happy to hear opening
20 statements.

21 MR. PLYLER: I wasn't suggesting we do that. I
22 was just -- it's more if you want opening statements.

23 THE COURT: Sure. Sure. Yes.

24 MR. PLYLER: Okay. Well, with that, unless they've
25 got something else.

1 THE COURT: Anything else?

2 MR. KENDRICK: I'm scared, Judge.

3 THE COURT: Well, let me tell you what, and I -- I
4 keep asking anything else because I want to get it all
5 out of the way. The other thing is I am considering at
6 3:20 PM, depending on how many more things, just starting
7 fresh in the morning. Getting all of this out of the way
8 and hitting the ground running tomorrow morning.

9 MR. KENDRICK: And the only thing -- I was gonna
10 tell you this, Judge, because it will move things along,
11 but I was gonna move under 611(c) to ask leading questions
12 of the first two Department of Corrections witnesses
13 because I think it would really speed it along and I think
14 it's appropriate under the rule, so. And I think that's
15 normal when we call an opposing party or agent of the
16 opposing party. That would be the only last thing and I
17 was just gonna -- I think that's a quick yes or no based
18 on your review of that rule and I don't think -- I'm not
19 gonna use it as a hostile witness, but I'm gonna use
20 it to get things going.

21 That's the only other pre-trial matter I had, and
22 I'll just say that, and if you're ready, Your Honor, I
23 think that my opening statement is relatively brief
24 and you've heard a lot of it, so I will start now if
25 you want.

1 THE COURT: As to the witnesses, you're referring
2 to Stirling and Rushton?

3 MR. KENDRICK: Yes, ma'am.

4 THE COURT: Okay.

5 MR. PLYLER: Your Honor, on your idea of starting
6 tomorrow morning fresh though, it would greatly increase
7 the likelihood of me being able to get these documents
8 turned around more expeditiously and efficiently, so I
9 would ask maybe that we consider that given how much
10 today's gone by and my understanding is there's only
11 one witness -- if these two go today, there's only one
12 witness tomorrow.

13 THE COURT: Okay. So I will allow the leading
14 questions under 611 of the Rules of Evidence, of course,
15 and, yeah, let's just start fresh in the morning, okay,
16 at 9:30 tomorrow morning with opening statements and,
17 you know, we'll hit the ground running.

18 Do not, do not, think of any additional pre-trial
19 things overnight. Please I ask of you. In fact, take
20 a moment right now to make sure that we've addressed
21 everything so that we can actually get moving in the
22 morning.

23 MR. KENDRICK: I think we have, Judge, and I think
24 that Mr. Plyler certainly knows that, you know, once we
25 kind of haltingly make it through this stuff and we get

1 some witnesses gone, we'll be able to do this in a very
2 efficient manner and we'll work together. I promise you
3 that I will not come to you with another reason unless
4 it is -- I don't think there's a reason why I would come
5 to you, Judge. We'll work it out amongst ourselves.

6 THE COURT: Okay. Yeah, I tend to think of trials
7 as sort of -- I've never flown an airplane, but like
8 flying airplanes it's very often difficult to get them
9 off the ground, all the work that goes into just getting
10 it off the ground and the baggage and the checking in and
11 this and that, safety checks, whatever all those things
12 are, and then oftentimes trying to land it is a little
13 bit complicated, but usually once it gets up in the air
14 it sort of coasts and that's the easy part. So this
15 holds true to that at least because we're having a tough
16 time getting it off the tarmac, but we will in the morning
17 at 9:30 tomorrow morning.

18 MR. MILLS: In here, Your Honor?

19 THE COURT: In here, yes. We'll be here for the
20 remainder of the trial.

21 MR. PLYLER: Is it okay if like extra copies of
22 stuff that we have we can leave them here? The room
23 will be secure?

24 THE COURT: Yes, the room will be secured, closed.

25 I ask that you have copies of exhibits for me. I

1 know that they'll be introduced into the record and I
2 can see them later. I like to see them in realtime,
3 so to the extent that you're handing a witness an exhibit
4 I would love to have a copy of it. If you could compile
5 those or whatever you think you're gonna use, just make
6 extra an extra photocopy for me so I know what you're
7 talking about while you're talking about it.

8 MR. PLYLER: And, Your Honor, I do plan on
9 continuing to present that way. I hope that's not --
10 in the new courtroom I hope you're still able to view
11 everything.

12 THE COURT: I should be able to.

13 MR. PLYLER: We're a little further away from it
14 than we were, but it's a big TV.

15 THE COURT: It is and I'll put my glasses on.

16 MR. PLYLER: Thank you very much for everything.

17 THE COURT: Okay. 9:30 tomorrow morning.

18 MR. KENDRICK: Thank you.

19 MS. FREEDMAN: Thank you, Judge.

20 (Whereupon, the proceedings were concluded for
21 August 1, 2022, at 3:26 PM.)

22 (The following proceedings were held August 2, 2022,
23 beginning at 9:34 PM.)

24 (Court's Exhibit Number 1 was marked for
25 identification.)

1 BAILIFF: Court come to order. All rise, please.

2 You may be seated.

3 THE COURT: Good morning.

4 MR. PLYLER: Good morning, Judge.

5 MS. FREEDMAN: Good morning.

6 THE COURT: Media-wise I don't know who all we
7 have. Greenville News again maybe? WACH Fox news?
8 Yes. You're good to go. Who did we have yesterday?
9 The State, Post and Courier. Anybody else?

10 Okay. Got you. I just want to acknowledge you-all
11 because I haven't sent the signed forms back, but I know
12 that you-all are here. It's fine.

13 So let's get rolling.

14 Mr. Plyler.

15 MR. PLYLER: Hey, Judge. No pre-trial motions.

16 THE COURT: Yes.

17 MR. PLYLER: One -- well, no more pretrial motions
18 from our side.

19 THE COURT: Okay.

20 MR. PLYLER: One we did make the Court Exhibit --
21 Court Exhibit Number 1 that we mentioned. I provided a
22 copy to plaintiff's counsel. I've already handed it
23 to our court reporter and she's marked it as Court
24 Exhibit 1.

25 Secondly, an update on the autopsies. I know we

1 still have about three hours, but we were able to get
2 out -- basically the Department of Corrections had
3 approximately twenty autopsies in their possession,
4 only five of which were by electrocution. Part of
5 that's because since 1977 only there's only been seven
6 electrocutions in South Carolina. We're trying to track
7 down the two at least from that timeframe that we don't
8 have that it does not appear the Department has possession
9 of them.

10 When I say trying to track down, someone from the
11 Department has even contacted the coroner's office --
12 the Richland County Coroner's Office to try and see if we
13 can get those two autopsies. We produced them, I don't
14 know, 6:00 last night, somewhere in that neighborhood,
15 under the confidentiality order pursuant to your ruling
16 to your order yesterday.

17 The only other caveat that I'm gonna add just so
18 the Court's fully aware of where we at on this, based
19 on my understanding since 1955 there's been twenty-seven
20 electrocutions in South Carolina. Before the moratorium
21 that went in place because of Gregg, the last execution
22 in South Carolina by electrocution was in 1962. So from
23 1962 to about 1976 there were no executions. The
24 moratorium went out of effect in approximately 1977
25 with Furman. There was not another execution in South

1 Carolina until 1985. So kind of the post-Furman area --
2 or, excuse me, era of executions in South Carolina begins
3 in 1985.

4 I'm not talking about sentencing and all that, and
5 that began in '77, the executions began in 1985. The
6 last electrocution, 2008 by the way. So there's, you know,
7 a 23-year period. There's seven of those executions, five
8 of which we had our hands on, two we're still trying to
9 track down even though it does not appear they're in the
10 possession of the Department.

11 The reason I bring up 1955, there is a statute that
12 appears to have been passed in 1955 talking about the
13 death of inmates at a facility and there needing to be an
14 autopsy done. We're still trying to figure out why the
15 Department doesn't have any of those. I don't know if it
16 was a records retention situation and post-Gregg I don't
17 know if it was -- you know, they didn't consider an
18 execution to be a death at a facility in 1955, I just
19 don't know, and, quite frankly, it predates me about a
20 good bit, I'm not quite that old. And there's not a
21 lot of people as you can imagine at the Department of
22 Corrections still from that time period that can give us
23 any update on it.

24 So anticipating that they may say we believe there's
25 more, why haven't they given to us, that's the update.

1 That is everything I know about it that I've been able to
2 garner in the last twenty-one hours and twenty minutes or
3 whatever, so I just wanted to give that -- in full candor
4 to the Court, that's where we're at.

5 I think those are the only pre-trial issues --
6 pre-trial updates that I needed to put up on the record
7 before we get started.

8 So thank you.

9 THE COURT: Thank you.

10 Yes, ma'am. Ms. Freedman.

11 MS. FREEDMAN: Thank you, Your Honor.

12 I am very sorry to have to do this, but given the
13 nature of the evidence that came in last night, we do
14 have just one hopefully very, very small pre-trial issue,
15 and that's we contacted counsel for the other side last
16 night after we received the autopsy reports and reviewed
17 them with our experts, and we don't see anything in there
18 that we think should be subject to confidentiality order.
19 We were not able to reach a consensus about that with the
20 other side.

21 Our position is basically that our experts should
22 be allowed to testify about the contents of the autopsies
23 and we would like to use the images in -- you know,
24 attached to the autopsy reports as a part of our case.
25 So at this point I guess we're moving to have those

1 documents removed from the confidentiality order.

2 THE COURT: Yes, sir.

3 MR. PLYLER: Okay. First off, yesterday you
4 specifically ruled they were to be produced under the
5 confidentiality order. I remember saying that. I said
6 Judge, under the confidentiality order, and you said yes.

7 So that was the first reason we're saying no. You
8 know, we -- we had a discovery argument about this, a
9 lengthy one. In fact, from our point of view the second
10 time we've had it, and I understand that, but just for
11 the record this has been well debated and discussed,
12 all that information has been presented to Your Honor
13 and Your Honor ruled it would be under a confidentiality
14 order.

15 Additionally, the statutes on this issue in South
16 Carolina make it crystal clear that autopsies, the photos,
17 depictions, descriptions, the -- even the person that was
18 autopsied, that information is not public record. They're
19 specifically exempted from FOIA. There's one that even
20 provides a criminal penalty for unauthorized people -- a
21 misdemeanor, but it is a criminal penalty for unauthorized
22 access to these autopsies. There's -- there's a whole
23 line of cases and if we need to get into it, I guess we
24 can, but this idea that of all the sudden, you know,
25 well, now we have the autopsies and they shouldn't be

1 confidential, they knew what was gonna be in the autopsy
2 reports.

3 Their entire case, at least of their two experts
4 according to them, have been based on all these autopsy
5 reports they reviewed from other states. The way
6 autopsies are done in South Carolina is no different than
7 how they're done in other states. So it's not like they
8 didn't know what was gonna be in there and it's almost
9 another one of these situations where yeah, we'll agree
10 to confidentiality so we can get the documents, but then
11 we're gonna come in here and argue that it shouldn't be
12 confidential. And I say that not lightly. That is
13 exactly the argument they made in front of the Fourth
14 Circuit earlier this year.

15 So there are statutes that provide these should be
16 confidential, there are third-party privacy rights in
17 this information that these individuals do not represent,
18 they cannot waive it for them. There's even a misdemeanor
19 provision. It's 17-5-535. So for all of those reasons,
20 in addition to the reasons that have already discussed
21 during the lengthy discovery discussions on this yesterday
22 and previously, we -- we believe there's absolutely no
23 reason to remove the confidentiality designation.

24 Thank you, Your Honor.

25 THE COURT: Yes, ma'am.

1 MS. FREEDMAN: So just at the outset, the
2 confidentiality order that we entered expressly
3 contemplates that we have to review the documents in
4 question before we can move to have them released from
5 the confidentiality order. So there was -- I mean,
6 yesterday we had no basis to request that they not be
7 released under the confidentiality order. We actually
8 didn't know the contents. We hadn't seen them.

9 And then, I think, actually 17-5-535, that doesn't
10 really apply to, in particular, the images that we're
11 seeking to have made part of the record here. The statute
12 applies to, and I quote, images of an autopsy. We're not
13 asking to introduce images of an autopsy. These images
14 are from before the autopsy was ever performed, so we're
15 seeking to introduce images of the bodies of the deceased
16 who were executed pursuant to a judicial execution
17 protocol.

18 MR. PLYLER: May I?

19 THE COURT: Yes.

20 MR. PLYLER: Thank you, Your Honor.

21 First off, the autopsies all start with an external
22 examination. The photographs taken were taken by the
23 coroner's office as the autopsy began. So to try to --
24 to separate the two of those is -- and I'm gonna use the
25 word, and I mean it -- disingenuous. The autopsy began

1 when the coroner took possession and started the process.
2 Reading the autopsy report, they start with an external
3 examination and they are documenting through these
4 photographs the external examination they're performing
5 on the body, so.

6 THE COURT: Well, your point -- I understand your
7 point, but let's -- let's analogize. Let's see. You
8 have a car wreck, right, and you take photos of your
9 vehicle, then the adjuster comes and they begin taking
10 photos of your vehicle, too, and, of course, their photos
11 become part of their insurance claim file, right? Those
12 pictures are probably identical to the ones that are on
13 your phone, so does that mean that they are -- to the
14 extent that an adjuster's file could be disclosed, I know
15 this is, you know, sort of a fiction that I'm operating
16 in a little bit, but would that mean that those photos
17 can't be used for any other purpose just because they
18 came from -- they happened to be identical to the ones
19 on your phone?

20 MR. PLYLER: Right. So, first off, cars don't
21 decay. Injuries to a body -- injuries to a car don't
22 continue to develop. That's part of the problem here,
23 okay?

24 Secondly, there's no statute protecting the
25 insurance -- in fact, I lost that argument recently, I

1 think, because the -- anyway.

2 THE COURT: That's why I say I'm operating in
3 a fiction, I know, but I was trying to use an analogy.

4 MR. PLYLER: Yes. So, one, is there's a specific
5 statute here about the autopsy, and this is part of the
6 autopsy, okay? If the Department had taken the photos
7 immediately after, that would be a different situation
8 altogether. That didn't occur. And we don't know --
9 especially the two they're talking about are both from
10 the eighties, okay? The other three are more recent, but
11 there are no photographs, at least not in the possession
12 of the Department of Corrections from those autopsies.
13 Why is that -- and I'm adding to this argument. Why is
14 that important? Well, first off, the two in the eighties
15 were under a completely different protocol. Over 2,000
16 volts for least one minute, two shocks to each person.
17 The experts will all agree that the longer you apply an
18 electrical current to human tissue, the more likely
19 you're gonna have burns. They're all gonna agree to that.

20 So it's not even the same protocol, the photos that
21 they're referencing. They're protected by statute. We
22 already had a lengthy debate about these autopsy reports
23 and the information in these autopsy reports and at the
24 end of it you declared they can be confidential.

25 And this is the distinction I wanted to make to

1 Ms. Freedman's argument. If there was a confidentiality
2 order placed in the case, hey, Judge, we know there's
3 gonna be some information that needs to be confidential
4 -- or at least from our point of view needs to be
5 confidential, we've all consented to this agreement, can
6 you please sign it, you do, and we put it in here. A
7 year later I designate something confidential and send it
8 to them, that's what that provision in the order is for
9 because you have not weighed in in any way, shape or form
10 on that particular set of documents. In this case, you
11 have.

12 In the case I'm describing, which that provision
13 applies, I'm, as the attorney, making a decision this
14 should be confidential. They would then have the
15 opportunity to ask you if my designation was accurate.
16 That's what that provision is for. Not we came to
17 court, we argued about this specific set of documents
18 and the Court declared they could be issued under the
19 confidentiality order. That's essentially asking you to
20 reconsider your decision yet again.

21 THE COURT: It is.

22 Yes, ma'am.

23 MS. FREEDMAN: I mean, I -- I guess I just sort of
24 disagree with the way the confidentiality order is
25 drafted. I -- we didn't know what was in the autopsies

1 and the autopsy reports until we saw them and so we -- I
2 think when they designate something confidential, we are
3 not in a position to say no, it's not confidential until
4 we actually see the contents of the document.

5 So yesterday when you issued your order instructing
6 them to give us the autopsies, we didn't object because
7 we had no basis to object. We didn't know what was in
8 the autopsies. Now that we've seen them, we've reviewed
9 them with our experts, we don't think there's anything
10 confidential in the documents.

11 With respect to his other argument, I think, you
12 know, at the end of the day if we can't use the images
13 that come from the South Carolina electric chair, we're
14 gonna be forced to rely on images from electrocutions in
15 other states. The question here is how South Carolina
16 carries out judicial electrocutions. We should be
17 allowed to base our arguments on what happens in South
18 Carolina's electric chair, not in another state. And if
19 his argument is that basically there's no way to know
20 when these injuries occurred, the extent of the injuries,
21 what the new protocol does versus an old protocol, those
22 are questions of fact for Your Honor to resolve after
23 hearing the evidence.

24 So I think at the end of the day we're talking
25 about a set of autopsy reports. And we would be more

1 than happy to redact identifying information from those
2 autopsy reports. I think, you know, there are so few
3 judicial executions that have taken place in this relevant
4 timeframe that it's gonna be fairly difficult for us to
5 completely eliminate any reference to the people whose
6 autopsies have been performed, but we would happily redact
7 identifying information, and we have those with us as
8 exhibits with that information redacted, and I think we
9 would just ask the Court to consider giving us the
10 opportunity to present our case based on the South
11 Carolina evidence rather than evidence from other states.

12 THE COURT: Well, are we talking about the reports
13 themselves or the photographs or both?

14 MS. FREEDMAN: Both. So I think we would like to
15 be able to, for example -- so just as an example, we
16 anticipate calling Dr. Wikswo this afternoon to discuss
17 some kind of sort of stereotypical injuries that are
18 common to most, if not all, judicial executions. Some
19 of the images that they produced to us yesterday we think
20 very well illustrate those kind of injuries and so we
21 would like to use those as basically demonstrative so he
22 can instruct the Court on what those injuries are. At
23 the same time, we would like to introduce the complete
24 autopsy reports with those images into evidence as -- as
25 exhibits.

1 THE COURT: What about the statute regarding
2 photographs or videos of autopsies?

3 MS. FREEDMAN: So two responses. The first is
4 that we don't believe that the images themselves are of
5 autopsies because the images are of the bodies before
6 the autopsies have been performed.

7 THE COURT: Okay. Let's pause there. Photographs,
8 video or other visual images and audio recordings of or
9 related to the performance of an autopsy.

10 Are these not related to the performance of an
11 autopsy?

12 MS. FREEDMAN: I mean, I would argue that they're
13 not. I think that these are just basically the images that
14 they took of the bodies before the autopsy was actually
15 performed, but even if that's the case --

16 THE COURT: They're not vacation photos.

17 MS. FREEDMAN: Right.

18 THE COURT: They're related to the performance of
19 the autopsy, correct? The coroner doesn't just go around
20 photographing bodies, right?

21 MS. FREEDMAN: Sure. Sure. So then I think we move
22 to the exceptions in the statute.

23 THE COURT: Okay.

24 MS. FREEDMAN: So Subsection (A) includes that there
25 is an exception. The exceptions applied would be the

1 judge, the attorneys, the parties to the case. I think
2 to the extent that the public has access to those images,
3 we don't really have a position on that.

4 THE COURT: Okay. So tell me -- but tell me where --

5 MS. FREEDMAN: It's 17 -- public access --

6 THE COURT: No, no, no. I see the exception
7 regarding judicial, administrative proceedings, attorneys
8 for the party and staff of the attorneys. Tell me where
9 -- what provision provides for the introduction of those
10 things into evidence in a public proceeding or into
11 evidence at all.

12 MS. FREEDMAN: We would just move to introduce them
13 under seal.

14 THE COURT: Yeah. So the problem I have is we're
15 not gonna do this whole trial under seal. It is a public
16 trial with public information that need to be handled in
17 accordance with the law. There are certain statutory
18 provisions that prevent the publication of certain
19 evidence and so, you know, I feel like every other topic
20 is well, we can do this under seal, under seal, under
21 seal, except that's not the way public trials are done.
22 The Supreme Court could have ordered that this proceeding
23 be sealed, closed, in-camera, not public, but this is a
24 court of record and that's the way this Court will
25 operate.

1 MS. FREEDMAN: Understood, and I think, you know,
2 as a basic principle we're very much in favor of having
3 this information to the extent possible available to the
4 public. I mean, I think that's sort of our position,
5 but I think maybe just to take a slight step back in
6 any case involving medical records, if we have medical
7 records just in a regular med mal case, any kind of
8 criminal case, the Court will consider the medical
9 records as an exhibit and then --

10 THE COURT: Absolutely, but what happens in those
11 cases, those are admitted into evidence because whether
12 it's a personal injury case and the medical records
13 offered are by the plaintiff in that case and they waived
14 any rights that they have to keep them confidential or it
15 could be a criminal proceeding where we're talking about
16 the -- the death of a specific individual, the victim in
17 that case, right, and even then they're limited, but they
18 are introduced into evidence.

19 But that is -- is sort of a different situation than
20 we are here. If your client were on trial for the murder
21 of John Doe and John Doe's autopsy photos were introduced,
22 they would have to be done in a very specific way and it
23 would fall within one of these exceptions. This is a
24 different case.

25 MS. FREEDMAN: I mean, I think our position is it's

1 basically the same case. We're moving to have these
2 documents introduced, you know, as exhibits and I don't
3 -- I mean, this -- the statute explicitly contemplates a
4 civil or criminal trial where the fact in question is an
5 inquiry into the death of an individual and, Your Honor,
6 that's what this is. We're, you know, asking the Court
7 to decide questions of fact about how these people died
8 and about how our clients are likely to die as a result.

9 MR. PLYLER: If I --

10 THE COURT: So if you'll -- okay. Go ahead.
11 I'm sorry, were you finished?

12 MS. FREEDMAN: (Nods head.)

13 THE COURT: Mr. Plyler.

14 MR. PLYLER: Thank you, Judge.

15 Well, first off -- and you-all talked about the
16 statute in a little more detail, but let's not skip
17 Part B.

18 THE COURT: Right.

19 MR. PLYLER: It says even if were gonna allow it
20 underneath the exceptions, it doesn't say you have to,
21 but even if you were gonna, it says all information
22 immediately identifying decedent has been redacted and
23 after making facial recognition anonymous to the extent
24 reasonably possible, that's when -- so (B) is part of
25 this.

1 Secondly, we don't have a lot of cases on this
2 issue. I think that is pretty telling that we don't have
3 a lot of cases on this issue because I've argued about
4 autopsies and had them excluded before. We don't have a
5 lot of appellate case law on it, so that's pretty telling.

6 Secondly, the attorney general's office since 2001
7 has weighed in on this issue three times and at all times
8 reiterated we consistently opine that autopsy records,
9 including photographs, are confidential under state law.
10 That is confidential under state law. That's why -- one
11 of the main reasons we asked that this be confidential
12 yesterday. We didn't have to even get into the whole
13 debate about the statute. It seemed like everybody
14 understood. Autopsies and the connected documents to
15 those autopsies are confidential under state law.

16 So, you know, we've got -- we have an attorney
17 general opinion from 2001, October -- excuse me. Yeah,
18 2001, one from 2011, and one from 2020. As recently as
19 2020. You know, if the General Assembly thought that
20 this should be public record in any way, they would not
21 have excluded it from FOIA. I mean, the Freedom of
22 Information Act sets public policy in the state about
23 what is or is not a public document.

24 Secondly, they went on -- they also passed a
25 specific statute about this type of issue that we've been

1 discussing. I think that shows the public policy in the
2 state of South Carolina that these are supposed to be
3 private and confidential. And this is very different
4 than a medical record for the reasons you already said,
5 but in addition to that, you know, with -- with the
6 medical records, part of why we're introducing them in a
7 med mal case is we're trying to make the medical system
8 safer for everybody who's gonna be a part of it. You
9 know, doctors should be held accountable when they make
10 mistakes and other doctors hopefully won't make those
11 mistakes in the future. Autopsy, that isn't a concern.
12 The people that get autopsied are already expired.

13 THE COURT: What about the provision of the statute
14 that provides for the photographs to be disclosed to
15 judges and administrative hearing officers, as well as
16 members of the jury which are impanelled to hear or
17 decide any issue arising from, related to or relevant to
18 the death or autopsy of the subject of the photograph?

19 Would -- and those are, I'm sorry, 17-5-535 (A)(4)(e)
20 and (f).

21 MR. PLYLER: Right. Related to or relevant to the
22 death of the subject. If we were litigating the death
23 of one of these individuals that was autopsied, that
24 would --

25 MR. MILLS: We are.

1 MR. PLYLER: -- that would -- we're not -- that would
2 specifically --

3 THE COURT: Cut that out.

4 MR. PLYLER: Well, when people make comments in my
5 ear like that --

6 THE COURT: Ignore it. Come on.

7 MR. MILLS: I was talking to my cocounsel here.

8 THE COURT: And -- and ignore it. I mean, seriously.

9 MR. PLYLER: This is talking about we are trying to
10 get to the bottom of a specific situation. That is not
11 the situation we're trying to get to the bottom of.
12 We're not looking at what happened to two individuals in
13 1980 that were executed in a different facility, using a
14 different electrical system, using a different protocol.

15 THE COURT: Well, that's your argument. Their
16 argument is something else. Their argument is this is
17 what happened to people who are electrocuted. This is
18 what we're talking about. I mean, obviously we're not
19 litigating the death of Freddie Owens, it hasn't happened
20 yet, right?

21 MR. PLYLER: Your Honor --

22 THE COURT: The only thing that they have is other
23 electrocutions.

24 MR. PLYLER: So if it --

25 THE COURT: So is that not -- is that not related --

1 relevant to or related to the death of the subjects in
2 those photographs? They're saying this is what happens.
3 Here's the evidence.

4 MR. PLYLER: If that was where we're going, then
5 every murder trial involving a stabbing I should be able
6 to get every autopsy for a period of time involving
7 stabbings and I can put them all into evidence in that
8 murder trial. That would be the slippery slope you start
9 going down if you're gonna allow that sort of connection.
10 This was clearly designed if we are -- if the judge, the
11 administrative hearing, is looking at that person's
12 situation, then they should be able to have access to
13 it. This is not the situation of those two individuals
14 from the eighties and it's not even the same electrical
15 system, it's not the same facility, it's not the same
16 current.

17 THE COURT: I hear you.

18 MR. PLYLER: I'm saying that at least if it was
19 connected, at least if they were saying well, this one
20 just happened last week and it's the exact same protocols
21 that they're intending on using, then we'd be doing what
22 they did in Florida. We'd be doing the Leon Jones case,
23 the Provenzano case, where, hey, this just happened a few
24 months ago, so we need to look at this process that's
25 happening. That -- we're talking about something that

1 happened thirty-seven years ago -- excuse me, thirty-six
2 years ago in one case and thirty-five years ago in the
3 other under a different protocol, in a different facility,
4 using a different electrical system. They're -- they're
5 different.

6 And that's actually my argument. What I'm saying
7 is maybe they get close, maybe, if they could show this
8 is the -- these are gonna be the same people, the same
9 facility, the same system, this happened last week.

10 THE COURT: Well, now you're getting into the
11 argument that we'll ultimately get to, and I'm sure
12 that's the argument you will ultimately make. For all
13 I know because I don't know what we're dealing with, I
14 haven't heard the first piece of testimony, but for all
15 I know their argument could be yeah, maybe it's not the
16 same chair, but this chair used this less voltage and so,
17 oh, my God, if this is what you get with, you know, less
18 voltage, can you imagine -- let's extrapolate that to
19 something -- I have no idea.

20 MR. PLYLER: Well, and that's why I'm trying to
21 share it with you so you're not making that decision in
22 a vacuum. Under their own records that they produced,
23 the two that they're talking about for which there are
24 photographs for, happened in the 1980's and on their
25 chart -- their chart they produced to me, they involved

1 higher voltages, they were in a different facility with
2 a different electrical system. That's their chart, not
3 mine.

4 THE COURT: Well, right. Listen, I used that for
5 -- as an example because I don't know what their argument
6 is going to be. That could have been it, it could be
7 something else, okay? It's higher voltage, but Dr. Wikswo
8 could opine that, you know -- I have no idea what his
9 opinion is. I don't even want to guess at what it could
10 be. We're -- I'm back on the statute as to whether it is
11 related to -- whether this proceeding is related to or
12 relevant to the death or autopsy of the subject in the
13 photos.

14 MR. PLYLER: I also did want to -- I've given you
15 everything I can to answer questions specific to that.
16 If you have additional questions, I'll do my best. I
17 promise you. I'm not sidestepping that. I understand
18 you're contemplating it.

19 I do want to address one other thing they said.
20 You know, earlier Ms. Freedman was saying essentially we
21 just want to use it in our trial, we're not talking about
22 making it publicly disseminated and then she later changed
23 to well, if you want to give it to the public, we're fine
24 with that. That -- that's part of the problem.

25 And the clerk's office in this case had to instruct

1 them to withdraw some of their exhibits to their --
2 their complaint when it was originally filed because
3 they included autopsy photos from other states, including
4 the ones as I mentioned yesterday that were not taken
5 immediately after the incident, but only after the person
6 was surgically cut, stitched back together, because it
7 appeared more gruesome. It's an effort at sensationalism,
8 which is why they wanted these to begin with and why we
9 fought, why we argued about this, why we said the public
10 policy of the state needs to be carried out, these need to
11 be confidential, and that hasn't changed, Judge.

12 So I just wanted to address that one point at least
13 for the record if nothing else. I'll -- I'll sit down
14 unless you have something else for me.

15 THE COURT: No, I don't have any questions. I am
16 gonna find that the plaintiffs are permitted to use the
17 photographs, but may not publish the photographs of the
18 autopsies. They may be given to the Court to consider
19 under seal, and that is pursuant to the confidentiality
20 order, but also South Carolina Code Section 17-5-535.

21 I do find that this is a civil proceeding that is
22 related to or relevant to the death or autopsies of the
23 subjects of the photographs; however, they may not be
24 produced to the public because of this statute. They
25 may be produced only to the Court because Subsection (e)

1 of that portion of this statute provides for dissemination
2 of the photos to judges in their administrative -- judges
3 and administrative hearing officers, which includes me.

4 As a secondary backup provision, Subsection (f),
5 members of any juries. I rely on that only because
6 typically they would come in a jury trial, but this
7 Court as the finder of fact sits in the place of a jury,
8 so that's sort of a secondary backup provision of the
9 statute.

10 Now they still must be appropriately redacted in
11 accordance with Subsection (B) of the same statute.

12 Understood, Ms. Freedman?

13 MS. FREEDMAN: Yes, Your Honor. Thank you.

14 And just so that we're -- we don't want to violate
15 any confidentiality order. Just to be clear, can we
16 elicit testimony from our experts about these autopsy
17 reports?

18 THE COURT: The testimony needs to be generalized
19 and not specifically identifying any person, the subject
20 of the autopsy.

21 MS. FREEDMAN: Could we, for example, refer to the
22 autopsies as Court's Exhibit A, B, C, just for the sake
23 of reference so that our experts -- I think we're gonna
24 have a hard time if we're trying to like kind of come
25 up with -- I think we just need a way to refer to them so

1 that our experts are able to refer to the same document
2 we're all looking at.

3 THE COURT: Right.

4 MR. PLYLER: Your Honor?

5 THE COURT: Yes, sir.

6 MR. PLYLER: Generally when -- first off, I
7 understand the Court's order. I'm not arguing your
8 decision. I just want -- I don't want to sound like
9 I am. To the extent this information is gonna be used,
10 I would think you'd use it just like you would any other
11 confidential witness. Confidential -- you know, you
12 can call it Inmate 1, Inmate 2, Inmate 3, you could call
13 Decedent 1, Decedent 2, Decedent 3, whatever, and as long
14 as we all know that the document they were looking at was
15 Decedent 1 and there's a confidential designator done,
16 then that's how you handle that. The confidential
17 designator could then be filed under seal. The problem
18 is since we're going down this route, I don't want to be
19 handcuffed. So what's good for the goose, has got to be
20 good for the gander, okay?

21 For instance, we all know there's only been a
22 handful of these executions since 1985 in South Carolina.
23 How am I am -- I mean, if I say well, isn't it true that
24 one occurred in 19 -- and I'm making up a date right now
25 -- 72 and someone goes to the public record and there's

1 only one execution in 1972, then we're right back to the
2 same problem, we've now disclosed all that, you know,
3 through an indirect means. But I've got to be able to
4 say -- if they're gonna be allowed to use these, I've got
5 to be able to say yeah, but those -- what you were just
6 talking about was from a different protocol, a different
7 system and you've already admitted the following, and I
8 can't do that if I can't -- do you see where I am getting
9 at? Now we're going down a path where you can't let them
10 have what they want, but then me be handcuffed on the
11 other side.

12 THE COURT: I understand.

13 MR. PLYLER: Okay.

14 THE COURT: And, frankly, some of what you say may
15 inadvertently be a side effect because I don't want to
16 handcuff you either. They're going to have to talk about
17 them in general terms and if someone is so inclined put
18 all the pieces together and find who we're talking about
19 that was executed, so be it, but the plaintiffs have got
20 -- or everyone's got to use the information contained in
21 those autopsies in a very general way, which is what I
22 would expect anyway because Dr. Wikswo is not here to
23 testify to the details of a specific autopsy. That's not
24 his role, right? He has an expert opinion about the
25 effects of electrocution, which doesn't need to be tied

1 to John Doe, Jane Doe, Richard Roe or any other named
2 person or any specific characteristics of that person;
3 their height, their weight, their date of birth, their
4 gender. I mean, you know, maybe their age range or
5 build or something to the extent that it impacts the way
6 electricity affects the body, of course, but as to any
7 specific identifying information, you know, this was
8 Suzy Q who had a tattoo on her right wrist and was 5-10
9 with brown hair, that's -- that's outside the scope.
10 It's just not relevant to his opinion, outside the scope
11 of his expertise, and he's not a fact witness to testify
12 to the facts of those -- those executions or those
13 autopsies.

14 MS. FREEDMAN: We have absolutely no problem with
15 that and I think Dr. Wikswo would be glad to hear that
16 he's limited in that way.

17 THE COURT: Okay.

18 Mr. Plyler, you're thinking.

19 MR. PLYLER: No, Your Honor. I'm -- no, Your Honor.
20 I'm sorry.

21 THE COURT: Okay.

22 MR. PLYLER: I was thinking, but I was thinking
23 about opening statements and not this.

24 THE COURT: Good. Got it.

25 All right. Anything else?

1 MS. FREEDMAN: Nothing from us, Your Honor. Thank
2 you.

3 THE COURT: Let's get this party started. Let me
4 hear opening statements.

5 MR. KENDRICK: Thank you, Judge. Good morning.

6 THE COURT: Good morning.

7 MR. KENDRICK: Let me -- let me start with what
8 this case is not. Obviously we are not challenging
9 the plaintiffs' convictions, we are not challenging
10 the -- whether or not inmates can be killed by the death
11 penalty. What this case is ensuring, that we don't
12 inflict cruel, unusual or corporal punishment by
13 electrocuting inmates with an antique contraption or
14 shooting them to death.

15 So we represent three clients who were sentenced to
16 death. Very recently a statute was passed that requires
17 painful methods of execution for the first time in recent
18 history. So this Court and the Supreme Court have asked
19 us to conduct a factual inquiry and advocate for our
20 positions in the case, that's what we're doing, and we
21 recognize that goal, Your Honor.

22 What this is, and what we intend for it to be, is
23 scientific and a demonstration of what I would call an
24 evolving understanding of science. So we have a deeper
25 understanding of the way electricity works in the human

1 body today compared to when these executions started and
2 really throughout history as they kept being done.

3 The Nebraska Supreme Court in Mata said that we've
4 made decisions based on those assumptions. This is a
5 2005-case where the Nebraska Supreme Court outlawed the
6 electric chair. The assumptions were wrong. They were
7 based on an outdated understanding. These are old,
8 abandoned methods. Most of the states have moved away
9 from electrocution. There's eight that still use it,
10 but we're the only state that make it the primary way
11 to die.

12 Firing squad is used in three other states and it's
13 only been used from what we could tell three times since
14 1977. Both methods are painful and cruel. They're very
15 unusual under modern day capital schemes and they create
16 unacceptable levels of mutilation and damage to the bodies
17 of the inmates. There is no other state that forces a
18 choice between these two methods. We stand alone.

19 So, Your Honor, we've taken the position that these
20 two methods are always unconstitutional, and what we're
21 gonna show you, the firing squad is a little bit simpler
22 and in some ways it's a little bit more difficult because
23 it's just rarely been used, but it is incredibly unusual.
24 Hardly anyone uses it. It is not a historically accepted
25 way to kill civilians. I think that just a general

1 knowledge of history would demonstrate that the majority
2 of firing squads have been done in a military context
3 which involves no civilian approval, no governmental
4 approval, and it's done for very different reasons than
5 what we have here. And it's painful for the same reason
6 I'm gonna tell you the electric chair is. You simply
7 cannot cause unconsciousness by shooting someone and
8 the amount of pain in between hitting those billets --
9 bullets -- being hit by those bullets and either later
10 becoming unconscious or dying is extreme, but also it
11 causes massive damage to the body, Your Honor.

12 So the electric chair, what we're gonna prove to
13 you, is that there is no science that says when you
14 kill someone in the electric chair it's an effective,
15 efficient, painless way to kill them.

16 The claim that a death in the electric chair is
17 instantaneous and painless is not supported by science.
18 In fact, basic electric physiology, studies related to
19 ECT therapy and studies related to animal care, are --
20 they all support that idea. It isn't acceptable to kill
21 animals with an electrode on the head and the leg, so our
22 protocol wouldn't be allowed in the use of killing farm
23 animals, Your Honor.

24 So all executions that we looked at other than a
25 few anomalies in the -- in the last hundred years end in

1 death, but the question here is when did that happen?
2 And the experts we intend to present will tell you it's
3 not immediate. It's also not painless under either of
4 those two methods.

5 No court in the country has ruled that it is painless
6 and instant, Your Honor. In fact, what I'm gonna talk
7 about briefly because I think -- and this is not a legal
8 argument. At most it's kind of giving you a little bit
9 of the framework that we intend to follow, but two cases
10 have basically considered the electric chair. The
11 Georgia Supreme Court and the Nebraska Supreme Court.

12 The Georgia Supreme Court in Dawson had a very
13 similar framework that we're gonna have here. The
14 Georgia constitution outlawed cruel and unusual
15 punishment. Very similar language to our constitution
16 other than the fact that we also add in the idea that
17 corporal punishment is not allowed. Georgia analyzed it
18 under its state constitution just like we're asking you
19 to do. They analyzed the law passed by the General
20 Assembly just like we're asking you to do, Your Honor.
21 They dealt with the presumption of constitutionality,
22 which has been raised here. They held that the prior
23 rulings are not determinative, and I'm gonna talk about
24 the only prior ruling that South Carolina really has in a
25 minute, but, you know, the Georgia case says -- and Mata

1 and Nebraska, talk about evolving standards of decency,
2 which is something that, you know, I think the defense
3 takes issue with under an originalist's view in how we
4 interpret the constitution, but really what it is, is an
5 evolving standard of science. The question is if you
6 knew this at the time of your original approval of it,
7 if you had the same advanced understanding, would you
8 have approved it? And I think the answer is pretty clear
9 that they wouldn't have.

10 So in Georgia, they have almost the exact same
11 protocol and what they heard from similar witnesses that
12 you're gonna hear is that instant unconsciousness does
13 not happen. The brain is shielded from electricity which
14 prevents that immediate unconsciousness. Sparks, flames,
15 smoke. It's a purposeless and needless imposition of pain
16 and suffering, but they also didn't limit the analysis to
17 the cause of death just like we're asking you not to do.
18 The mutilation to the body, the damage to the body, those
19 are factors when you're considering whether this is an
20 appropriate way to kill somebody.

21 So when you hear this sort of dramatic language
22 involving the spectre of excruciating pain and the
23 certainty of cooked brains and blistered bodies, that's
24 not made up by me or my cocounsel, that's what the
25 Georgia Supreme Court said, Your Honor, but the present

1 day science has changed.

2 A couple of years later when Mata was considered,
3 they have the same constitutional framework, they
4 started with some of the very same ideas that we just
5 talked about, but what they did that I think informs your
6 opinion is looked back and said who has ever looked at
7 whether electrocution does what its claimed to do? So
8 they looked at the case -- the very first case in the
9 1890's and said that didn't have any analysis of how
10 electrocution works. They looked at our case, Malloy
11 versus South Carolina from 1950, and said South Carolina's
12 approval of electrocution wasn't based on any real
13 evidence about what electrocution in the electric chair
14 does. The U.S. Supreme Court in 1946 did the same thing.
15 The two cases since 1946, the two courts that looked at
16 the science, that listened to the evidence about the
17 electric chair, said this untested science from 1890
18 that we now have this vastly expanded field of knowledge
19 about, they both used the same quote, Your Honor, time
20 works changes and brings into existence new conditions
21 and purposes, but that doesn't appeal to humanity or a
22 floating legal concept, it's scientific. What it's
23 saying is as we learn, we change, but we change based on
24 scientific knowledge in this case, Your Honor, so this is
25 not a sense of humanity and morality that we appeal to,

1 it's a sense of knowledge.

2 So what we intend to do here is update this science
3 for you, Your Honor. It's not newfangled, it's not novel.
4 This is undisputable science that our sister states in
5 Georgia and Nebraska have heard. You're gonna hear from
6 probably the preeminent electrophysiologist and whatever
7 other fields he may be in. I mean, he knows. He knows
8 what this is.

9 So you're gonna hear some of the same experts
10 these other states heard, you will hear some of the same
11 arguments, and we're gonna ask you to reach the same
12 result, Your Honor. Ultimately, what we're doing is
13 talking about the scientific basis that tells you it
14 cannot cause instantaneous, painless death and that the
15 level of time, the level of pain are unacceptable under
16 the South Carolina Constitution, and at the end of the
17 trial we're gonna ask you to declare these two methods
18 unconstitutional under our state constitution.

19 Thank you.

20 THE COURT: Thank you, sir.

21 Mr. Plyler.

22 MR. PLYLER: Thank you, Your Honor. May it please
23 the Court?

24 I'm gonna try my best to make this an opening
25 statement and not an opening argument like my colleague,

1 and I'm gonna start with we're trying to reframe this
2 a little bit. As we make our way through this trial and
3 you hear the offered testimony in this case, and I believe
4 my colleague said scientific fifty times in his opening
5 statement, I'd ask you to pay very close attention to
6 what, if any, scientific evidence is actually offered.

7 But I'd also ask that you to keep in the forefront
8 of your mind the fact that the plaintiffs have the burden
9 in this case and no matter how they continually try to
10 shift that burden, the burden remains with them, and it
11 is a heavy burden.

12 Because unlike your average civil trial, this case
13 was brought to specifically challenge the constitutionality
14 of a recently passed statute, and that statute is 24-3-530.
15 That statute sets the approved methods of execution in
16 the state of South Carolina. It is without question that
17 the death penalty is constitutional. They even admitted
18 they are not challenging it and the law on that is it does
19 not guarantee a painless death. Just like none of us in
20 this courtroom or in this state are guaranteed a painless
21 death.

22 It has repeatedly been found to be constitutional by
23 our courts and the Federal courts with jurisdiction for
24 South Carolina. They've talked repeatedly about Nebraska
25 and Georgia. They failed to mention the other states

1 that have considered similar issues. They also failed to
2 mentioned the posture of those cases and I assume at some
3 point when we get to argument you'll be able to hear the
4 other side of that particular point.

5 But since it is constitutional, it stands that there
6 must be a constitutionally acceptable method for carrying
7 out these lawfully imposed sentences. The plaintiffs in
8 this case do not challenge the death penalty and capital
9 punishment itself by their own admission. They're not
10 challenging their convictions. The appeals of those
11 challenges have run their course and they've even called
12 themselves at points execution eligible. They're not
13 attempting to claim their innocence. Instead, they're
14 launching another attack directly challenging -- excuse
15 me, indirectly challenging their convictions and sentences
16 decades after they were -- decades after they were placed
17 upon them.

18 And this is similar to what condemned persons
19 across the country have started doing. Pursuing a
20 collateral attack by alleging that the statute that
21 establishes the methods by which they will be put to
22 death is unconstitutional and that the methods set by
23 the statute to be used to carry out their sentences are
24 unconstitutional.

25 Under prevailing law, you must start your analysis

1 in consideration of plaintiffs' claim the presumption that
2 the statute they are attempting to challenge is, in fact,
3 constitutional. In fact, I think they -- they acknowledge
4 that in their opening statement. And, if possible, you
5 must interpret that statute in a manner to render it
6 valid. Those presumptions, those limitations, on your
7 review are rooted in the basic principles of our form of
8 government. They find root in the basic doctrine of the
9 separation of powers and in South Carolina the legislative
10 branch, our General Assembly, makes the laws, and in May
11 of 2021 after considerable deliberation, discussion and
12 debate, our General Assembly acted and amended 24-3-530.
13 They did so amidst robust public debate, not a small
14 courtroom occupied by a select few, and openly declared
15 their purpose and in doing so setting the public policy
16 for our state.

17 When they amended it, they added firing squad. That
18 was not something that existed and through their debates,
19 through their careful considerations, they openly declared
20 firing squad in addition to electrocution is the public
21 policy of this state.

22 In this trial, you'll hear how the General Assembly
23 was faced with a conundrum created by anti death penalty
24 advocates and their lobbying efforts against the
25 manufacturers and distributors of drugs used to carry out

1 judicial executions by lethal injection and to deal with
2 that conundrum they elected to amend 24-3-530 with the
3 express purpose of removing encumbrances caused by factors
4 outside the State's control and allow the lawfully imposed
5 sentences of the people of South Carolina finally after
6 decades of delay be enacted.

7 The public record clearly show that since at least
8 since 2013 our state, much like other states across the
9 nation, has not been unable to obtain the drugs needed in
10 order to carry out an execution by lethal injection. It's
11 not a South Carolina-specific problem. It's faced the
12 entire nation. That was exactly the result anti death
13 penalty advocates wanted. A stalemate. They realized
14 they were not going to be successful in having the death
15 penalty declared unconstitutional, so they embarked on a
16 mission of attempting to have courts declare that the
17 only constitutional way to carry out a death sentence
18 would be by lethal injection and while doing so they
19 continued to work trying to ensure that the drugs needed
20 to carry out an execution by lethal injection were not
21 available as sort of collateral attack on capital
22 punishment in general, the result being only one way to
23 do this, and that result is not available. That's the
24 conundrum that the General Assembly was faced with,
25 debated and resulted in the amended statute that's now

1 being challenged before you.

2 That this argument plaintiffs are making, this
3 collateral attack, must fail. This is exactly what these
4 plaintiffs are attempting to accomplish in this case and
5 they should not be allowed to circumvent the clearly
6 stated public policy of the state of South Carolina and
7 the will of the people. For too long the victims and the
8 families of those victims have waited for justice to be
9 carried out and this case is yet another attempt decades
10 after they were imposed to delay that justice.

11 Plaintiffs attempt to phrase their real intentions
12 under the purportedly different causes of actions in
13 their operative complaint, but when you look at all
14 those causes of action at heart, they are all a
15 collateral attack on the convictions and they all center
16 on are these methods of execution that were put into the
17 statute by our General Assembly constitutional under our
18 constitution.

19 Now the testimony and supported evidence they're
20 intending on presenting is simply not going to meet the
21 burden they face. The standard that you must use to
22 judge their claims are clear and it starts with the
23 presumption of constitutionality, moves to giving the
24 statute every possible reading to make it valid and
25 culminates in the application of carefully thought out

1 elements. Importantly, the type of challenge claims
2 they're attempting to bring requires us to ascertain what
3 exactly the framers of our constitution and the people
4 who adopted it intended when they drafted language like
5 that contained in the article of our constitution in
6 question. That's the originalist analysis that we've
7 been discussing as we've been preparing this case.

8 It's important to keep that analysis in mind as you
9 make your way through these proceedings because I submit
10 to you that at the end of this case the originalist
11 analysis will result in finding the plaintiffs have
12 failed to prove their claims. Simply put, capital
13 punishment has always been its own separate category of
14 punishment. They tend to hinge most of their arguments
15 on the idea that this should be categorized being
16 corporal punishment, but it has always been seen since
17 the inception of our constitution as a separate form of
18 punishment just like it is a separate form of punishment
19 from incarceration.

20 So under the originalist view their claims are --
21 should fail and will fail, but even if they could meet
22 that burden under that analysis, which they can't, the
23 review would continue and the applicable standards
24 would require these plaintiffs establish, first, that
25 the challenged methods of execution, in this case

1 electrocution and firing squad, pose substantial risk
2 of severe pain -- substantial risk of severe pain, and
3 that's been set forth by the U.S. Supreme Court and used
4 by multiple states across the country in looking at
5 similar challenges to methods of execution. So, simply
6 put, they have no proof to establish those requirements.

7 And I ask Your Honor to pay especially close
8 attention to these, quote, scientific, end quote, evidence
9 they intend on offering, especially with Dr. Wikswo. As
10 we argued yesterday in the motion to exclude him, there
11 are serious problems with the opinions he wants to offer
12 and there is no scientific proof. Instead, the two
13 experts that they are intending on offering are really
14 trying to do nothing but inappropriately shift the
15 burden to the defendants. Instead of accepting their
16 burden and trying to prove their burden in this case,
17 they want to shift the burden to the State inappropriately
18 to try to say prove that it is painless, prove that it
19 is instantaneous and, simply put, that's not the way we
20 analyze these types of claims.

21 As you listen to that testimony, I think you'll --
22 you'll hear without any trouble that it's full of nothing
23 but speculation, it lacks scientific basis, and even the
24 medical evidence they claim to have does not support the
25 opinions they're offering. So that's one step of the

1 analysis.

2 The next step, even if they can show substantial
3 risk of severe pain related to executions by electrocution
4 or firing squad, they -- they also have to show that
5 there is a feasible and readily implemented alternative
6 method of execution that would substantially reduce that
7 risk of severe pain, and as you listen to the testimony in
8 this case you will hear there is absolutely no proof to
9 establish that other element that they must meet. So I
10 simply ask that you pay close attention to the testimony
11 and the documents presented to the lack of proof, the
12 lack of reliable basis and the clear speculation offered
13 by plaintiffs' proffered experts, all while keeping in
14 mind the heavy burden they took on in pursuing this case,
15 and at the conclusion of their case I submit to you you'll
16 have no difficulty finding that they have failed to meet
17 their burden and that they have failed to offer any proof
18 to satisfy the standards that must be used to analyze
19 their claims and, therefore, enter a ruling in favor of
20 defendants and that the public policy of the State as set
21 by our General Assembly can be carried out.

22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 Let's take a five-minute break before you call
25 your first witness.

1 MR. KENDRICK: Thank you, Judge.

2 THE COURT: Five or ten minutes.

3 (Recess taken at 10:29 AM.)

4 (Back on the record at 10:43 AM.)

5 BAILIFF: Remain seated. Come to order, please.

6 MR. KENDRICK: Judge, before --

7 THE COURT: I can't leave you-all alone.

8 MR. KENDRICK: No, no, no. Your Honor, we've got
9 something we agreed on. We wanted to approach the
10 bench to tell you about it.

11 MR. PLYLER: It has to do with some of your rulings
12 yesterday and procedural issues, not anything to do with
13 the decision you made.

14 MR. KENDRICK: And we agree.

15 THE COURT: Okay. Can we just --

16 MR. KENDRICK: Yeah, let us tell you what it is and
17 you can decide.

18 THE COURT: Yeah, yeah.

19 MR. PLYLER: Well, Your Honor, my concern is we
20 have microphones and stuff here and I don't -- this is
21 the type of stuff that can't be overheard.

22 MR. KENDRICK: We can go in the back hallway.

23 MR. PLYLER: I'm sorry.

24 THE COURT: Yeah, we'll go in the back hallway.

25 Go off the record.

1 (Recess taken at 10:45 AM.)

2 (Back on the record at 10:50 AM.)

3 BAILIFF: Remain seated. Come to order, please.

4 THE COURT: And I will put on the record that the
5 reason we went off the record and into the back hallway
6 was a security issue, something that doesn't need to be
7 discussed on the record because it involves security
8 details.

9 So with that said.

10 MR. PLYLER: One last thing. We also stipulated to
11 something during the last break, the authenticity of the
12 autopsy records you've already ruled on. I've just
13 confirmed with Josh I'm not gonna require him to go lay
14 some elaborate foundation for you.

15 Thank you, Your Honor.

16 THE COURT: Okay. Thank you.

17 MR. KENDRICK: I think based on that, Your Honor,
18 I'll just -- can I just move those into evidence under
19 your previous order and that way when we get to the
20 appropriate witness we'll move right through them?

21 Does that make sense?

22 MR. PLYLER: Yeah, and -- so the reports and photos
23 you said could be accepted under seal. Is that my
24 understanding?

25 THE COURT: Yes.

1 MR. KENDRICK: Yes.

2 MR. PLYLER: With that stipulation, I don't have
3 an objection to it other than what -- preserving my
4 objections that I rule on earlier -- or, excuse me,
5 you've already ruled on, I have no additional objections
6 to that.

7 THE COURT: Yes, sir. So they'll be admitted.

8 Give me the exhibit numbers, Mr. Kendrick.

9 MR. KENDRICK: Okay. I guess we could just call
10 them -- I have some to enter through this witness, but
11 just to keep it clean, why don't we make them 1 through 5
12 or we --

13 THE COURT: Sure. I mean, sure. Confirm with the
14 court reporter as she's the one that actually does the
15 marking, but...

16 (Plaintiff's Exhibit Number 1 through 5, autopsy
17 reports, were marked for identification under seal.)

18 MR. KENDRICK: Your Honor, since they aren't really
19 relevant to Mr. Stirling, I'm gonna let them work on
20 organizing them to give to the clerk so that way we can
21 get going, if you don't mind?

22 THE COURT: That's fine.

23 All right. Call your first witness as soon as
24 you're ready.

25 MR. KENDRICK: We call Director Bryan Stirling,

1 Your Honor.

2 BAILIFF: Come forward and be sworn, sir.

3 Face the clerk. Put your left hand on the Bible
4 and raise your right.

5 (Whereupon, Bryan Stirling was duly sworn by the
6 Clerk of Court.)

7 THE CLERK: Thank you. Please have a seat on the
8 witness stand and state your full name for the record,
9 sir.

10 THE WITNESS: My name is Bryan, B-R-Y-A-N, Stirling,
11 S-T-I-R-L-I-N-G. I'm currently the Director of the South
12 Carolina Department of Corrections.

13 BRYAN STIRLING,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. KENDRICK:

17 Q. Thank you, Director Stirling. I'm Josh Kendrick. I
18 represent the plaintiff in this case. You and I have met
19 on a number of occasions.

20 A. Yes, sir.

21 Q. I'm gonna try to keep this brief. I know you're very
22 busy.

23 A. We'll not go into that history here.

24 Q. Your background prior to becoming Director of
25 Department of Corrections was as a lawyer?

1 A. Yes, sir.

2 Q. And you were in a general practice, then you were an
3 attorney general -- deputy attorney general and then you
4 worked for a prior governor, correct?

5 A. I did. I went to a law firm for a little and did
6 mainly real estate, but started out in a general practice
7 law firm for a little while, attorney general's office and
8 then Governor's office and then Department of Corrections.

9 Q. Did you have any prior corrections experience when you
10 took the job as interim director?

11 A. I did not.

12 Q. Okay. Had you gone to any -- done any educational
13 programs or have any background educationally in
14 corrections?

15 A. Not before, but there's a new director's training and
16 I go to conferences and things of that nature.

17 Q. And that -- that answers my next question as kind of
18 what kind of -- what training you have related to
19 corrections. Not in detail, but since you've took the job
20 you've been to the training you've just described?

21 A. Yes, sir.

22 Q. Now as your role as the director of the South Carolina
23 Department of Corrections, you're essentially in charge of
24 the operations of the Department, right?

25 A. Yes. The whole kit and caboodle.

1 Q. Everything falls to you at the end of the day, right?

2 A. Yes.

3 Q. And you've never seen an execution, right?

4 A. I have not.

5 Q. And that's because under your tenure there hasn't been
6 anyone eligible for execution until very recently?

7 A. That's correct.

8 Q. Now prior to the new law being changed, was it your
9 expectation that any executions that took place would be by
10 lethal injection?

11 A. It was my expectation, but we couldn't get the drugs,
12 so.

13 Q. But, I mean, the statute governs --

14 A. Yes.

15 Q. -- that governs says that was how they would die?

16 A. Through a default, yes. It would default, yes.

17 Q. It would default, yes. Yes, sir. As director, do
18 you know whether or not the South Carolina Department of
19 Corrections keeps records of any historical observations of
20 executions?

21 A. I do not.

22 Q. Okay. And -- and is it that you don't know or --

23 A. I don't know.

24 Q. Okay.

25 A. I mean, I've heard the back and forth about the

1 autopsies yesterday, but that's the extent of my knowledge.

2 Q. Okay. So if you wanted to study a prior execution, if
3 you will, I'd assume you'd have to go through a process not
4 -- not dissimilar to what I'd have to go through, right?
5 You'd have to track it down and figure it out?

6 A. Yes, sir.

7 Q. Have you ever done that before?

8 A. I have not.

9 Q. All right. So do you have any historical knowledge
10 about any of the executions that have taken place in the
11 state of South Carolina?

12 A. My only historical knowledge is very high level and
13 there haven't been any problems with them. I have not
14 heard of any, but that's my knowledge. That's the extent
15 of my knowledge.

16 Q. Okay. And when you say you haven't heard of any
17 problems, you base that on not having heard as opposed to
18 having researched these executions and made an independent
19 determination?

20 A. Correct. That would be correct, yes, sir.

21 Q. And as the director of the South Carolina Department
22 of Corrections, what responsibility do you have regarding
23 -- let me -- let me step back because I think we've already
24 been through this, so it will make it easier. What do you
25 consider a successful execution?

1 A. To carry it out without being botched.

2 Q. Okay. Let's talk about, in particular, the electric
3 chair.

4 A. Okay.

5 Q. You're familiar with the electric chair, right?

6 A. Generally.

7 MR. KENDRICK: Your Honor, this goes against what
8 I said earlier, so I -- but I won't mess my numbers up.
9 I'm gonna -- if we can mark this as Exhibit 1.

10 MR. PLYLER: She's already marked them.

11 MS. FREEDMAN: Yes. Josh, we'll do 6.

12 MR. KENDRICK: Sorry. 6.

13 (Plaintiff's Exhibit Number 6 was marked for
14 identification.)

15 (Discussion between counsel.)

16 MR. KENDRICK: Your Honor, Plaintiff's Exhibit 6
17 is a picture of the South Carolina electric chair. I'd
18 like to go ahead and move it into evidence without
19 objection I understand.

20 THE COURT: Any objection?

21 MR. PLYLER: No. No, Your Honor. I don't think
22 that going into detail with the foundation and the
23 authenticity would be of any benefit to the Court, so
24 I don't have an objection.

25 THE COURT: So Plaintiff's 6 is admitted without

1 objection.

2 (Plaintiff's Exhibit 6, a photograph, was admitted
3 into evidence.)

4 BY MR. KENDRICK:

5 Q. And just to clarify the source of this, Director
6 Stirling, I believe this is a picture that was given to the
7 press as part of a South Carolina Department of Corrections
8 press release. Does that sound familiar?

9 A. It could have been a press release, it could have been
10 FOIA. I'm not sure. It was given to the press by some
11 vehicle.

12 Q. Okay. Have you seen this chair before in person?

13 A. I have.

14 Q. Have you examined the chair?

15 A. I've looked it over. I wouldn't said I've closely
16 examined it.

17 Q. Okay. Do you understand how this electric chair
18 operates from a general standpoint?

19 A. Very generally, very high level.

20 Q. Okay. I'm gonna -- I'm gonna talk to you about that
21 very briefly. I have a fairly -- I just have a bigger
22 picture of it and you've got your picture there.

23 A. Yes, sir.

24 Q. So just in general we have this wooden chair. So
25 let's talk a little bit about the history of it. Are you

1 aware of how old this chair is?

2 A. I'd be speculating. I think it's been around for a
3 long time, but I don't have a specific date.

4 Q. Sure. And that's actually fair enough. So it looks
5 like we have a series of straps here and if we start here
6 at the bottom --

7 A. Uh-huh.

8 Q. -- it looks like what I'm pointing to here, those
9 would be where you would strap the inmate's legs down?

10 A. Yes, sir.

11 Q. And then we strap their arms to these armrests?

12 A. Yes, sir.

13 Q. Then it looks like there's an upper set of straps that
14 would essentially strap their body to the chair?

15 A. I believe so, yes, sir.

16 Q. And do you know if their head is restrained?

17 A. I don't. I think it would be, but I don't.

18 Q. Okay.

19 A. I don't recall if I did have that knowledge at one
20 time.

21 Q. Do you have any idea when this picture was taken?

22 A. I'd say in the last year. Last year, maybe sooner,
23 but last year would be an appropriate time, but I don't --
24 you know, I say that, but I don't know if it was taken for
25 the release or if we had one on file.

1 Q. Okay. So is it -- but it's fair to say, and I think
2 that we all agree, there hasn't been an execution -- an
3 electric chair execution in South Carolina since 2007,
4 2008, somewhere around then?

5 A. I believe so, yes, sir.

6 Q. Okay. So about fifteen years is fair, right?

7 A. Yes. Sounds right.

8 Q. So no one has sat in this chair and been electrocuted
9 for that period of time obviously?

10 A. Correct. Not to my knowledge obviously.

11 Q. You see in this picture, if you look down at the
12 bottom, the strap here that -- I think it would be your
13 left -- actually the right strap, and it looks -- it looks
14 different than the other one. Do you have any explanation
15 for whether -- what that black marking is on the straps?

16 A. I don't.

17 Q. Do you know if it's burning?

18 A. I don't.

19 Q. So we talked about this being a very old chair. Has
20 the chair been updated at any point?

21 A. The structure of the chair, I don't think so. I don't
22 know if any other updates have happened.

23 Q. Okay. So when you said -- when you said that, and I
24 asked a bad question because I probably should have said
25 under your tenure do you know if there has been any update,

1 and you said the structure of the chair hasn't --

2 A. I think the chair -- I think the wood chair has been
3 the same, I believe, but I don't know if there's been an
4 update to it or not.

5 Q. Okay.

6 A. Not that I'm aware of.

7 Q. Who would decide if the chair did need to be updated?

8 A. That would be members of the execution team and staff
9 of SCDC.

10 Q. Okay. I don't want to talk about that. What I do
11 want to talk about is your role. So as director if someone
12 that had that responsibility made the decision that it
13 needed to be updated, would they come to you?

14 A. I think it would depend. They probably would, but I
15 think if it was minor, you know, maybe a strap or a buckle
16 or something like that they probably wouldn't let me know.

17 Q. Okay.

18 A. But if it was something different than that, they
19 probably would. Now I don't ever recalling anybody coming
20 to me on something to that effect.

21 Q. Well, would you agree that the act of executing a
22 person is probably one of the more solemn and important
23 things that the Department of Corrections does?

24 A. Amongst the litany of solemn things we do, yes, sir,
25 I would.

1 Q. Right. But -- but this results in the death of a
2 person?

3 A. Yes. Absolutely, yes.

4 Q. So would you expect to have involvement in -- in any
5 kind of decisions related to that process?

6 A. I would rely on the people at the Department that are
7 the subject matter experts on that.

8 Q. Okay.

9 A. I would expect to maybe be briefed on the bigger
10 decisions. Some of the smaller decisions, you know, I
11 would leave that up to the subject matter experts because
12 I am not a subject matter expert on this.

13 Q. Okay. And without -- I'm not -- I'm asking a very
14 specific question. Are there subject matter experts that
15 work for you?

16 A. Yes, sir.

17 Q. Okay. Do you -- when you talk about leaving it up to
18 them, would you leave it up to them in an autonomous way or
19 would you actually say hey, you've got to come to me, but
20 I'm relying on you to tip me off to problems?

21 A. Yes, I'd expect that if there were problems they would
22 come to me and say hey, we have a problem.

23 Q. And you would expect that if it was anything more than
24 just minor, you know, maybe -- not to call it cosmetic,
25 but minor little maintenance issues that you need to be

1 involved in that, right?

2 A. I would be briefed on it, yes. That's what I would
3 expect.

4 Q. Okay.

5 MR. KENDRICK: Your Honor, my next exhibit is one
6 that we talked about yesterdays, the protocols, and it's
7 my understanding that you would like to take this exhibit
8 sealed and we worked out on the record yesterday the
9 questions I'm allowed to ask about it and I don't intend
10 to stray from those.

11 MR. PLYLER: I just haven't seen the documents
12 you've got in your hand.

13 MR. KENDRICK: Oh, sorry.

14 MR. PLYLER: I think you're supposed to give me
15 one first.

16 MR. KENDRICK: Yeah, I am.

17 THE WITNESS: And, Your Honor, can I pass this over
18 to -- the chair over to --

19 MR. KENDRICK: Oh, yeah. Of course.

20 And mark this next.

21 MR. PLYLER: Your Honor, I -- I remember your ruling
22 from yesterday that the protocols would come in under
23 seal. I remember that part. What I don't know is when
24 he said we went over the questions I'd be allowed to ask
25 about it. I don't -- I guess I'm not certain on that part

1 of it, so --

2 MR. KENDRICK: So just very quickly, I intended
3 to ask about the electricity sequence phases, so that's
4 -- but in a general manner, so level of voltage, level
5 of voltage, level of voltage, time, time, time. That's
6 the only electrical questions from the electrocution
7 protocol.

8 There are some questions about the equipment that's
9 used. I don't know if we talked about those yesterday,
10 but the -- what is being hooked up to the inmate. I
11 don't think --

12 MR. PLYLER: You mean the stuff that's not pictured
13 in the chair?

14 MR. KENDRICK: Correct.

15 MR. PLYLER: I mean, of Exhibit 6.

16 MR. KENDRICK: Correct.

17 MR. PLYLER: Right.

18 And, Your Honor, can we approach?

19 MR. KENDRICK: Sure.

20 THE COURT: Yes. Can I see what we're talking
21 about?

22 MR. KENDRICK: Yeah. Sorry.

23 (Proceedings held at the bench; not reported.)

24 MR. PLYLER: Your Honor, I believe this is gonna
25 be Plaintiff's 7, and just subject to our previous

1 objections, which you've already ruled on, we have no
2 additional objections to it be being accepted into
3 evidence under seal.

4 THE COURT: Plaintiff's 7 is admitted and that
5 one is sealed.

6 (Plaintiff's Exhibit Number 7, execution protocols,
7 was marked and admitted into evidence under seal.)

8 BY MR. KENDRICK:

9 Q. So, Director Stirling, I have some general questions
10 about this Exhibit 7 --

11 A. Yes, sir.

12 Q. -- the South Carolina electrocution protocols. Have
13 you reviewed these protocols?

14 A. I have.

15 Q. What we're specifically gonna talk about is the
16 electrocution protocols and the firing squad protocols.

17 A. Okay.

18 Q. Generally you would agree with me that the firing
19 squad protocol is very new?

20 A. It is.

21 Q. All right. We're gonna put that aside for a minute
22 and we're gonna talk about the electrocution protocols.

23 A. Okay.

24 Q. Did you have any hand in developing that protocol?

25 A. I did not. Not that I recall.

1 Q. When you say not that you recall, let's just try to
2 figure it out. Would you have -- would you have been
3 involved in -- in reviewing an electrocution protocol and
4 determining whether it was appropriate?

5 A. I think I say not that I recall because in -- in
6 reviewing the firing squad, I believe I looked at
7 everything. I just don't recall if I asked a question
8 or not or if there was a change. I don't recall there
9 was, but, yeah, so not to my -- not that I recall. I just
10 don't know if I changed a word. I don't think anything
11 significant changed there if it happened at all.

12 Q. Sure. Do you know how old that protocol is?

13 A. I don't.

14 Q. Okay. Have you asked anyone or researched whether it
15 has ever been updated?

16 A. I don't recall if I have or not.

17 Q. Okay. So if -- if I wanted to say tell me when this
18 protocol was first developed and when changes have been
19 made to it, you do not know that answer?

20 A. I do not.

21 Q. Okay.

22 (Discussion between counsel.)

23 MR. KENDRICK: If you will mark these as 8 --

24 MR. PLYLER: Your Honor, if I can just approach to
25 make sure they get in the same order that I've seen?

1 I don't want to walk up to somebody with their back
2 to me.

3 THE COURT: Oh, sure.

4 (Plaintiff's Exhibit Numbers 8, 9 and 10, were
5 marked for identification.)

6 BY MR. KENDRICK:

7 Q. Director Stirling, I'm gonna show you what we've
8 marked as Plaintiff's Exhibit 8, 9 and 10. We talked about
9 these documents, you may remember, at a prior deposition.
10 Do you have a general familiarity of with what these
11 documents are?

12 MR. PLYLER: Your Honor, just for the record I
13 haven't asked him to lay a foundation. If he -- if he
14 wants to move these into evidence, I -- I was just
15 waiting for him to ask to do that.

16 MR. KENDRICK: Oh, sorry. Yes.

17 MR. PLYLER: I don't have an objection as to
18 authenticity and foundation.

19 MR. KENDRICK: All right. So, Your Honor, I'd
20 move without objection Plaintiff's Exhibit 8, 9 and 10
21 into evidence.

22 THE COURT: All right. 8 --

23 MR. PLYLER: And I would -- for the record, Your
24 Honor, these were originally designated confidential
25 yesterday. We were able to work out redactions to the

1 documents to alleviate any confidentiality concerns so
2 they can use them.

3 So to the extent you see, as you review the evidence
4 in the case a confidential designator, I just wanted you
5 to understand what that was and that no one is trying to
6 violate your confidentiality order.

7 Thank you, Judge.

8 THE COURT: Okay. So Plaintiff's 8, 9, 10 are
9 admitted without objection.

10 (Plaintiff's Exhibit Number 8, a 6/23/21
11 letter/report, Plaintiff's Exhibit Number 9, a 4/6/22
12 letter/report, and Plaintiff's Exhibit Number 10,
13 Electric Chair Test, were admitted into evidence.)

14 THE COURT: Mr. Kendrick, do you have copies for me?

15 MR. KENDRICK: Oh, sorry.

16 BY MR. KENDRICK:

17 Q. All right. Director Stirling, I'm gonna --

18 A. Just hold onto the protocols or hand it over?

19 Q. No, no. You can hand it over.

20 A. Okay.

21 Q. Thank you. Thank you for asking.

22 Exhibits 8 and 9 are a June 23, 2021 and April 6,
23 2022, sort of letter/report about the testing of the
24 electric chair; is that correct?

25 A. That's what they appear to be, yes, from a brief

1 overview.

2 Q. Okay. Did you have any involvement in this testing
3 process?

4 A. I did not.

5 Q. Did you direct it to take place?

6 A. I did not.

7 Q. Did you check on whether it was taking place?

8 A. I did not.

9 Q. Did you get a report afterwards about whether it was
10 taking place?

11 A. I did not.

12 Q. Okay. So the document describes the three phases of
13 the electric chair, and I'm gonna tell you because --

14 A. Okay. Thank you.

15 Q. -- I have about five pairs of reading glasses, but
16 rather than give them to you, I'm just gonna read it to
17 you.

18 A. Thank you.

19 Q. But there's a first phase of 2,000 volts for four and
20 a half seconds, the second phase of 1,000 volts for eight
21 seconds, and a third phase of 120 volts for 120 seconds.
22 Is that your general understanding of how a South Carolina
23 electric chair execution will take place?

24 A. And if I could stop, there's a name in here that I'm
25 not sure was redacted, and I'm not sure it should be. I

1 just noticed that.

2 Q. Why don't you show me and I'll make sure we clear it
3 up because we intended to --

4 A. Yeah. Just --

5 MR. KENDRICK: Your Honor, we -- we missed a
6 redaction in the paragraph -- the second paragraph.
7 It's not relevant to any of my questions and if Your
8 Honor will allow, I will make sure we redact it at a
9 break today and get with defense counsel and the court
10 reporter and correct it. I think that's cleaner than
11 trying to mark it out just in case it ever, you know --
12 is that fair?

13 THE COURT: Yes.

14 MR. PLYLER: And, Your Honor, if I could just have
15 a moment. I mean, obviously I'm being handed these at
16 the same time you're getting them, so I want to make
17 sure there weren't any other errors.

18 I do not believe there are any other missed
19 redactions, but, again, I've had very limited time to
20 look at these, Your Honor.

21 THE COURT: Yes, sir.

22 Continue, Mr. Kendrick.

23 MR. KENDRICK: Thank you, Judge.

24 BY MR. KENDRICK:

25 Q. Thank you for pointing that out, Director.

1 A. Yes, sir.

2 Q. Do you have any understanding of why the phases are
3 arranged in that way?

4 A. I do not. I'm not an expert in this at all.

5 Q. Okay. Do you know if -- and it sounds like based on
6 my earlier questions, they have been arranged that way
7 since prior to your time as director?

8 A. I don't know, but I would assume so, yes.

9 Q. Okay. And if I remember correctly, there weren't any
10 executions under the prior director either, Mr. Byars?

11 A. Yeah, he was there a very short time. He didn't stir
12 up --

13 Q. So --

14 A. Well, actually I take that back. There -- there was
15 one in 2011.

16 Q. Electric chair. I'm sorry.

17 A. Oh, yes, sir.

18 Q. Okay. So you don't have any idea whether anyone has
19 looked at these phases to decide if it's appropriate or
20 not?

21 A. I wouldn't have that knowledge. No, sir.

22 Q. One of the other things that is referenced in both
23 Exhibit 8 and 9 at the bottom of the first paragraph is
24 that these are connected to a load bank to simulate the
25 im-pe-dence of the human body.

1 MR. PLYLER: Your Honor, objection. I believe the
2 word is "impedence". I just -- I'm not -- I want the
3 record to be clear because that's not what the document
4 says.

5 THE COURT: I think that's a pronunciation issue,
6 I think.

7 MR. PLYLER: I'm sorry. And I wasn't being flippant.
8 I thought I heard a very different term there, so I
9 apologize.

10 THE COURT: It's a pronunciation error, but the
11 document is in evidence and the document speaks for
12 itself.

13 BY MR. KENDRICK:

14 Q. I apologize, Director Stirling.

15 A. That's okay.

16 Q. The load -- the load bank would simulate the impedence
17 of the human body. Are you aware of that testing?

18 A. I'm not, no.

19 Q. Do you have any knowledge of who decided to set up the
20 load bank the way it's set up?

21 A. I don't.

22 Q. So you can't tell me whether that's, in fact, an
23 accurate representation of the impedence of the human body?

24 A. I can't.

25 Q. Do you have the required knowledge to tell us at which

1 phase of this process the inmate is expected to die?

2 A. I do not.

3 Q. Okay. Do you have a thought on it? Do you know?

4 A. I don't. I have no idea. It would be a guess.

5 Q. Do you have a belief as to which phase they should die
6 in to comply with appropriate executions?

7 A. I'm not very familiar with electricity and so I'd be
8 -- I think the first phase, but I don't know. I mean, I
9 really just -- I don't know enough about electricity, so I
10 shouldn't guess.

11 Q. Okay. Do you have any knowledge as to what the act of
12 applying electricity will do to the inmate's body?

13 A. I don't. I mean, besides ending their life.

14 Q. Do you know whether or not the procedure calls for a
15 hood to be placed over the inmate's head?

16 A. There's a -- I know there's the -- the helmet-type
17 thing. I'm not a technical expert on this and I believe
18 if I could look at the protocol I think that would be
19 instructive. I knew at one time. I just can't recall.

20 Q. Okay. We'll -- we don't need that. We'll move on
21 from that.

22 A. I think so, but I just can't recall. At some point in
23 time I think that was done.

24 MR. KENDRICK: Your Honor, if you'll give me one
25 second. I'm trying to keep it as streamlined as I can.

1 THE COURT: Sure.

2 (Discussion between counsel.)

3 BY MR. KENDRICK:

4 Q. Before we move on to the next set -- step, we've had
5 discussion this morning about these autopsies that result
6 from electrocution deaths, right?

7 A. Yes, sir.

8 Q. You heard that?

9 A. Yes, sir.

10 Q. Do you have any personal knowledge of where these
11 autopsies are kept?

12 A. Yes.

13 Q. Okay. Where do -- are these autopsies kept?

14 A. I think most are at the Department, at headquarters.
15 I think some had to be gathered from elsewhere, a coroner's
16 office or something.

17 Q. Okay. Are those autopsies generally available to you?

18 A. I guess they would be if I asked for them, yes.

19 Q. And I -- I feel like I might have already ask you
20 these questions, so I sincerely apologize.

21 A. That's okay.

22 Q. But when we talked about -- I think I asked you -- I
23 feel like I did ask you whether there were any types of
24 reports related to executions?

25 A. And I -- I don't believe there are.

1 Q. Okay.

2 A. I think in my deposition on page 9 I might have said
3 yes and then I thought about it some more thinking I wasn't
4 sure what you were talking about reports and then page 10,
5 line 4 I said I don't know if there would be something like
6 that.

7 Q. Okay. And that's a great recall of the deposition.
8 Much better than mine.

9 So the -- the reports that -- so when I say reports,
10 too, I'm not trying to limit it to some internal term. I
11 just mean any kind of document that -- that in any way
12 memorializes any observations and is that the same
13 understanding you have of reports?

14 A. To my knowledge, it would be the autopsies. That
15 would be it.

16 Q. Okay. So as far as you know, the autopsies are all
17 we have?

18 A. As far as I know, yes.

19 Q. All right. And I believe there are two that we do
20 not have from the relevant time period and -- and it's my
21 understanding that you don't know where those are?

22 A. There were so many numbers flying around in court
23 yesterday and everything with the back and forth, I was
24 very confused about that, so I don't know.

25 Q. Fair enough. Well, let's talk about the firing squad.

1 Have you ever witnessed --

2 A. Can I hand this over?

3 Q. Oh, yes, sir. I'm so sorry. Yes.

4 A. And then should I get the protocols back?

5 Q. No, you don't need them back.

6 A. Okay.

7 Q. Well, if you think you need them back, but I don't - I

8 don't know that --

9 A. I just want to make sure that's redacted properly.

10 Q. Sure. Sure. We will handle that.

11 Have you ever witnessed a shooting?

12 A. In person?

13 Q. Yes, sir.

14 A. Like an execution?

15 Q. Any shooting.

16 A. I've not witnessed one in person, no.

17 Q. Have you ever seen a death by a firing squad?

18 A. I have not, sir.

19 Q. Have you ever reviewed any records from a death by

20 firing squad to get any kind of understanding about how it

21 works?

22 A. I have not.

23 Q. Do you -- do you have any understanding of how a

24 firing squad works?

25 A. Generally, yes.

1 Q. What is your general understanding of how it works?

2 A. People are -- the person is put in a chair just like
3 the protocol said, and I'm not sure how much I can get into
4 with this, but anyways they're -- they're shot.

5 Q. I got you.

6 A. I mean, I'm not trying to be -- make light of this,
7 it's a very serious thing, but they're -- they're shot.

8 Q. And nor am I. I'm just trying to get some background
9 knowledge.

10 A. Yes, sir.

11 Q. Do you believe that a death by a firing squad would be
12 a humane way to die?

13 A. I think so, yes.

14 Q. Okay. And what do you base that answer on?

15 A. I just think -- I just think if you're shot in the
16 heart, you're gonna die instantly, but that's my knowledge.
17 I don't have any more knowledge than that. Just kind of
18 thinking about it.

19 Q. Is that a layman's knowledge?

20 A. Yeah, it definitely is layman's knowledge. Yes, sir.

21 MR. KENDRICK: Madam Court Reporter, do you mind
22 telling me what number I'm on?

23 THE COURT REPORTER: 11.

24 (Plaintiff's Exhibit Number 11 was marked for
25 identification.)

1 MR. KENDRICK: Any objection, Mr. Plyler?

2 MR. PLYLER: What's -- are you trying to move the
3 document into evidence?

4 MR. KENDRICK: So I'm happy to go through the
5 rigamarole, but you said that we didn't need to do that,
6 so I'm just clearly asking if you have an objection and
7 moving it into evidence?

8 MR. PLYLER: Your Honor, I do not have an objection
9 as to the foundation or authenticity of this document.

10 THE COURT: Okay.

11 MR. KENDRICK: I would, therefore, move it into
12 evidence, Your Honor.

13 THE COURT: Are there other objections?

14 MR. PLYLER: No, Your Honor.

15 THE COURT: So that's -- Plaintiff's 11 is admitted
16 without objection.

17 (Plaintiff's Exhibit Number 11, a photograph, was
18 admitted into evidence.)

19 THE COURT: Do you have a copy for me?

20 MR. KENDRICK: I do. And I'm sorry about not giving
21 you a copy, Judge. I will correct that. I'm glad she
22 pulled that out from under the table.

23 BY MR. KENDRICK:

24 Q. And you have your copy, right?

25 A. Yes, sir.

1 Q. Director Stirling, I'm gonna show you -- I have shown
2 you and handed you Exhibit 11. Tell me what that picture
3 depicts.

4 A. The picture depicts the electric chair and the firing
5 squad chair. The electric chair is covered. The firing
6 squad chair is not.

7 Q. So I think we can assume based on that answer that the
8 two chairs exist in the same room?

9 A. They do.

10 Q. And I'm gonna to refer to it as the execution room.

11 A. Chamber.

12 Q. What's that?

13 A. Chamber.

14 Q. Execution chamber. Excellent. So when a firing squad
15 execution takes place, is it fair to say this electric
16 chair will not be moved?

17 A. It would be moved.

18 Q. It will be moved. So it will not be sitting where
19 it's sitting in this picture?

20 A. Right.

21 Q. Okay. What was your role in the design of the firing
22 squad in the execution chamber?

23 A. I re -- okay. So you're asking me what my role is in
24 the design, but then you pointed to the chair. Are you
25 talking about the design of the chair?

1 Q. So let me ask you two questions, but I appreciate
2 that. It's good working with a lawyer, right? You know
3 more than I do. So there is a chamber here that I
4 understand was in existence previously?

5 A. Yes, sir.

6 Q. But had to be modified in order to conduct firing
7 squad executions?

8 A. Correct.

9 Q. And then there's also a very specific chair where you
10 would intend to restrain the inmate before they're shot?

11 A. Place restraints.

12 Q. All right. So let's talk about first what your role
13 would have been in the overall design of the chamber.

14 A. It -- I would not have had a role in that. I would
15 have relied -- relied on the folks at the Department with
16 subject matter expertise.

17 Q. Okay. Did you have any general things that you wanted
18 to ensure happened?

19 A. No, I was gonna rely on those folks. I don't -- I
20 don't have the expertise to -- to really weigh in generally
21 on that.

22 Q. Okay. Are you now though generally familiar with what
23 -- what this structure is here in the chair?

24 A. I am, sir.

25 Q. Okay. So I think that I have been confused by the

1 fact this chair actually does not have a back, correct?

2 A. Not the metal part. There is a backing behind it, I
3 guess, is the best way to describe it.

4 Q. So we have a chair that has straps and then there's a
5 backing. Would -- are those straps for just to lean the
6 back against or are those straps to restrain?

7 A. I think they're both.

8 Q. Okay.

9 A. I think some of them are to lean the back against and
10 I think some are to restrain. I'm having a hard time with
11 it. It is very dark.

12 Q. And then we have -- it looks like these are four sort
13 of loops or cuffs, if you will, and that would be to
14 restrain the arms and the legs?

15 A. Yeah, I think they're all for -- for restraints. I
16 don't think they're for a back, but, yes, they're for arms
17 and legs.

18 Q. Okay. And then beneath the chair, sort of this square
19 structure with kind of a slanted --

20 MR. PLYLER: Your Honor, I -- I've been trying to
21 be cautious here about relevance. I mean, he's already
22 talked at length about doesn't know, didn't design it.
23 You know, I'm just -- there's a relevance issue here at
24 this point.

25 THE COURT: Overruled.

1 MR. KENDRICK: Thank you, Judge.

2 BY MR. KENDRICK:

3 Q. And we're almost done, Director Stirling. And we've
4 got this -- this below thing here. Is that a catch basin?

5 A. Yes, sir.

6 Q. And that's to catch the blood and the other matter
7 that will result from the firing squad?

8 A. Yes, sir.

9 Q. Okay.

10 A. That's my understanding.

11 MR. KENDRICK: One second, Your Honor.

12 (Discussion between counsel.)

13 BY MR. KENDRICK:

14 Q. Every time I talk to them it gets shorter, Director
15 Stirling.

16 A. No problem.

17 Q. It's good to not be the smartest person here.

18 A. I wouldn't say that I'm any smarter. I'm sitting
19 behind here.

20 Q. Exactly. I am almost done. Let me ask you a
21 question. Are -- so in some of the -- the filings I have
22 seen, there -- there seems to be an idea that these methods
23 have because they're enacted by the Legislature been
24 approved by the people of South Carolina. Do you hold that
25 position?

1 A. So what filings? This -- in this case filings?

2 Q. Filings in the case and arguments. I mean, we've
3 talked about -- and even if we put that aside, do you
4 believe that these are methods that the citizens of South
5 Carolina have approved?

6 A. I believe that the Legislature believes that.

7 Q. Okay.

8 A. You know, we're a democratic republic here. We have
9 elected people come to Columbia and so I believe that's
10 what the Legislature -- they're a representative body, but,
11 yes, that's what I believe.

12 Q. Okay.

13 A. Not all citizens obviously.

14 Q. Okay. And -- and I think what I'm getting to is would
15 you agree with me that the vast majority of the things that
16 we're discussing, the protocols, the details, the results,
17 those are all inaccessible to the public, correct?

18 A. Yeah, the -- for the most part, yeah. I mean, during
19 an execution we have witnesses and the media, up to three
20 media outlets that can be there, but -- a camera and
21 photographer, the AP or something. Whatever the law says.

22 Q. But if John Q. Public came and said I would like to
23 know how an execution takes place, the details of it and
24 the rest of --

25 A. Oh, no. Yeah, they wouldn't.

1 Q. Would not be allowed?

2 A. Correct.

3 Q. And do you know if that is a standard position
4 throughout the country or if that is sort of unique to
5 South Carolina?

6 A. No, I think that's a standard position, I believe.

7 Q. Okay. Would it surprise you to know that we're one of
8 the only states that doesn't release the protocol to the
9 public?

10 A. To a certain extent, it would, but, I mean, it just
11 doesn't seem like people really talk about this.

12 Q. I think I talked to you about this at your deposition,
13 about your role in the passage of this law that made the
14 electric chair the primary sort of default way of executing
15 people, and then the firing squad is the backup way.

16 A. Are we done with this picture?

17 Q. Yes.

18 A. Okay.

19 Q. Can you tell me what your role was in that law being
20 passed?

21 A. Yes. I think my role as director was just to advise
22 the Legislature. That's all I -- all I did. If I -- if
23 there were questions, if I were called to testify, I would
24 advise them if they had questions, and that's what I did.
25 I did not advocate one way or the other.

1 Q. Okay.

2 A. I don't think that's my role.

3 Q. Okay. So you did not have a position on whether the
4 law should be passed, you had a position on what your role
5 would be if passed; is that fair?

6 A. Yeah, I guess. I'm confused by the question, but I
7 think yes.

8 Q. It was a confusing question. When you say you advised
9 the Legislature, what did you advise them of?

10 A. I just answered questions. I think that's advising.
11 I think that's what all directors, all captive agencies
12 should do if they're asked questions, to answer their
13 questions.

14 Q. Do you remember the general nature of the questions
15 that -- that you discussed with them?

16 A. I think it was very limited. The attorney general's
17 office did most of the testifying. I think -- I think I
18 was asked -- I can't remember if it was the Senate or the
19 House if we could do this and I think my simple answer was
20 yes, we can.

21 Q. Okay. Did the attorney general's office consult with
22 you in any way?

23 A. I think they probably consulted with my lawyers.

24 Q. Okay. So did you give the Legislature any specifics
25 about how this could be done or did you just say I believe

1 we can do it?

2 A. I just said I believe we can do it.

3 Q. Okay. And was there anyone else from the Department
4 of Corrections that advised them besides you?

5 A. I'd be the main person. I do have a legislative
6 person, but I don't think he would have talked to them.
7 For something like this, they would have come to me.

8 Q. Okay.

9 MR. KENDRICK: One more second.

10 (Discussion between counsel.)

11 MR. KENDRICK: Director Stirling, that's all the
12 questions I have for you. I appreciate your time this
13 morning.

14 THE WITNESS: Thank you very much.

15 THE COURT: Mr. Plyler.

16 MR. PLYLER: Yes, Your Honor. Very briefly.

17 May it please the Court?

18 CROSS-EXAMINATION

19 BY MR. PLYLER:

20 Q. Director Stirling, during your examination by
21 Mr. Kendrick you were asked if you had any background in
22 corrections before you were -- you were selected to be
23 interim director and eventual director of the Department of
24 Corrections; is that right?

25 A. Yes, sir.

1 Q. That wasn't a secret that you didn't have a background
2 in corrections when you were selected, was it?

3 A. No. I mean, my family's been in law enforcement for
4 over a century now, but not specifically corrections. It
5 was more on the police officer side.

6 Q. Sure. And you've been the director for how long now?

7 A. October 1, 2013, I was interim and then sometime in
8 January of 2014 I was -- I was voted on by the Senate and
9 confirmed to be the director of the Department.

10 Q. And how many governors have you served under?

11 A. Two. So about a hundred years it feels like.

12 Q. You'd agree with me that you didn't choose what the
13 methods in South Carolina should be for carrying out
14 executions, right?

15 A. Not my role.

16 Q. Right. That's set by statute?

17 A. Yes.

18 Q. And the death penalty in general is set by statute?

19 A. Correct. Correct.

20 Q. In fact, the responsibilities of your department, the
21 South Carolina Department of Corrections, are also set by
22 statute; is that right?

23 A. Yes.

24 Q. Okay. And at no point did you lobby to have firing
25 squad added to this statute, did you?

1 A. I did not.

2 Q. Do you -- do you know where that originated from?

3 A. I do. During one of the hearings several years ago on
4 another portion of the protocols, a Senator Shealy pulled
5 up on her phone or iPad and said we should do firing squad,
6 it's hundred percent accurate, and then that kind of --
7 nothing ever came of that and then Senator Harpootlian
8 and I think Senator Hembree sponsored a bill in the Senate
9 to add the firing squad and change the way the law was
10 written.

11 Q. Bear with me just for a minute, sir.

12 I'm gonna ask that you look at Plaintiff's Exhibit 6,
13 please, which is the photograph of the electric chair.

14 A. I believe I gave it -- thank you.

15 Q. And you were asked some questions by Mr. Kendrick
16 about this particular photograph; is that right?

17 A. Yes, I was.

18 Q. Okay. Now that just shows the actual chair, correct?

19 A. Yes.

20 Q. It doesn't show the electrical system for the chair,
21 does it?

22 A. No.

23 Q. Yeah. So you were -- when you were answering
24 questions about that, about whether the physical structure
25 of the chair had been updated in any way, you -- that's --

1 that's the subject matter for which you were answering?

2 A. The wooden part of the actual structure of the chair
3 is what my understanding of the question was.

4 Q. Okay. Historically speaking -- like Broad River
5 Correctional Institution's where executions are now carried
6 out; is that right?

7 A. Yes, sir.

8 Q. That didn't exist back in 1912, did it?

9 A. I have no knowledge of that. I don't -- I don't think
10 so. I forget when Broad River was built, but it wasn't in
11 1912.

12 MR. PLYLER: Director, I'm gonna -- I'm gonna be
13 done with my questions. Obviously, the Governor's also
14 a defendant in this case and has separate counsel. They
15 may have some questions for you, so please answer any
16 questions they might have.

17 Thank you.

18 THE WITNESS: Am I done with this?

19 MR. PLYLER: Yeah, you can give that back to the
20 court reporter.

21 THE WITNESS: I get nervous about exhibits in a
22 trial and I don't want them to get lost.

23 MR. LIMEHOUSE: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. LIMEHOUSE:

1 Q. Director, Thomas Limehouse, as you know, counsel for
2 Governor McMaster. I have a couple of quick questions for
3 you. I believe you said it was in 2014 you were appointed
4 by Governor Haley; is that correct?

5 A. I was appointed in 2013 and then I was confirmed in
6 2014.

7 Q. When you were first appointed and later confirmed, did
8 you take an oath of office?

9 A. I don't think I did. I -- there was -- I don't
10 remember. No, I did not raise my hand or anything. I was
11 just voted on by the Senate.

12 Q. When you were given your commission --

13 A. Yes.

14 Q. -- did you sign forms from the Secretary of State?

15 A. Right. Yes. So I signed that. I'm sorry. There was
16 no formal ceremony or anything like that. Just --

17 Q. Do you -- do you take the -- that oath and your duties
18 seriously?

19 A. Yes. I mean, I take it as a person, as -- you know,
20 as a lawyer, as a director. I take -- we deal with life
21 and death stuff all the time in the Department, so I take
22 everything we do very seriously.

23 Q. Thank you.

24 MR. LIMEHOUSE: Thank you for your service. No
25 further questions.

1 THE COURT: Mr. Kendrick.

2 MR. KENDRICK: That's all we have for Director
3 Rush -- Stirling.

4 MR. PLYLER: Your Honor, I believe they have him
5 under subpoena. I just ask that he be released from the
6 subpoena. Obviously as a defendant, he may want to
7 continue to attend. I just wanted that formality taken
8 care of.

9 THE COURT: Any objection?

10 MR. KENDRICK: Of course. My apologies for keeping
11 you under that subpoena for longer than I meant to.

12 THE COURT: All right. Thank you. You're free
13 to go.

14 THE WITNESS: Thank you. Thank you, Judge.

15 (Witness excused.)

16 THE COURT: Call your next -- your next
17 witness.

18 MR. KENDRICK: The next witness would be Collie
19 Rushton.

20 MR. PLYLER: Colie Rushton.

21 MR. KENDRICK: Colie Rushton. I apologize. Sorry
22 for the mispronunciation.

23 BAILIFF: Step forward and be sworn, sir. Face the
24 clerk.

25 (Whereupon, Colie Rushton was duly sworn by the

1 Clerk of Court.)

2 THE CLERK: Thank you. Please have a seat in the
3 witness stand and state your full name for the record
4 and please spell your first and last name.

5 THE WITNESS: All right. My name is Colie,
6 C-O-L-I-E, Rushton, R-U-S-H-T-O-N.

7 COLIE RUSHTON,
8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. KENDRICK:

11 Q. Good morning, Mr. Rushton.

12 A. Good morning.

13 Q. My name is Josh Kendrick. I represent the plaintiff
14 in this case. You and I have met previously.

15 A. Yes, sir.

16 Q. And I want to be clear when I address you. What is
17 your title at the Department of Corrections?

18 A. I am Director of Security and Emergency Operations for
19 Department of Corrections.

20 Q. Is Director Rushton the appropriate way to address
21 you?

22 A. That's fine.

23 Q. Okay. And I'll tell you why. Because I -- I don't
24 have a lot of questions about your background, but I
25 remember from deposing you that you've been with the

1 Department of Corrections for almost half a century,
2 correct?

3 A. Yes, sir. As a matter of fact, I will -- come Friday,
4 I will start my forty-ninth year.

5 Q. And -- and just to walk you through what you've done
6 there, it's my understanding you became a senior deputy
7 warden in 1986, the warden in 1995, and then your current
8 role of Director of Security in 2007?

9 A. That's correct.

10 Q. Would you mind just telling the Court just generally
11 what your role as Director of Security encompasses.

12 A. As Director of Security and Emergency Operations, I
13 am responsible for all the emergency teams, which would be
14 the special ops, the hostage negotiation, which is the
15 SITCON, and the RRT, which is the rapid response team. I
16 also have an oversight over the gang intelligence unit, the
17 transportation unit, emergency action center, the agency
18 search team, the drone unit, the specialized dog unit, post
19 orders. We have security at community hospitals, we have
20 oversight on the SCDC security details at the Statehouse.
21 There's probably more, but that's -- that's what I recall
22 at this point.

23 Q. So it's fair for me to say it's a wide variety of
24 things and a lot of responsibility?

25 A. Yes, sir.

1 Q. Okay. What I want to talk to you about today is in
2 your role as Director of Security we're gonna start with
3 your knowledge of the electric chair. Are you familiar
4 with the electric chair protocols?

5 A. Yes, sir.

6 Q. Okay. And are you familiar with the current voltage
7 and timing of an electrocution?

8 A. Yes, sir.

9 Q. You would agree with me so we're talking about the
10 same thing, that Phase I is 2,000 volts for four and a half
11 seconds?

12 A. Yes, sir.

13 Q. Phase II would be a thousand volts for eight seconds?

14 A. Correct.

15 Q. And then Phase III would be -- I think I messed this
16 up. 240 or 120?

17 A. 120 at 120 seconds.

18 Q. 120 for 120 seconds. Do you know who decided on that
19 voltage and timing?

20 A. I do not.

21 Q. Was that voltage and timing created while you were
22 director of security?

23 A. No, sir.

24 Q. Would that voltage and timing have been created by a
25 prior Director of Security?

1 A. I do not know that.

2 Q. Did you -- to say it simply, did you inherit that
3 protocol?

4 A. Yes, sir.

5 Q. Do you have any knowledge as to why that voltage and
6 timing is used?

7 A. I do not.

8 Q. When is the first time you would have reviewed an
9 electrocution protocol as the Director of Security?

10 A. Well, I -- I took the Director of Security position in
11 May of 2007, so it would have been somewhere around that
12 time.

13 Q. Okay. And as your role of Director of Security, that
14 falls under your general responsibilities, right?

15 A. Yes, sir.

16 Q. Okay. Do you have any knowledge related to
17 electricity?

18 A. You need to be more specific.

19 Q. I do. You're exactly right. Why don't you tell me
20 the extent of your knowledge related to electricity.

21 A. I know it keeps my house cool and lighted.

22 Q. There you go. You and me are in the same boat. So
23 is it fair to say that you don't have a lot of detail or a
24 lot of knowledge about sort of what -- why these voltages
25 and phases were selected for the electric chair?

1 A. That would be accurate.

2 Q. Okay. And you don't know who determined those?

3 A. I do not.

4 Q. Have you consulted with anyone about that protocol?

5 A. I have not as it relates to why those numbers are
6 selected.

7 Q. Why those -- so let me ask you a series of questions.
8 Have you -- have you consulted with anyone about why those
9 voltage numbers were selected?

10 MR. PLYLER: Your Honor, I -- I'd just ask for one
11 -- one -- one second. We'd object -- can I explain my
12 objection? I'm trying to do it correctly.

13 THE COURT: Yes.

14 MR. PLYLER: The word "consulting" should include
15 legal counsel either for the Department or for me in this
16 litigation.

17 MR. KENDRICK: I can correct it.

18 BY MR. KENDRICK:

19 Q. Let me rephrase that question. Have you consulted
20 with a subject matter expert in the area of electricity
21 unrelated to the litigation we're in now about the voltage
22 and the timing of the electric chair?

23 A. I have not.

24 Q. Okay. Have you -- and so that would encompass
25 consulting as to whether this protocol is appropriate or

1 needs to be changed, right?

2 A. Clear that up.

3 Q. You've never gone to an expert and said hey, this is
4 the -- the three phase system we use to -- in our electric
5 chair. Do you have any thoughts on it?

6 A. I have not.

7 Q. Okay. Have you ever been asked to do that?

8 A. No, sir.

9 Q. Do you know whether anyone at the South Carolina
10 Department of Corrections has ever done that?

11 A. I do not.

12 MR. KENDRICK: Madam Court Reporter, I need to make
13 sure I don't mis-refer to some exhibits, so if I could
14 have the two pictures.

15 THE COURT REPORTER: (Handing.)

16 BY MR. KENDRICK:

17 Q. Director Rushton, I am gonna show you what has been
18 previously entered as Plaintiff's Exhibit 6.

19 MR. KENDRICK: Your Honor, my apologies. I know I
20 need to ask to the approach the witness. Are you okay
21 if we just do that during the course of the trial?

22 THE COURT: I'd rather you not ask to approach the
23 witness.

24 MR. KENDRICK: Perfect. Thank you.

25 BY MR. KENDRICK:

1 Q. The Exhibit 6 you have in front of you, Mr. Rushton,
2 is also the top picture on this easel here.

3 A. Yes, sir.

4 Q. Do you recognize that?

5 A. Yes, sir.

6 Q. And that's the electric chair, right?

7 A. That is correct.

8 Q. Do you know how old this chair is?

9 A. I do not.

10 Q. Do you know if this is the original chair from when
11 South Carolina -- South Carolina began using the electric
12 chair for executions?

13 A. I would say it is not the first chair.

14 Q. Okay. Do you know if it is the second chair?

15 A. I think it would be at least the second chair.

16 Q. And do you have any general timeframe of when this
17 chair would have come into existence?

18 A. Not when it come into existence, no, sir.

19 Q. Okay. Do you know whether any changes have been made
20 to this chair ever?

21 A. If any changes have been made, it would only be to
22 replace a strap.

23 Q. Okay. And do you know if any changes, including what
24 you just referred to, have been made since 2007 when you
25 took over as Director of Security?

1 A. I do not.

2 Q. Would you be consulted about those changes?

3 A. Yes.

4 Q. Okay. So have you been consulted about any changes?

5 A. I have not.

6 Q. Okay. Director Rushton, I'm gonna show you what we've
7 previously entered into evidence, Plaintiff's 8 and 9, and
8 what I understand those to be are letters memorializing
9 a test of the electric chair last fall and earlier -- last
10 summer and earlier this spring; is that correct?

11 A. This is April of 2022 and June of 2021.

12 Q. Yes, sir. Were you aware that the chair was being
13 tested on those dates?

14 A. Yes.

15 Q. And were you present at the tests?

16 A. Yes, sir.

17 Q. Okay. One of the things that it says in that letter
18 is that there is a load bank that simulates the impedance
19 of the human body, and the way I understand that, impedance
20 would be the -- the conductivity or resistance to
21 electrical flow. Do you -- is that how you understand
22 impedance?

23 Maybe a better question to start with, and I
24 apologize, did you have any involvement in this load bank
25 or that testing process?

1 A. No, sir. I was there only for observation.

2 Q. Okay. So do you know why they would have used that
3 specific load bank?

4 A. Not specifically I wouldn't.

5 Q. Okay. So is it also fair to say that you would not
6 know why they made the determination during the testing
7 that that load bank simulated the human body's impedance?

8 A. No, sir. I would assume that would be the expert that
9 -- that conducted it.

10 Q. Did you have any discussion with that expert about
11 whatever decision led to using that load bank?

12 A. No, sir.

13 Q. Okay. Do you have any knowledge as to whether that
14 load bank accurately reflects the impedance of the human
15 body?

16 A. I do not.

17 MR. KENDRICK: One second, Your Honor.

18 (Discussion between counsel.)

19 BY MR. KENDRICK:

20 Q. One of the things that we -- we've learned from the
21 documents we're talking about is the three phases that I
22 referenced earlier, Director Rushton. Is there a -- do you
23 know whether the protocol contemplates a pause between
24 those three phases or whether they happen immediately one
25 after the other?

1 A. As one phase ends, the other one begins.

2 Q. Okay. So there's no pause in between?

3 A. It's automatic.

4 Q. Thank you.

5 The next thing I want to talk to you about, Director
6 Rushton, is the firing squad, which you'd agree with me is
7 a relatively new method of execution in South Carolina,
8 right?

9 A. Yes, sir.

10 Q. And you were tasked by the Department of Corrections
11 with developing the protocol for the firing squad, correct?

12 A. Yes, sir.

13 Are we -- excuse me, are we through with this?

14 Q. Oh, yeah. You can give that back. Thank you for
15 reminding me.

16 Was it Director Stirling that asked you to develop
17 that protocol?

18 A. Yes, sir.

19 Q. Did you have any guidance or did you basically start
20 from scratch in creating the protocol?

21 A. I -- I researched the information that was -- that was
22 available for a starting point.

23 Q. Okay. And I'm gonna ask you a series of questions
24 about some of --

25 MR. PLYLER: We might need to have a quick sidebar.

1 It's an issue that I -- that I didn't anticipate coming
2 up, but that came up previously that we haven't talked
3 about yet.

4 THE COURT: Okay. You-all approach.

5 (Proceedings held at the bench; not reported.)

6 THE COURT: Proceed, Mr. Kendrick.

7 BY MR. KENDRICK:

8 Q. Director Rushton, in the course of your development
9 of the protocol, you gathered information about other
10 firing squads, correct?

11 A. Yes, sir.

12 Q. I believe you talked to officials in the State of Utah
13 about the firing squad?

14 A. Yes, sir.

15 Q. Did you talk to officials in any other states about
16 the firing squad?

17 A. No, sir.

18 Q. Did you talk to any military officials about the
19 firing squad?

20 A. I did not talk to any.

21 Q. Okay. And I believe we talked about the fact that you
22 looked on the Internet to conduct some of this research
23 about firing squads; is that correct?

24 A. That's correct.

25 Q. Did you look at any of the historical uses of a firing

1 squad?

2 A. I did.

3 Q. And what did you find out about the historical use of
4 a firing squad?

5 A. Well, that it's been used by the military.

6 Q. Okay. And when was the last time the military shot
7 someone to death with a firing squad?

8 A. I -- I don't recall.

9 Q. Okay. Do you know if it was recent or a while ago?

10 A. I do not.

11 Q. Okay. Did you do any research into China's use of the
12 firing squad?

13 A. No, sir.

14 Q. How about Iran?

15 A. No, sir.

16 Q. Iraq?

17 A. No, sir.

18 Q. Egypt?

19 A. No country outside the United States.

20 Q. Okay. So none of the middle eastern countries, none
21 of the other few countries in the world that use firing
22 squads, you didn't research their use of this method?

23 A. No country outside of the United States.

24 Q. Did you consult with any doctors regarding the
25 development of firing squad protocol?

1 A. I did not.

2 Q. Did you consult with any firearms experts regarding
3 the development of a firing squad protocol?

4 A. I did not.

5 Q. Okay.

6 MR. KENDRICK: I'm gonna mark this and move it
7 into evidence. Be prepared.

8 (Plaintiff's Exhibit Number 12 was marked for
9 identification.)

10 MR. KENDRICK: That will be Number 12.

11 THE COURT: Do you have a copy for me?

12 MR. KENDRICK: I do. I'm sorry Judge. I don't know
13 why I always leave you out.

14 Any objection to moving this into evidence?

15 MR. PLYLER: Your Honor, I'm just gonna put on the
16 record we don't have an objection to the authenticity
17 and foundation of this particular document. It was --
18 it was originally produced under a confidentiality order.
19 We talked yesterday and I was -- they asked if they could
20 use this and I didn't ask that it be placed under seal,
21 so we're not gonna make that objection either. And the
22 reason I'm hesitant is -- well, you know what, I'm not
23 gonna propose any objection to it at this time.

24 Thank you, Your Honor.

25 THE COURT: Plaintiff's 12 is admitted without

1 objection.

2 MR. KENDRICK: Thank you, Judge.

3 (Plaintiff's Exhibit Number 12, ballistic
4 information sheet, was admitted into evidence.)

5 BY MR. KENDRICK:

6 Q. Director Rushton, I'm gonna show you what we've
7 marked as Plaintiff's Exhibit 12. During the course of
8 your development of the protocol, one of the things you
9 researched on the Internet was the ammunition that would
10 be appropriate for a firing squad death, right?

11 A. Yes, sir.

12 Q. And you came to the decision that the 308 Winchester
13 110-grain TAP Urban round would be the appropriate
14 ammunition, correct?

15 A. Correct.

16 Q. How did you come to that decision?

17 A. Based on the fact that this round is a fragmentation
18 round, meaning that when it makes contact that the bullet
19 starts to fragment, which then creates cavitation, versus
20 if you have a -- a bullet that does not fragment, then it
21 stays solid and would be subject to drill straight through
22 whatever it hit, and with the fragmented round, with this
23 308 110 TAP Urban, once it -- once it hits -- in this case
24 if we were using it in a firing squad, that once it hit the
25 individual and the bullet starts to fragment, then it would

1 create cavitation at the heart and, therefore, cause a more
2 instantaneous death versus if you had a clean shot through
3 that would facilitate a more long-term bleed out, which in
4 my opinion, would cause a prolonged or a more prolonged
5 death, whereas with this bullet it's more instantaneous.

6 Q. I'm gonna go backwards a couple of steps and then
7 bring you back up to what we just talked about. Do you
8 have any formal training in ballistics?

9 A. Be more clear.

10 Q. By ballistics, I would mean -- and that's good. How
11 about this? Do you have any formal training in the effect
12 of a bullet or other projectile on a human body?

13 A. I've not went to any class concerning shooting
14 individuals and the effect that the bullet has when it hits
15 them.

16 Q. Okay. Have you -- have you done something else to
17 look into that knowledge?

18 A. Other than my just research.

19 Q. And when we talk about this research, was it done on
20 a general database like Google or was it done on a special
21 database that you might have access to based on your role
22 at the Department of Corrections?

23 A. I'm not aware of any special database.

24 Q. Okay. And I don't know. So -- so basically you go on
25 the Internet and you look up this ammunition. So when you

1 talk about the fact that you decided on the TAP Urban, one
2 of the things you talked about was cavitation?

3 A. Yes.

4 Q. Can you tell the judge what cavitation means?

5 A. In -- in the firing and impact of this bullet -- and
6 -- and when you asked about the research, I researched
7 what information the FBI had on this bullet as far as the
8 cavitation goes and when it's -- when it's used -- fired
9 in a general pop and the cavitation is when the -- the
10 bullet impacts, say, in this case a -- a person and the
11 bullet being fragmented goes -- it breaks into pieces when
12 the bullet goes in and the cavitation is when it expands
13 the area that it hits. And in this case, for instance, it
14 may be that you have an expansion of -- of four or six
15 inches cavitation is where it would expand the tissue in
16 that area where the bullet hits.

17 Q. Okay. So earlier when you were talking about, for
18 example, a round that does not fragment, so if we had a
19 308 that was not a fragmenting round, then I think you --
20 you stated what it would do is go right through body with
21 a very small path, correct?

22 A. Yes, sir. It wouldn't have the cavitation that a
23 fragmented round does.

24 Q. Far more likely under those circumstances to not cause
25 as much injury and probably not death, right?

1 MR. PLYLER: Object to the form.

2 A. It would not --

3 MR. PLYLER: Objection.

4 THE COURT: Overruled.

5 MR. PLYLER: Okay.

6 THE WITNESS: In my mind it would cause death, but
7 it would take longer to bleed out because there wouldn't
8 be the -- the trauma to the heart as instantaneous as a
9 fragmented round will.

10 BY MR. KENDRICK:

11 Q. And the -- and the point of the fragmentation and the
12 cavitation is the damage that is done to the heart area?

13 A. Correct.

14 Q. And you said that from your research the cavitation of
15 the TAP Urban was somewhere in the neighborhood of four to
16 six inches and do you mean depth or width?

17 A. Well, that would be in the -- as far as the cavity
18 goes.

19 Q. All right. So -- so you're on page 2 of that
20 exhibit --

21 A. Correct.

22 Q. -- and you're looking at -- it looks like the top
23 results?

24 A. Yes, sir.

25 Q. And I think you said this earlier, but for

1 clarification with the judge, when you talk about the
2 gelatin, can you describe for us what that is that you're
3 using to test this bullet?

4 A. Yes, sir. Your Honor, it is called ballistic gelatin
5 and in our -- in our testing it's the same as the FBI and
6 -- and the block was approximately sixteen inches by six
7 inches in depth in a rectangular block and so when -- when
8 the bullet penetrates the gelatin and it fragments as in
9 this picture here, it's not as clear as if you were looking
10 at the block of gelatin, but it shows how the bullet
11 expands in that area into the -- you know, what distance
12 the bullet fragments travelled, so that gives you a
13 simulation of if it hit the intended person what it's
14 subject to look like so you can assess the -- the expansion
15 of the -- the tissue in that area.

16 Q. And what I'm gonna stick with, Director Rushton, is
17 the top entry there because that's the gelatin, and I don't
18 particularly care about the other four materials, so the
19 gelatin chart has a series of measurements across the top.
20 Do you see that?

21 A. Yes.

22 Q. And total penetration would be how far in inches the
23 bullet travelled into the gelatin before it stopped,
24 correct?

25 A. Yes. That is shooting at bare gelatin.

1 Q. Okay. And we'll talk for a minute about some of the
2 differences if it wasn't bare gelatin, but that is ten
3 inches of penetration, correct?

4 A. Correct.

5 Q. And then the second category is max cavity and does
6 that mean the largest area of cavitation from the bullet?

7 A. Yes.

8 Q. And that is six inches, so can we understand from this
9 chart that that would be a six-inch wide cavity?

10 A. According to this chart that would be the maximum that
11 it should produce.

12 Q. And just one more. The next category is depth to max
13 cavity is four and a half inches. If we put those two
14 numbers together, do you understand that four and a half
15 inches into the gelatin there's a six-inch cavity?

16 A. Yes, sir.

17 Q. Okay. Now when you -- you got this testing, you
18 referred to it as FBI testing?

19 A. Yes.

20 Q. Did you find this on the general Internet like Google
21 or did you discuss it with the FBI?

22 A. No, I found this in searching the ammunition.

23 Q. Okay. And once you found this, did you then go and
24 talk to the FBI about their testing?

25 A. I did not.

1 Q. Okay. Did you talk to anyone in South Carolina law
2 enforcement about the testing?

3 A. I did not.

4 Q. Did you take this testing to anyone who is an expert
5 in ballistics or firearms?

6 A. I did not. I utilized the information provided by the
7 ammunition company.

8 Q. Okay. And -- and is the -- the block of gelatin you
9 referred to something that is generally available?

10 A. It is through -- through -- yes, sir.

11 Q. Okay. So I don't have to be like a certified law
12 enforcement agent or a government worker to get it, it's
13 something that any of us could get and use?

14 A. That's correct.

15 Q. Okay. Did you take those test results to anybody in
16 the medical field to discuss how the human body might match
17 the gelatin results?

18 A. I did not.

19 Q. Okay. Do you have an understanding of how the human
20 body would be affected by the bullet as opposed to the
21 gelatin?

22 A. I have the understanding that once -- once the bullet
23 hits the body and based on the fact that there's bone in
24 front of the heart that at that point the bullet will begin
25 to fragment and, therefore, result in the cavitation,

1 whereas with the gelatin the bullets go into enter and it
2 doesn't have the same resistance that bone would have.

3 Q. And the heart -- some of us who when we put our hands
4 over our heart kind of have this idea that it's on the left
5 side our body, but would you agree with me it's actually
6 closer to the middle of your chest?

7 A. Unless you have an anomaly, yes.

8 Q. Right. So if you don't have an anomaly, if you have
9 a standard heart, if you will, the average heart that's
10 located roughly in the middle of the chest, do you know
11 whether or not the heart is located behind bone?

12 A. It would be bone and cartilage.

13 Q. Okay. And will that bone and cartilage cover the
14 heart?

15 A. Yes.

16 Q. And how big do you understand the human heart to be?

17 A. My research as said that the human heart is -- is
18 basically the size if you took both your fists and put them
19 together.

20 Q. Like this?

21 A. Yes.

22 Q. And would that be standard across five people? For
23 example, if I have smaller hands than you, would you be
24 able to account for that or does that really matter?

25 A. I -- I can't answer that.

1 Q. Okay. Did you learn that in the course of your
2 general research that we've been discussing?

3 A. I did.

4 Q. Okay. Did you discuss with a medical professional
5 whether that was accurate or not?

6 A. I did not.

7 Q. Did you discuss with anyone about the different parts
8 of the heart?

9 A. No, I just -- just what I researched and read.

10 Q. Okay. Do you hold the belief that when the bullet
11 hits the person they will immediately lose consciousness?

12 A. I believe it would be very quick.

13 Q. Do you have a definition in seconds for your term
14 "very quick"?

15 A. No, I can't -- I can't say that.

16 Q. Can you tell me the basis for that knowledge? Why do
17 you believe that?

18 A. Because if the -- if the heart -- I believe if the
19 heart's been destroyed, then the person will cease to
20 survive.

21 Q. Okay. And do you have a source of information for
22 that?

23 A. I think it's common sense.

24 Q. Okay. Do you have an understanding of the damage that
25 will occur to the human body when these bullets hit the

1 chest?

2 A. It's if -- if the bullets hit the heart and the
3 heart's destroyed, then the blood will stop pumping.

4 Q. Do you know what that would look like? What that
5 wound would look like?

6 A. It will look like a bullet entry wound from the
7 outside.

8 Q. Do you have an understanding of the size of the bullet
9 entry wound?

10 A. The entry wound would be approximately the size of the
11 bullet.

12 MR. KENDRICK: One second, Your Honor.

13 (Discussion between counsel.)

14 MR. KENDRICK: That's all I have, Your Honor.
15 Thank you very much.

16 THE COURT: Mr. Plyler.

17 MR. PLYLER: Briefly, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. PLYLER:

20 Q. Director Rushton, thank you for being here and thank
21 you for fifty years service to the people of South
22 Carolina. We -- I don't want that to go unnoticed. We
23 sure appreciate it.

24 I want to start my questions -- and I can be very
25 brief -- with this photo of the electric chair that

1 Plaintiff's counsel keeps referring to that's Plaintiff's
2 Exhibit 6, and that's just the chair itself, correct?

3 A. That's correct.

4 Q. All right. So the electrical system is not pictured
5 in this particular photograph?

6 A. It is not.

7 Q. All right. The chair that's pictured in this
8 photograph is at the Broad River Correctional Institution;
9 is that right?

10 A. At the capital punishment facility, yes, sir.

11 Q. Okay. It hasn't always been there, has it?

12 A. No, sir.

13 Q. All right. Before -- at one point it was at what has
14 now been torn down, the -- the Central Correctional --

15 A. CCI. Yes, sir.

16 Q. -- Institution? Would you agree with me that this --
17 the chair and the capital punishment facility was moved to
18 its current location in approximately 1989?

19 A. That's correct.

20 Q. Okay. In 1989, what was your role at the Department
21 of Corrections?

22 A. In 1989, I was the senior deputy slash associate
23 warden at the McCormick Correctional Institution.

24 Q. Were you aware through that role and your position in
25 the Department that the capital punishment facility was

1 being constructed and the chair was gonna be moved to that
2 location off of Broad River Road?

3 A. Yes, sir.

4 Q. Okay. And you're aware that was gonna be a new
5 electrical system that was being constructed to be used in
6 this facility?

7 A. Well, I knew it was new construction, so everything
8 would be new with the exception of the chair being located
9 there.

10 Q. That's a much better answer than the question was, so
11 I appreciate it. So it was raw land and they built the
12 capital punishment facility to include the electrical
13 systems, moved the chair there, and that occurred in 1989?

14 A. Yes, sir.

15 MR. PLYLER: Thank you very much, sir. Again,
16 as I said, thank you for your service to the people of
17 South Carolina. We appreciate it.

18 THE COURT: Mr. Limehouse.

19 MR. LIMEHOUSE: No further questions, Your Honor.

20 THE COURT: Mr. Kendrick, anything further from this
21 witness?

22 MR. KENDRICK: That's all I have, Your Honor. Thank
23 you very much.

24 THE COURT: Okay. Thank you. You may step down.

25 THE WITNESS: Thank you.

1 (Witness excused.)

2 THE COURT: All right. Let's take about a 15-minute
3 break and then we will resume. Fifteen minutes.

4 MR. KENDRICK: Thank you, Judge.

5 (Recess taken at 12:11 PM.)

6 (Back on the record at 12:22 PM.)

7 BAILIFF: Remain seated. Come to order, please.

8 THE COURT: All right. So did you have something,
9 Mr. Kendrick?

10 MR. KENDRICK: I was just gonna say, Your Honor,
11 my understanding is the next very short part of the trial
12 is in-camera.

13 THE COURT: Absolutely. Right. So -- that's where
14 I was going. I understand there's some additional
15 testimony for the Court to hear that the Court has
16 ruled will be in-camera, it will be brief, and we are
17 gonna take a lunch break immediately afterward, so I
18 will excuse everyone from the courtroom now. We'll
19 start back -- how short is short, Mr. Kendrick?

20 MR. KENDRICK: Ten minutes. Fifteen minutes,
21 Judge.

22 THE COURT: We'll start back at 2:30.

23 So I'll excuse everyone from the courtroom now
24 until 2:30.

25 (Whereupon, the courtroom was cleared.)

1 Redacted - S.C. Code 24-3-580

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22 (Whereupon, the sealed portion of the transcript
23 was concluded.)

24 THE COURT: Anything else before we break for lunch,
25 folks?

1 MR. KENDRICK: No, Your Honor.

2 THE COURT: Mr. Plyler.

3 MR. PLYLER: Nothing that I can think of, Your
4 Honor.

5 My understanding is they're calling Dr. Wikswo as
6 the last witness of the day. I will -- I will say I'm
7 concerned that -- I mean, we may have to push a little
8 late, if that's okay with the Court, to get him finished
9 today. I know it's okay with the people at my table
10 because if we're gonna have four witnesses tomorrow -- I
11 know we would all love to wrap up tomorrow, if possible,
12 in terms of at least the witness testimony, and if we
13 had to push Dr. Wikswo until tomorrow morning or part
14 of his testimony until tomorrow morning, that may cause
15 an issue.

16 So I just figured I'd go ahead and broach the topic
17 now and whether we could push through even if it tends
18 to go a little late. I'm not talking about like 8 or
19 9:00 at night, I wasn't suggesting that, but, you know,
20 it might be 6, 6:30 or something. And just for no other
21 reason than procedural, just making sure that everybody
22 is kind of on the same page.

23 THE COURT: Okay. We'll try. We'll see what
24 happens.

25 All right. See you-all at 2:30.

1 MR. PLYLER: Thank you, Your Honor.

2 (Whereupon, a luncheon recess was taken at 12:38 PM.)

3 (Back on the record at 2:29 PM.)

4 BAILIFF: Court come to order. All rise, please.

5 You may be seated.

6 THE COURT: WLTX is here.

7 REPORTER: Yes.

8 THE COURT: Hi. Welcome.

9 Are we ready to roll?

10 MS. FREEDMAN: Yes.

11 THE COURT: Yes?

12 MR. FREEDMAN: Yes. We're ready.

13 THE COURT: Great. Let's do it.

14 Call your next witness.

15 MR. PLYLER: Your Honor, I -- I'm sorry.

16 I was just gonna give you an update on some things.
17 We -- we did -- the two autopsies that we were trying to
18 track down, we did track them down through the coroner's
19 office. I've marked them confidential and Bates labeled
20 them in accordance with your rulings and provided them
21 to plaintiff's counsel as soon as I could. I think my
22 turnaround was about fifteen minutes. I did the best I
23 could to get that turnaround.

24 I do have -- I received an e-mail from them at lunch
25 apparently with new evidence or something that they plan

1 on using with Dr. Wikswo that obviously I would object
2 to at this point on day two of the trial. It's kind of
3 hard to understand what exactly the intention of them
4 e-mailing it to me was, so I just would -- I guess to
5 the extent that I'm now aware of it, I'd just kind of
6 like to know, you know, if they plan on using this in
7 some way I think I'm definitely entitled to know what
8 that is considering I didn't get the opportunity to
9 question him about it when we took his deposition four
10 weeks ago. So I just figured I'd bring that to the
11 Court's attention.

12 And then from the standpoint of objections, in --
13 in the hopes of limiting the number of objections that
14 I may have to raise, I would just like to renew the
15 motion to exclude and the grounds for it as the bases
16 of his opinions and speculation, lack of foundation,
17 you know, lack of a reliable basis that you've already
18 heard and ruled upon to make sure I'm preserved and I
19 don't have to stand up and object every time I think
20 he's speculating, if that makes sense.

21 So to the extent I can have a continuing objection
22 to those issues, I believe it would make it where I am
23 not interrupting their direct as to all of those.

24 THE COURT: Understood.

25 MR. PLYLER: Thank you, Judge.

1 THE COURT: Let's talk about the e-mail and new
2 evidence.

3 MS. FREEDMAN: Yes. We -- we just felt like we
4 were under a continuing interrogatory and so part of
5 that was to provide, you know, material that gets
6 provided to us in the course of his -- he's just -- I
7 think I can ask -- yeah, it's just this the authority
8 that he's relying on. We just felt like this was part of
9 our on-going obligation pursuant to the interrogatories
10 to make sure that they had everything that he has given
11 to us.

12 THE COURT: Okay.

13 MS. FREEDMAN: We're not introducing them. These
14 are not gonna be exhibits or anything like that.

15 MR. PLYLER: Right. Except they want to offer
16 opinions basically based off information I was not
17 previously provided. I believe I even had an agreement
18 that if his opinion changed in any way, because I normally
19 ask that question, that they would alert us immediately.

20 So to the extent this is forming the basis of some
21 sort of opinion, then I -- I don't want to be hearing
22 about it for the first time up there. That's -- that's
23 what I'm trying to figure out. Because, quite frankly,
24 they've offered this man as the for -- quote, foremost
25 expert in his field, so I'm not understanding what in

1 the last four weeks he needed to learn or research that
2 he supposedly didn't already know as the expert. And I
3 certainly don't know why if it's important to this
4 opinions in this case, I wouldn't have been told about
5 it before I deposed him. It's not like I deposed him a
6 year and a half ago like sometimes happens in a trial.
7 This is actually just shy of four weeks ago. I believe
8 it will be a month at the end of this week.

9 THE COURT: Ms. Freedman.

10 MS. FREEDMAN: His opinions, to be very clear, have
11 not changed. What happened is their expert -- we deposed
12 their expert, he had some questions about the -- their
13 expert's deposition testimony that I think it was just
14 sort of intellectual curiosity on his part. He just
15 continued to do the same kind of sort of growth of his
16 intellectual base that he always does.

17 I mean, my understanding is he has a large file that
18 he keeps with a lot of articles that sort of support his
19 understanding of the basic principles that he's prepared
20 to talk about today. These are just additional sources.
21 This is just -- we were just trying to make sure that
22 we aren't sort of in violation of our obligations under
23 their interrogatories. He's not -- his opinion hasn't
24 changed. Nothing has changed. This is a just additional
25 authority.

1 THE COURT: And when did you come to learn about it?

2 MS. FREEDMAN: Over the last two days.

3 MR. PLYLER: Can I ask then why two minutes after I
4 left the courthouse and was walking down the street to
5 get lunch is the first time it got provided to me?

6 MS. FREEDMAN: I -- candidly, I was preparing with
7 him until 1:30 last night and so we did not sort of have
8 all of the materials together until then.

9 MR. PLYLER: See, this my confusion. If they got it
10 two days ago and the purpose was to comply with
11 interrogatories that were continuing, then why didn't
12 they produce it two days ago? Why was it only at 1:30
13 in the morning as they're preparing him for his testimony
14 that they realized they needed to provide it to me if it
15 doesn't form any of the bases for his opinions or anything
16 he's gonna use in them? That's -- that's my -- that's
17 where I'm confused. Like why is it even being provided
18 to me? The interrogatory was provide me anything that
19 your expert is using to form the bases of his opinion.
20 That's the interrogatory.

21 MS. FREEDMAN: And I -- you know --

22 MR. PLYLER: You didn't even send the e-mail. I
23 think Ms. -- Ms. Vann sent the e-mail. Maybe she can
24 explain why they literally waited until they walked out
25 of the courtroom doors on the lunch break to send it to

1 us.

2 MS. FREEDMAN: None of the -- maybe we didn't need
3 to send it to them. This was just really out of an
4 abundance of caution, I think, on our part just trying to
5 be as candid as possible. He had sent us these articles.
6 I hadn't even looked at them until when we were preparing
7 and so I -- you know, we -- we sent them as soon as we
8 could.

9 And I think -- to the extent that his objection is
10 -- is asking for some sort of relief, I don't really
11 think he can sort of extract the articles from his base
12 of knowledge. This is just information that he has
13 acquired in the course of his fifty years as an expert in
14 his field and this is just kind of the last four articles
15 he looked at before coming to court today.

16 THE COURT: What relief are you questioning,
17 Mr. Plyler?

18 MR. PLYLER: I just -- I don't want to be surprised.
19 You know, that's the whole purpose of me flying to
20 Nashville and taking this man's deposition was so that
21 we would know what his opinions were, we would know what
22 the bases of his opinions were, and that I would be
23 prepared to come in front of the Court and defend --
24 defend the statutes that we have.

25 THE COURT: I understand your position. What are

1 you asking the Court to do at this moment?

2 MR. PLYLER: If she's being honest with you and it's
3 not gonna form any of the bases of his opinions, then
4 that's really all I needed to know, but I just find it
5 highly suspicious that it's not gonna form a basis of an
6 opinion.

7 And to the extent he intends on using it in any way
8 in his opinions, I haven't had the opportunity to read
9 the four articles. These are four scientific articles
10 that literally just got e-mailed to me. So I -- the
11 main thing I want is some sort of explanation for why
12 I'm being provided what appeared to be new evidence on
13 the second day of this trial not even an hour and a
14 half before the witness that it apparently came from is
15 supposed to step onto the -- the witness stand.

16 THE COURT: I understand your concern. I'm asking
17 what you do want the Court to do?

18 MR. PLYLER: I -- and I'm trying -- I don't know
19 how to craft the appropriate -- I mean, to me, he should
20 have been excluded yesterday. I'm not rearguing that
21 argument, but this is just kind of a continuation of the
22 problem. If he knew this stuff and he's the world
23 foremost expert like they are claiming he is, then why
24 did he have to go look it up? Why did he have to go
25 find somebody else's work?

1 THE COURT: Listen. Time out.

2 MR. PLYLER: I'm sorry.

3 THE COURT: You know, because I think sometimes in
4 court we get a little far afield, and I --I promise I
5 don't mean to be dismissive of your statements in any
6 way, but from time to time counsels tend to, and I don't
7 mean you specifically, counsel tends to begin to vent
8 for lack of better phrase in front of the Court, right?

9 What the Court does is decide controversies. If you
10 want me to do -- and that's why I keep asking you what
11 would you like for me to do and then I can evaluate
12 whether I have an appropriate remedy, but just to sort
13 of get it off your chest and I don't know why and I
14 should have had this a couple of weeks ago, I hear you,
15 and I'm not trying to lessen the validity of your
16 concerns, but what do we do about it? You can be upset
17 about it and you can wonder all day long why you didn't
18 get it four weeks ago, but unless you need me to do
19 something --

20 MR. PLYLER: Your Honor, I -- to be quite frank,
21 I'm a zealous advocate for my client. I mean, that's
22 what all good lawyers should be. I'm not upset about
23 it. What I'm concerned about is ordinarily in trial --
24 and I'm not asking for this because all of us want this
25 -- this decision, and the Supreme Court's already said

1 you've got ninety days to do it, and that ends Thursday.
2 I would normally say Judge, I need an opportunity to go
3 talk to the witness about this and find out. Quite
4 frankly, it might undermine some of his opinions for all
5 I know, but I haven't even had a chance to look at them,
6 you know.

7 So -- I mean, if -- if he's not gonna rely on it
8 and that's what happens here, then I guess I have no
9 additional objections and it's more almost in the sense
10 of a motion in limine trying to make the Court aware of
11 what's happened and that there could be some surprise
12 that happens in the middle of his testimony and what I
13 believe is probably some discovery issues, but, then
14 again, considering the short timeframe, it's not as
15 egregious as you might think in the average case, so
16 it's -- it's less venting and more I'm not sure how you
17 deal with it because the remedy that would normally be
18 prescribed to something like this is a continuation or
19 exclusion or some ability to go talk to the witness
20 ahead of time and find out what this has to do with your
21 opinions in any way, not hear about it for the first
22 time on the stand, and I know we can't do some of those
23 measures. Thursday is the day.

24 THE COURT: We could recess this afternoon and I
25 can give you this afternoon to research and talk to him

1 about it and, you know, it will make tomorrow a long day
2 and maybe Thursday will be a long day as well to get her
3 done. But, I mean, if your goal was to finish testimony
4 tomorrow, testimony can spill into Thursday if necessary
5 because all that's after arguments is -- you know, all
6 the testimony has already been --

7 MR. PLYLER: We never expected -- when we gave you a
8 four-day estimate, it was after talking to them and they
9 told us that they had two days of testimony and we -- we
10 took that as Monday and Tuesday would be their witnesses
11 and then like the day before we start trial, they're
12 telling me well, one of their key witnesses isn't even
13 available until Wednesday, which then creates witness
14 availability issues for me. Some of my experts were
15 not gonna available on Thursday, but are available on
16 Wednesday.

17 So, you know, I believe I've put into the record,
18 I think, what I need to put in.

19 THE COURT: And I'm offering you a remedy.

20 MR. PLYLER: I don't -- I do not think that in the
21 interest -- the best interest of the Court's time, my
22 client's time, our witnesses and to keep from derailing
23 this trial -- I appreciate that remedy, but I don't
24 think that -- that I would ask that you grant that.

25 So if -- if somehow this becomes an issue during

1 his testimony, I would just ask for some leeway from the
2 Court, you know, for me to -- I just -- I just -- I guess
3 I don't want to try your patience with objections and --
4 and all that, so.

5 THE COURT: You-all keep saying that like I'm a
6 ticking time bomb. I'm really not.

7 MR. PLYLER: No, ma'am. It's just a concern I have
8 any time I'm presenting a case for a client and usually
9 there aren't this many surprises in -- during the trial
10 with new evidence and stuff like that, so I'm trying to
11 do handle this the best way I can and as professionally
12 as I can to make sure I'm also doing the job I'm supposed
13 to do for my client.

14 So if their representation is that he's not gonna
15 rely on it specifically, it's not gonna be introduced
16 into evidence, then hopefully nothing happens and we don't
17 have some other issue creep up during his testimony, so.

18 THE COURT: Fingers crossed.

19 MR. PLYLER: Thank you, Your Honor. I appreciate it.

20 THE COURT: All right.

21 The plaintiffs can call their next witness.

22 MS. FREEDMAN: Your Honor, we, I guess at this
23 point, would move to introduce the five -- plaintiffs'
24 first five exhibits into evidence.

25 We received two additional autopsies very recently.

1 I have -- candidly have not had an opportunity to review
2 them, so I think we'll just have to wait on those until
3 later, and for now just move the first five into evidence.

4 THE COURT: Have they been properly redacted, shown
5 to defense counsel, et cetera?

6 MS. VANN: We -- may I? Sorry. We were working on
7 this over lunch.

8 THE COURT: Give the court reporter your name for
9 the record.

10 MS. VANN: I'm sorry. I'm Lindsey Vann, counsel
11 for the plaintiffs. We had shown them to defense counsel
12 before lunch, we discussed additional redactions and then
13 did them over the lunch break. We have not had a chance
14 to review them with defense counsel to make sure that the
15 redactions are set.

16 THE COURT: That needs to be done for them to
17 determine whether there's an objection to the exhibits.

18 MR. PLYLER: Well, Your Honor, my understanding of
19 your earlier ruling is these are coming in under seal.

20 THE COURT: They are.

21 MR. PLYLER: So in the interest of time, I believe
22 that's something I can do after we end court today. So
23 as long as they're under seal, I don't know that the
24 specificity of the redactions at that point matter too
25 much that we can't start the witness.

1 So with that said, given your prior rulings on
2 these particular documents and the fact they're being
3 admitted under seal, we have no additional objections
4 to the documents.

5 THE COURT: Okay.

6 Plaintiff's 1 through 5 are admitted without
7 objection and those are under seal.

8 (Plaintiff's Exhibit Numbers 1 through 5, autopsy
9 reports, were admitted into evidence under seal.)

10 THE COURT: All right. Call your next witness.

11 MS. FREEDMAN: Thank you.

12 At this time the plaintiffs would call Dr. John P.
13 Wikswow, Junior.

14 BAILIFF: Come forward and be sworn, sir.

15 Place your left hand on the Bible and raise your
16 right.

17 (Whereupon, John Peter Wikswow was duly sworn by
18 the Clerk of Court.)

19 THE CLERK: Please have a seat there, sir. Speak
20 into the microphone. State your full name for the record
21 and spell your last.

22 THE WITNESS: My name is John Peter Wikswow, Junior.
23 Last name is spelled W-I-K-S-W-O.

24 THE COURT: Your witness.

25 MS. FREEDMAN: Thank you.

1 JOHN PETER WIKSWO, JUNIOR,
2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. FREEDMAN:

5 Q. Good afternoon, Dr. Wikswo. Could you please tell the
6 Court where you are currently employed?

7 A. Vanderbilt University in Nashville, Tennessee.

8 Q. And what is your job title at Vanderbilt?

9 A. I am the Gordon A. Cain University Professor, the
10 A.B. Learned Professor of Living State Physics, a tenured
11 professor of physics, a tenured professor of biomedical
12 engineering and a tenured professor of molecular biophysics
13 and physiology -- molecular physiology and biophysics.

14 Q. And if could you, Dr. Wikswo, I think it's a little
15 hard to hear. If you'd just back up a little from the
16 microphone.

17 A. Back up. Is that better?

18 Q. I think so. Okay. Yes. Thank you.

19 And what does it mean that you're the Gordon A. Cain
20 University Professor?

21 A. Mr. Cain, gave a substantial amount of money to
22 Vanderbilt to create the first university professorship
23 that is by definition is tenured in more than one school
24 and more than one department, and I was offered that
25 position. So I am, as I said, tenured in physics and

1 astronomy, biomedical engineering and molecular physiology
2 and biophysics.

3 Q. Thank you. Could you please describe your educational
4 background for the Court?

5 A. I received a bachelor of art in physics from the
6 University of Virginia in 1970. I received a master's
7 degree in physics from Stanford University in 1973 and
8 a Ph.D. in physics from Stanford University in 1975. I
9 then went on and became a research fellow in the Division
10 of Cardiology at the Stanford University Medical Center
11 funded by the Bay Area Heart Research Foundation.

12 Q. During the course of your education, did you receive
13 any particular honors?

14 A. Yes. I came to Virginia as an Echols Scholar, which
15 was one of the entering classes, the highest prospects. I
16 was elected to Phi Beta Kappa, the academic honorary
17 society, my junior year. I have graduated with highest
18 honors. I guess you'd say graduate as probably the word
19 entails. I've been an Alfred P. Sloan fellow, I've been
20 a Woodrow Wilson fellow, I've been a John Simon Guggenheim
21 fellow, and I think there are probably a few other ones,
22 but anyway.

23 Q. And are you a member of any professional organizations
24 and, if so, please describe them.

25 A. I'm a member of over dozen professional organizations

1 in physics, biomedical engineering and physiology,
2 including the American Physiological Association, the
3 American Heart Association, the Biomedical Engineering
4 Society and the American Institute for Medical and
5 Biological Engineering, Institute for Electrical and
6 Electronic Engineers, the American Physical Society. I'm
7 a fellow of the American Association for the Advancement
8 of Science.

9 Q. And what does it mean to be a fellow in a scientific
10 organization?

11 A. Basically it is a position -- it's an honor bestowed
12 upon the senior members of a scientific organization in
13 recognition of their contributions to the field and it's by
14 election by their peers.

15 Q. Could you, please, describe for the Court your current
16 work and research areas.

17 A. My primary research is in an area that's called
18 microphysiological systems, also know as organs-on-chips,
19 which is basically trying to recreate small scale
20 physiological systems for in vitro experiments in the
21 -- in the laboratory and that involves building a
22 brain-on-a-chip, a lung-on-a-chip. A -- the
23 brain-on-a-chip has a blood brain-barrier. A different
24 version is a blood CSF barrier, using an airway chip and
25 a brain chip to study COVID infections. We're doing

1 isolated cardiac -- actually engineered cardiac tissue
2 constructs on-a-chip to understand drug effects and
3 genetic disorders, and we're starting a major project to
4 build massively parallel bioreactors for pharmaceutical
5 and biotechnology applications.

6 Q. And I'm sorry to do this to you again, but can you
7 maybe push the microphone away from you a little bit? It's
8 just -- it's echoing a lot.

9 A. Okay.

10 Q. Is that better?

11 A. I hope. I can't tell.

12 Q. I think that's better. Yeah.

13 A. Okay. Good.

14 Q. Just try not to lean forward because then it gets all
15 echo-y.

16 A. It may be a reverberation of the glass wall.

17 Q. Right. And what additional kinds of research projects
18 have you been involved with in the past?

19 A. I've been involved in a -- a great breadth of
20 different research projects. I went to Stanford to measure
21 the magnetic fields of the brain, but the technologies that
22 we needed to do those experiments were never finished by
23 members of the group, so instead I measured the magnetic
24 field of the heart and invented a technology that lets you
25 make magnetic measurements of a cardiac contraction. That

1 was subsequently patented and became the de facto standard
2 for measuring iron liver content though I wasn't involved
3 directly in that research.

4 So I spent a lot of time at Stanford studying the
5 electrocardiogram, the electrical recordings of electrical
6 activity of the human heart and the dog heart, and magnetic
7 -- magnetocardiogram, magnetic recordings of the electrical
8 activity of the human heart.

9 When I went to Vanderbilt, I went there with the
10 express intention of making the first measurement of
11 the magnetic field of an isolated nerve axon, which I
12 succeeded in doing, and worked on that for more than a
13 dozen years. While we were doing that, we were measuring
14 magnetic fields of skeletal muscle and more to the point
15 of developing an intraoperative technique for measuring
16 nerve conduction velocity distributions in -- in an
17 operating room.

18 While I was at Vanderbilt, I continued my cardiac
19 research, began working on even a larger number of
20 experiments on dogs to measure, for example, the effects
21 of antiarrhythmic drugs on the conduction velocity of
22 electrical activation in the heart. We did studies of the
23 time course of the electrocardiogram changes associated
24 with acute myocardial infarctions. Heart attack.

25 The work on measuring conduction velocities with --

1 affected by antiarrhythmic drugs led to -- that plus the
2 magnetic measurements of the heart, those questions
3 together, led me to look into what's called the bidomain
4 model which explains how the insides of cells and the
5 outsides of cells talk to each other, particularly in
6 the heart, although that model is usually used for
7 electroconvulsive therapy now.

8 But going back to the bidomain model, that led us
9 to some observations that convinced the world that the
10 bidomain model of the heart was extraordinarily valuable.
11 We discovered what are called virtual electrodes in the
12 heart that has laid the solid foundation for today's
13 understanding how cardiac defibrillation works.

14 As we were measuring magnetic fields, I was contacted
15 by a number of different organizations to see whether I
16 could do nondestructive testing. I was funded by the
17 Electric Power Research Institute to see whether you
18 could use these superconducting magnetometers to identify
19 flaws in electrical hardware for power generation. Eli
20 Dupont funded us heavily to study if we could look at flaws
21 in plastics. The Air Force Corrosion Office and other Air
22 Force agencies funded me to look at corrosion in aging
23 aircraft.

24 In 2000, I decided that I wanted to get into
25 microfluidics. I got \$5 million grant to give Vanderbilt

1 -- to build for Vanderbilt the microfluidics, little --
2 little channels in plastic devices to study cells, and
3 proceeded to do a substantial body of work on the cell
4 migration association with cancer metastasis. That led
5 in about 2000 to three major projects on organs-on-chips.
6 One run by Harvard, one run by Los Alamos and one that I
7 ran. The project that I ran brought us the neurovascular
8 and blood brain-barrier on-a-chip.

9 There are probably a few other things we've done since
10 then. We've done a fair number of calculations. We did
11 one, for example, to determine whether -- which species
12 would be susceptible to COVID-19 infection.

13 Q. Great. Thank you. Do you have any patents?

14 A. I currently have forty. There are notices of
15 allowances out for two and there are several pending.

16 Q. And what about peer-reviewed articles?

17 A. More than 230 peer-reviewed articles and probably
18 twenty some book chapters, which are effectively reviewed
19 by either peers or the editor of the -- of the book.

20 Q. What -- what does it mean for an article to be
21 peer-reviewed?

22 A. Typically on a peer-reviewed journal, you submit it
23 to the editor of the journal, the journal is then given to
24 two or three anonymous reviewers who see if they can shred
25 it and find any methodological, stylistic or scientific

1 flaws and they then issue a decision that is then weighted
2 by the -- by the editor as to whether you reject it, accept
3 with minor revision, accept with major revisions or accept
4 as is. Typically what happens is it's accepted with either
5 minor or major revisions and you go through two or three
6 passes with the reviewers and eventually you have a
7 manuscript that everybody agrees is publishable or you
8 abandon the manuscript.

9 Q. And of --

10 A. It's quality -- it's peer quality control for the
11 scientific literature.

12 Q. Great. And of the articles you've published, how
13 many, if any of those, relate to human physiology?

14 A. In rough numbers probably about a third.

15 Q. What about electrophysiology?

16 A. More than quarter. I don't have the exact count of
17 manuscripts.

18 Q. That's no problem. What about cardiology?

19 A. Probably about a quarter. Maybe even more than a
20 quarter in cardiology since I've been doing cardiology for
21 fifty years.

22 MS. FREEDMAN: May I approach, Your Honor?

23 THE COURT: Yes.

24 MS. FREEDMAN: I am now handing you what will be
25 marked as Plaintiff's 13.

1 (Plaintiff's Exhibit Number 13 was marked for
2 identification.)

3 BY MS. FREEDMAN:

4 Q. Do you recognize this document?

5 A. Yes, I do.

6 Q. What is this?

7 A. This is my complete curriculum vitae from June of 19
8 -- June of 2022.

9 Q. Does this document appear to accurately reflect all of
10 your publications?

11 A. It seems to be the version that I provided, yes.

12 MS. FREEDMAN: Okay. At this point we would move
13 to admit this as Plaintiff's 13.

14 MR. PLYLER: I object, Your Honor.

15 THE COURT: What's the objection?

16 MR. PLYLER: First off, it's hearsay. Secondly,
17 he can tell us what his educational background and all
18 that is. He's right here. In fact, I think he just
19 spent the better part of fifteen minutes doing that, so
20 I'm not sure what the relevance of his CV is.

21 I'm also not sure this is the CV that was produced
22 to us previously despite asking for it. I don't remember
23 it being quite so weighty.

24 So those are my objections to it. I -- I don't see
25 the relevance of his CV and hearsay.

1 THE COURT: Okay. Overruled. Plaintiff's 13 will
2 be admitted over the defendant's objection.

3 (Plaintiff's Exhibit Number 13, CV of John P.
4 Wikswo, was admitted into evidence.)

5 BY MS. FREEDMAN:

6 Q. Okay. So does this CV accurately reflect all of your
7 presentations?

8 A. To the best of my knowledge.

9 Q. How about grants?

10 A. To the best of my knowledge.

11 Q. Great. How long have you been involved in studying
12 electrophysiology?

13 A. Since 1973, so that's forty-nine years. '72, so it's
14 fifty years.

15 Q. And what about studying the electric chair in
16 particular?

17 A. Since 1992, so that's thirty years.

18 Q. How is it that you came to be interested in studying
19 the electric chair?

20 A. One day the telephone rang in the office of the
21 Department of Physics and Astronomy and the person at the
22 other end of the line said I'd to speak to a physics
23 professor who understands electricity and whoever answered
24 the phone said oh, you need to talk to Professor Wikswo.

25 Q. Have you ever testified before about the electric

1 chair?

2 A. Yes, I have.

3 Q. And where was that?

4 A. I've testified about the electric chair in three
5 separate places. One is -- about two places. One is
6 Florida in the Provenzano -- Florida versus Provenzano and
7 the other is Nebraska versus Faust.

8 Q. Were you admitted as an expert in those cases?

9 A. Yes, I was.

10 Q. And have you also testified as an expert in other
11 kinds of cases?

12 A. Yes, I have. I've testified in a case that was
13 basically a combination of physics and thermodynamics
14 involving a gas explosion that severely burned two
15 telephone linemen working in a manhole. A kinematic
16 experi -- a case where a truck going around a corner threw
17 a pallet through the windshield of a boy returning from his
18 paper route and the question is what were the forces that
19 caused the pallet to come off the truck.

20 I testified for the Federal Trade Commission on
21 whether a particular copper -- gold-plated copper bracelet
22 could be ionized for health benefits and I testified in a
23 thermodynamic -- regarding a thermodynamic calculation on a
24 time of death case -- a capital time of death case.

25 MS. FREEDMAN: Your Honor, at this time we would

1 move to have Dr. Wikswo admitted as an expert in physics,
2 biomedical engineering and molecular physiology and
3 biophysics.

4 THE COURT: Go over that again. Go over that again,
5 the areas of expertise.

6 MS. FREEDMAN: Physics, biomedical engineering and
7 molecular physiology and biophysics. And those are the
8 three departments in which he's tenured.

9 THE COURT: Any new objections or restating previous
10 objections only, Mr. Plyler?

11 MR. PLYLER: First off, I -- I think the term
12 "physics" is so broad it doesn't really let me know what
13 field he's being offered to offer opinions in in this
14 case, but, I mean, without definitions of these fields
15 and an explanation of these fields, I don't know how the
16 Court could be prepared to qualify him as an expert in
17 those fields.

18 Additionally -- and I don't know if Your Honor is
19 gonna allow voir dire of the witness before he's
20 qualified or not.

21 THE COURT: Well, that was my next question. First
22 objection or voir dire.

23 MR. PLYLER: Well, I mean -- and I'm not being
24 obtuse when I say this. The term "physics" -- I mean,
25 and maybe I should just voir dire him.

1 THE COURT: Go for it.

2 MR. PLYLER: All right.

3 Can I have just a moment to move some of this stuff,
4 Your Honor?

5 THE COURT: Yes.

6 VOIR DIRE EXAMINATION

7 BY MR. PLYLER:

8 Q. Dr. Wikswo, Daniel Plyler. We met about a month ago,
9 I guess, when I took your deposition. Do you recall that?

10 A. Yes, I do.

11 Q. All right. You would agree with me that when you
12 use the term "physics" you believe it encompasses almost
13 everything; isn't that right?

14 A. I don't believe I've ever said that. Physics happens
15 to be the discipline of science that describes the laws
16 that govern the entire universe around us, so it has some
17 general aspects.

18 MR. PLYLER: Your Honor, if I may open the original
19 transcript of Dr. Wikswo's deposition?

20 THE COURT: Yes, sir.

21 MR. PLYLER: May I approach?

22 THE COURT: Yes, sir.

23 MR. PLYLER: You've already given us permission
24 for that. I forgot.

25 BY MR. PLYLER:

1 Q. Here's a copy and that's the exhibits as well.

2 All right, sir. You recall being deposed just shy of
3 a month ago, correct?

4 A. Yes, I do recall that.

5 Q. And you were under oath in that deposition similar to
6 the oath you just took here in this courtroom, correct?

7 A. That's correct.

8 Q. All right. If you'll please flip to page 43 of your
9 transcript, please, sir.

10 A. Okay.

11 Q. And I'm gonna read from -- I'm gonna read from lines
12 19 through 25. You make sure I get it right. It's here on
13 the screen if you need to see it bigger.

14 All right then. And then physics is just the study
15 of the natural forces, basically those interplays was my
16 question, and your answer was I think in the most general
17 description physics is the study of the four fundamental
18 forces that creates the world as we know it and, hence,
19 physics encompasses almost everything.

20 Did I read that correctly?

21 A. Yes, you did, which is what I thought I just said a
22 minute ago.

23 MR. PLYLER: Well, Your Honor, you know, thankfully
24 that's why we keep a transcript of these things like his
25 deposition.

1 BY MR. PLYLER:

2 Q. I believe what you said was I don't think I've ever
3 said it that way, but physics encompasses almost
4 everything.

5 And you see that right there in your answer on
6 page 25, correct, sir?

7 A. Yes, and I -- yes. Physics encompasses almost
8 everything.

9 Q. But you're not suggesting to this Court that you're an
10 expert in almost everything, are you?

11 A. No, I'm not.

12 Q. In fact, you'd agree with me that you're not an expert
13 in the study of pain, correct?

14 A. That is correct.

15 Q. You're also not an expert in the study of
16 consciousness, correct?

17 A. That is correct.

18 Q. All right.

19 A. I do understand some of the laws of science that
20 underlie those two phenomena.

21 Q. Would that be like understanding gravity, but thinking
22 you could fly a plane?

23 A. I don't see that parallel. I'm sorry.

24 MR. PLYLER: Just moment, Your Honor.

25 BY MR. PLYLER:

1 Q. Doctor, you're being offered in -- the plaintiff is
2 attempting to offer you in three different categories. One
3 is physics, which we just talked about that one, and to
4 build off of that, physics usually uses mathematical
5 equations to try to understand these forces; isn't that
6 right?

7 A. Physics uses both mathematical equations and
8 experimental measurements. I have done both.

9 Q. Okay. The next one I believe they tried to offer you
10 in is biomedical engineering; is that correct?

11 A. Correct.

12 Q. And you were discussing during your testimony before
13 they offered you as an expert this idea of cells on a chip;
14 is that right?

15 A. Correct.

16 Q. And are you familiar with the term homunculi?

17 A. Yes, I'm.

18 Q. And you gave a Ted Talk about homunculi; is that
19 right?

20 A. Yes, I did.

21 Q. And these cells on-a-chip are actually your effort
22 to create these things you call homunculi?

23 A. Well, the cells on-a-chip are creating what is
24 known in the scientific and found in literature as
25 microphysiological systems, which are small in vitro

1 models of subsets of physiology.

2 Q. Okay. In vitro models. Tell -- the Court what an
3 in vitro model is.

4 A. An in vitro model is basically in glass versus
5 in vivo, in a living system, and people have been doing
6 in vitro experiments for centuries.

7 Q. Beside the cells on-a-chip and this in glass process
8 you just described, what other biological engineering are
9 you currently involved in? Excuse me. Biomedical
10 engineering. That was the term.

11 A. Well, I -- I regularly teach courses in biomedical
12 engineering and physical measurements on biological
13 systems, systems biology, working on mathematical modeling
14 of biophysical processes, mathematical computations of
15 the ability of the SAR-CoV-2 virus combined to the H2
16 receptor. I've done a tremendous amount of theoretical
17 and experimental work on cardiac defibrillation.

18 Q. So define in simple terms what biomedical engineering
19 is.

20 A. Biomedical engineering is the application of
21 engineering principles and practices to the study of
22 biomedical systems, so it's just that. You've got a
23 biomedical system. Whether it is an instrument or a
24 patient or a model of a patient, biomedical engineers do
25 experiments on rats and pigs and dogs and rabbits and

1 models of humans and they do experiments on trying to
2 develop instruments such as high powered defibrillators
3 that I sold to the Food and Drug Administration.

4 Q. I'm sorry. I didn't understand that. Are you saying
5 you actually sell the --

6 A. We got a grant from the Food and Drug Administration
7 to deliver a very high voltage defibrillator for
8 research purposes to a scientist at the Food and Drug
9 Administration. That was my role as a biomedical engineer.
10 The recipient was also a biomedical engineer.

11 Q. Of one device?

12 A. One device.

13 Q. Okay. And what was the third field that you hold
14 yourself out as an expert in?

15 A. I'm a tenured professor of molecular physiology and
16 biophysics, so I've been publishing in the physiology
17 literature for fifty years.

18 Q. Okay. So define those terms for us.

19 A. Physiology in contrast to anatomy, anatomy is
20 basically the structure of a biological organism.
21 Physiology is the function of a biological organism. So
22 you can describe the anatomy. A pathologist would
23 primarily be looking at the anatomy, the structure,
24 because many pathologists are only looking at dead tissue.
25 Physiology is basically the dynamic processes by which

1 living organisms, whether they are cells, tissues, organs
2 or complete organisms functioning. So physiology is the
3 dynamic processes of life.

4 Now molecular physiology is -- initially physiology
5 started by looking at humans, looking at the cadavers, some
6 of that being more in the realm of anatomy studying how
7 electric currents can cause the leg of a frog -- the legs
8 of a frog to twitch as Galvani did.

9 Q. And that's a dead frog, correct?

10 A. That was a recently sacrificed frog and they probably
11 did it on live frogs, too. You can do it on live frogs
12 as well as on recently sacrificed frogs as long as their
13 muscles are still alive.

14 As physiology developed, the field of biochemistry
15 was understanding the chemical reactions associated with
16 life; that is, biochemistry is the chemistry of biological
17 systems, and as the understanding of physiology improved
18 from the level of the organism to the organ, to the tissue,
19 to the cell over the past several decades or, let's say,
20 thirty years, people have been trying to understand the
21 role of molecules in physiological processes. So the
22 Department of Physiology changed its name to molecular
23 physiology to recognize the extent to which they were
24 doing both genetic and molecular studies of physiology
25 and because there was a group of biophysicists in the

1 department, they chose the name molecular physiology and
2 biophysics, and I happened to be basically doing both
3 molecular physiology and biophysics for the twenty years
4 that I've been a tenured member of that department.

5 Q. Now you have not been to medical school, correct?

6 A. No, I have not.

7 Q. You don't hold any medical degrees like an M.D.,
8 correct?

9 A. I do not hold any medical degrees.

10 Q. And you're not trained in anatomical pathology or
11 forensic pathology, correct?

12 A. I have studied a great deal of anatomical and -- well,
13 of anatomy. I have not been formally trained in it and I
14 have not been trained in forensic pathology.

15 Q. You're not a forensic pathologist, correct?

16 A. No, I am not a forensic pathologist.

17 Q. And in the studies you've done, you'd agree with me
18 that only a very few would have actually involved human
19 subjects, correct?

20 A. I don't understand your question.

21 Q. Well, you've mentioned doing quite a number of
22 studies and somewhere in this CV they're also listed, but
23 of those studies only a very few involved any sort of human
24 subjects.

25 A. Well, that's -- I disagree with that because I have

1 made extensive recordings of human magnetocardiograms,
2 human electrocardiograms. Our laboratory made some of the
3 very earliest measurements of the magnetic -- measurements
4 of the electrical activity of the human gastrointestinal
5 tract. That has led to the creation of a clinical facility
6 at Vanderbilt that I'm affiliated with. I've done a
7 tremendous amount of work on quantitative analysis of
8 vector magnetocardiograms regarding acute myocardial
9 infarctions at the veterans hospital. I have personally
10 operated recording devices that I and my group still study
11 nerve conduction during carpal tunnel release, so I've done
12 a fair number of human subject studies.

13 Q. Do you still got that deposition up here with you?

14 A. Yeah. Yes.

15 Q. How about flip to page 109, would you? Let me know
16 when you've got the transcript there in front of you, okay?

17 A. I have the transcript in front of me.

18 Q. So on line 25 at page 109, your answer begins in my
19 career I only have done a very -- and then we go down to
20 the first line on 110 -- small number of studies involving
21 human subjects. Did I read that correctly?

22 A. Yes, you read what's in the transcript.

23 Q. Okay. Well, you were under oath when you answered
24 those questions; were you not?

25 A. Yes.

1 Q. And under oath your answer to that question was I have
2 only done a very small number of studies involving human
3 subjects; isn't that right?

4 A. The context of that question was from the point of
5 view of discussion of bias and my answer was in the context
6 that I have not been involved in studies for which bias
7 was the subject or that were not subject to bias. If I
8 remember correctly, you were trying to decide the extent to
9 which I was making observations that could be subject to
10 observer bias and in that context I have not done -- I -- I
11 should have been more explicit in my answer during the
12 deposition. I have done a small number of studies
13 involving human subjects that might be subject to bias.

14 Q. So you want to amend your answer to your deposition
15 from four weeks ago?

16 A. I would clarify it given your questions.

17 Q. Speaking of bias, you've not actually -- I think you
18 admitted in your deposition, unless you want to amend your
19 answer again, that you've never even created a model or
20 tried to create a study that could account for human bias,
21 correct?

22 A. Could you repeat the question, please?

23 Q. Yeah, I'll be happy to. In your career you've not
24 actually created a study, nor do you think you could model
25 a study that could account for human bias in a -- in the

1 study, correct?

2 A. To the best of my knowledge, I have not encountered a
3 problem for which I have to design a study to address bias
4 -- observer bias.

5 Q. All right. So let's go right back to page 110 of
6 your deposition, okay? Finishing the answer you were just
7 reading, you say to the best of my knowledge none of them,
8 talking about the very small number of studies involving
9 human subjects, sir, to the best of my knowledge none of
10 them involved qualitative observations by an observer and,
11 hence, bias was not a factor in any of the studies that I
12 have -- that I personally have been involved in.

13 My next question was so how, if you were designing a
14 study, do you create a study to account for the potential
15 bias of your subjects in a qualitative analysis? And your
16 answer, it is beyond my expertise to hypothesize on the
17 design of a study designed to avoid reporter bias. Did I
18 read that correctly?

19 A. Yes, you did.

20 Q. So it's beyond your expertise to even design a study
21 to account for reporter bias, correct?

22 A. That's what we said.

23 Q. Is it correct?

24 A. It's correct.

25 MR. PLYLER: Your Honor, based on the definitions

1 he's given and the all encompassing nature of his belief
2 of what physics is, I -- even if he is qualified in those
3 three fields, I'm not sure how he can offer relevant
4 testimony in this case.

5 I renew my motion to exclude. I do not believe
6 he's qualified in anything that would allow him to offer
7 relevant opinions in this case, especially given his
8 admissions. He's not qualified to talk about pain, he's
9 not qualified to talk about the bias of reporters, and
10 we know from the motion and the evidence we've already
11 presented in front of Your Honor, that all of his
12 relevant opinions, the ones that actually go to this
13 case, are based off of anecdotal reports of purported
14 witnesses without any account for reporter bias,
15 something which is also outside of his field of
16 expertise. He has no expertise in the field of medicine,
17 he has no expertise in pathology or forensic pathology
18 when it comes to human subjects. He's only performed a
19 very small number of studies involving human subjects.

20 So I renew my motion to exclude. Even to the extent
21 he's qualified in the three fields they want to offer him
22 in, those don't form a basis for him to provide relevant
23 testimony and reliable testimony in this case.

24 THE COURT: Would you like to speak on that,
25 Ms. Freedman?

1 MS. FREEDMAN: Sure. I mean, I think at the end of
2 the day Dr. Wikswow is an interdisciplinary expert. He
3 is a tenured professor in three departments. One of
4 those departments is housed in the medical school at
5 Vanderbilt. He teaches in the medical school. His work
6 involves the study of how the human body works. He is
7 an expert on human physiology. He is an expert on
8 electricity. We're here today to get a better
9 understanding of how electricity affects human physiology.
10 He is imminently qualified to testify on that point.

11 And I just wanted to make the point I don't think
12 Dr. Wikswow said he's not qualified to discuss pain and
13 consciousness. He's just not an expert qualified in
14 those specific fields. He can explain the sensation of
15 pain using the physiology that produces a sensation of
16 pain. He can describe that through a biological systems
17 discussion and he can do the same for consciousness.

18 MR. PLYLER: Your Honor, first off, he said molecular
19 physiology and then explained in great detail how it
20 first started with humans, the idea of physiology and
21 then kept getting smaller and smaller and smaller until
22 now they're actually looking at physiology of molecules.
23 He didn't say he was an expert in human physiology as in
24 the whole body of the human. His testimony about the
25 field was molecular physiology, and that's different.

1 And, secondly, that still doesn't -- and this idea
2 of well, I'm not an expert in pain, but I can get up here
3 and talk about pain, that goes directly against 701. I
4 mean, the rules on why we even allow certain people to
5 come in here and give opinions and other people aren't
6 allowed in here to give opinions. He's got to have the
7 expertise. He doesn't have it.

8 Now if he wanted to design an electrical system
9 and, you know, cardiac defibrillators, the electrical
10 components of those and the machine itself, yes, I
11 believe he's fully qualified to do that, but that's not
12 what's at issue in this case. That's not what we're
13 talking about in this case.

14 So I renew my motions. He should not be allowed to
15 testify in the case. He doesn't have a relevant field
16 of expertise to the issues that we're actually discussing
17 in this case and he should be excluded.

18 THE COURT: Dr. Wikswow will be admitted as an expert
19 in the field of physics, biomedical engineering and
20 molecular physiology and biophysics over the defendant's
21 objection. I think based on his training, knowledge,
22 skill, experience he is certainly capable or competent
23 to testify within those three fields of expertise.

24 To Mr. Plyler's point, you know, I don't know how
25 much of his proposed testimony will be contained within

1 those fields of expertise and so I understand that by
2 offering him or the Court qualifying him as an expert
3 in those three fields that may limit his testimony to
4 some extent. There still may be some -- some questions
5 or -- or proposed answers that are not relevant to the
6 subject matter in this case or may be outside of his
7 field of expertise, but we'll have to take those as they
8 come.

9 But I -- I certainly think he's qualified within
10 those fields of expertise.

11 MR. PLYLER: Thank you, Your Honor.

12 THE COURT: Ms. Freedman, you may continue.

13 MS. FREEDMAN: Thank you, Your Honor.

14 CONTINUED DIRECT EXAMINATION

15 BY MS. FREEDMAN:

16 Q. Okay. So let's just get right back into where we left
17 off. I was about to ask you to please just give the Court
18 in sort of a broad brushstroke your overall opinion about
19 South Carolina's electric chair.

20 MR. PLYLER: Your Honor, it's gonna have to be a
21 more specific question given your previous ruling;
22 otherwise, I don't have an opportunity to object to what
23 I need to to protect the record and my client.

24 THE COURT: Can you specify?

25 MS. FREEDMAN: I can. I'm gonna have to be slightly

1 more leading.

2 THE COURT: Sure.

3 BY MS. FREEDMAN:

4 Q. Okay. Dr. Wikswo, could you please describe the
5 body -- some areas of studies that you have relied on in
6 reaching your opinions in this case?

7 A. There are a large number of biophysical,
8 electrophysiological and bioengineering principles that
9 come into play in the process of the South Carolina
10 judicial electrocution. The basic idea is that you place
11 an electrode on the top of the scalp, an electrode on
12 the right leg and pass sufficient electric current to, in
13 theory, render the brain insensate and stop the heart from
14 beating at which point the prisoner being executed can be
15 declared dead. Those are all within the areas of study and
16 teaching of biomedical engineering, physiology and physics
17 and electrical engineering, and much of the work in the
18 field have been done by either electrical engineers or
19 biomedical engineers, not physicians.

20 Q. And what is your opinion about the theory that you
21 just described?

22 A. Well, what has been put forward in judicial
23 electrocution for about a hundred years is that it's
24 instantaneous and painless. I do not believe that there
25 is any scientific proof that judicial electrocution is

1 either instantaneous or painless.

2 Q. And what is your sort of basic overview of what
3 the affirmative evidence does show about a judicial
4 electrocution?

5 A. Well, the -- the first point is that were it to work
6 as advertised, the brain would stop working and there'd
7 be no perception of pain and the heart would stop beating
8 and the prisoner would be dead in a matter of seconds to
9 a minute. There are counterexamples in the literature
10 that describe the need for a second shock and, in fact,
11 protocols designed for judicial electrocution involve
12 either prolonged shocks or multiple shocks. Unfortunately,
13 the -- the procedures that are presented are typically done
14 without -- well, they are always done without scientific
15 justification. There are no measurements to prove that the
16 brain is rendered insensate from the early shocks. In
17 contrast, the animal husbandry community has invested a
18 tremendous amount of time, effort, money and peer-reviewed
19 publications into the act of -- of both animal euthanasia
20 and animal slaughter. In the case of euthanasia,
21 veterinarians --

22 MR. PLYLER: I've been pretty lenient here, but I --
23 this is clearly out of three sides -- outside the three
24 fields of expertise you just mentioned. Now he's talking
25 about animal euthanasia and what studies have been done

1 in the field of husbandry. Despite his lengthy CV, I
2 don't see any of those listed.

3 He's also talking about what he believes would be
4 pain without having any expertise in pain, so there's no
5 bases that he's provided for any of this, they aren't
6 within his scope of expertise. I object.

7 MS. FREEDMAN: So I think he -- what he is
8 referencing, and maybe he can be slightly more specific,
9 is in the field of animal husbandry, electrical stunning
10 is a common form of euthanasia. That's directly relevant.
11 He is an expert on how electricity operates within
12 molecules and so that's kind of what he's talking
13 about.

14 THE WITNESS: Engineers have spent a great deal of
15 time --

16 MR. PLYLER: Your Honor, I need to interrupt. He
17 shouldn't be talking while you're pondering a ruling.

18 THE COURT: Nor do I need anyone to tell me how to
19 handle the courtroom, Mr. Plyler.

20 The objection is overruled and Dr. Wikswo may
21 continue his answer.

22 THE DEFENDANT: The reason animal husbandry work
23 is important in this context is that the engineers and
24 physiologists who have been studying animal husbandry
25 have been able to make physiological measurements that

1 are not permitted or have not been done in humans.

2 So they have placed electroencephalogram electrodes
3 on the heads of cattle being slaughtered. They have
4 placed -- they're called cortical electrodes on the
5 surface of the brain beneath the skull. They've
6 recorded all sorts of other physiological signals and
7 these provide data that a -- a reasonable engineer would
8 expect to be provided for a system under study.

9 I know of no cases where electroencephalogram
10 electrodes, cortical electrodes, blood pressure, heart
11 rate, electrocardiogram recordings have been made on a
12 prisoner being executed and, hence, you have the only
13 choice to infer that just as I have done experiments on
14 rats, rabbits, frogs and dogs, used them as a model of
15 a human system to understand the physiology which has
16 substantial parallels between species.

17 So the animal husbandry community after a great
18 deal of analysis have, in fact, concluded that it is
19 not ethical to do -- I have be careful about the term
20 "ethical", I can't remember the exact phrasing, but
21 electrical shocking of animals during slaughter is
22 allowed under a number of conditions, one of which is
23 that it not be done from the head to a limb or hoof.
24 It also has to be followed immediately with a means
25 to stop the heart or to exsanguin -- exsanguinate the

1 animal.

2 So basically the animal husbandry community after
3 intense work has concluded that they would not do to
4 an animal in a slaughterhouse what is done in South
5 Carolina's death chamber.

6 BY MS. FREEDMAN:

7 Q. Okay. So I think it would be helpful for all of us if
8 maybe we could take a little bit of a step back and start
9 with some basic principles of electricity so that we can
10 understand how this system actually works. So could you
11 please explain to the Court what is a circuit?

12 A. A circuit is a closed path along which electric
13 current flows.

14 Q. And are there any variables that sort of define a
15 circuit?

16 A. There are basically three minimal parts to a circuit.
17 One is a source of electromotive force, a voltage, but
18 it's called an electromotive force because it is actually
19 pushing the charge carriers along the circuit. Now I use
20 the word "charge carriers" because in copper wire the
21 charge carriers are electrons. In some semiconductors,
22 the charge carriers are actually holes, meaning absence of
23 electrons, and in biological systems the charge carriers
24 are either sodium, potassium chloride or calcium ions that
25 are in solution or other charged species.

1 So you need an electromotive force that can push these
2 charged species, charged objects, small as they are, around
3 the circuit. So the first thing on a circuit is you need
4 an electromotive force to get the charge carriers to move.

5 The second thing you need is a way to contain the
6 charge carriers, which is typically a wire, though you can
7 do it with an electron beam, but we're not doing that here.
8 You have a charge carrier that is, let's say, a sodium ion
9 and chloride ion in blood that are carrying electric
10 current along a blood vessel, so that is effectively the
11 equivalent of wire. And the last thing that's critical to
12 a circuit is whatever impedes the motion of the charge
13 carriers, which is electrical resistance. Some materials
14 are more resistive than other materials. Blood is a
15 billion times less good a conductor than copper. So the
16 electric current is pushed around this circuit by an
17 electromotive force. It's a little pedantic, but it's --
18 it's useful to have the term of a force being pushed and
19 an object being pushed. It's like pushing a car around a
20 racetrack. You're either behind it pushing or you have an
21 engine pushing it and you have a force that's doing the
22 propelling and there's a resistance against being pushed
23 around the racetrack.

24 A -- an nicer or actually a more appropriate analogy
25 is imagine you have a swimming pool and in the swimming

1 pool you put a pump and to the pump you connect a garden
2 hose and you lay the garden hose out on your yard and you
3 take the garden hose and put the end of the garden hose
4 back in the swimming pool, so you're basically sucking the
5 water out of the pool, putting it down the hose and it's
6 going back into the pool. That is a closed circuit. If
7 you take the hose out of the pool, it's no longer a closed
8 circuit -- it's a closed circuit from the point of view of
9 the environment, but the water's going into the clouds to
10 make it rain, but the bottom line in the example of the
11 hose going back into the pool, you're pushing in a circuit.

12 Now if the pump is turned off, there's no flow. The
13 pressure of the pump is the perfect analogy to the voltage
14 of a battery. So what happens is that when there's no
15 voltage, there's no current. When there's no pressure,
16 there's no flow. You turn the pump on low speed, you get
17 a low pressure, that creates a low flow and it goes back
18 around the circuit. You turn up the speed of the pump to
19 medium and you now have a medium pressure that makes a
20 medium flow that goes back into the pool. You turn the
21 pressure onto high -- I mean, the pump onto high speed,
22 you get a high pressure and a lot of water goes around the
23 pipe, the tube. Now the pump is pushing against what we
24 call the hydraulic resistance of the hose. If it's a long
25 skinny hose, it's harder to push water through; if it's a

1 short fat hose, it's easier. If you double the length of
2 hose, you unscrew the fitting, you connect another length
3 of hose and then it goes back in, you have twice the
4 resistance and half the flow. There's subtleties on how
5 the pump is built, but in general a pressure pump, twice
6 resistance, half the flow. So that's -- that's really the
7 best analysis -- best analogy for a circuit.

8 If it's copper wire, you're moving electrons around
9 the circuit, and if it is a biological system, blood,
10 cerebral spinal fluid, lymph, interstitial fluid, it's
11 sodium and potassium and chlorine ions and a few calcium
12 ions that are carrying the charge around the circuit, okay?

13 Q. Thank you. What is just in sort of basic terms the
14 relationship between the three variables you just
15 described?

16 A. That's basically Ohm's law. That it's typically
17 written as voltage is equal to current times resistance.
18 The problem with that law is it's, as written, not as
19 intuitively obvious as you would like because, in fact,
20 what happens for most systems that we're used to working
21 with it should be written as the current is the voltage
22 divided by the resistance. So you double the voltage, you
23 get twice the current; you double the resistance you get
24 half the voltage -- I mean, half the current. There are
25 similar parallels with Newton's laws of motion, but if you

1 write Ohm's law as current is equal to voltage divided by
2 resistance, if you increase the resistance, the current
3 goes down, if you decrease the resistance the current goes
4 up, okay?

5 Q. Great. And what happens when a circuit conducts
6 electricity?

7 A. Okay. When the charge carriers are moving through
8 the circuit, they are given -- they're being pushed by an
9 electromotive force and the fact that there is some
10 resistance to the flow can come from two reasons, one of
11 which is -- and let's go to electrons because it's a little
12 bit easier. If the electrons are moving around inside of a
13 motor, they are creating magnetic fields that are making
14 magnetic forces that are doing mechanical work. You shove
15 your electrons through a motor, that lifts your elevator on
16 -- on the office building. That's taking electric energy
17 and doing mechanical work. The other way it works though
18 is that if you don't have mechanical energy creating these
19 magnetic fields of forces, but simply have a quiet
20 resistor, you're converting the electric energy to heat.

21 So if you look at the electric burner on top of an
22 electric stove, you're putting typically more than
23 200 volts across that burner, it's a 3,000-watt burner,
24 and some numbers of -- of amps will flow through this and
25 the burner will get red hot. So what you're doing is

1 you're taking the electromagnetic force operating over time
2 to do thermodynamic -- to release thermodynamic energy --
3 thermodynamic energy in the form of heat. So you're simply
4 taking electric energy and converting it to thermal energy.

5 Q. Just to be clear, what happens to power when it
6 dissipates?

7 A. Power is dissipated either in mechanical work or heat.
8 So when you run up the stairs, you are doing mechanical
9 work lifting yourself up the stairs, but you're also
10 getting hot because you're using metabolic energy that's
11 not perfectly -- you know, not a perfectly efficient
12 machine. So basically the electrical -- the electrical
13 energy in a circuit is either doing mechanical work,
14 which is of no consequence to judicial electrocution, no
15 significant consequence, or you're heating.

16 Q. Okay. So one other question about sort of how
17 circuits operate. How are electrons or in our example --
18 our analogy, water, how is that distributed throughout the
19 circuit?

20 A. Okay. Well, one unfortunate myth is that electrons
21 flow from high concentration to low concentration. Now if
22 you take a teaspoon of sugar and put it in the bottom of a
23 cup of tea, you have the sugar sitting in the bottom of the
24 cup of tea and you're not stirring anything and the sugar
25 will diffuse upwards and if you wait long enough your

1 entire tea will be sweet, that is moving -- the sugar
2 molecules are going from high concentration to low
3 concentration of sugar.

4 So now if you think of the garden hose example and you
5 say well, what's the concentration of charge carriers in
6 the garden hose, it's how many pints of water are in a foot
7 of hose. The quote -- and nobody would seriously think of
8 the concentration of water in a garden hose, but a foot of
9 water is the same, quote, concentration here and here and
10 here and here. So it makes -- the water moved in the
11 circuit is not the concentration of the water, but the
12 pressure applied to it, and the pressure is high at one
13 end, medium in the middle, and low at the other end. It's
14 all moving as this incompressible fluid.

15 The same thing with electrons in a wire. You have a
16 wire that has billions and billions and billions of
17 electrons in it and you push an electron in and an electron
18 pops out at the other end. The electrons are acting like
19 incompressible fluid moving through this wire. Just
20 identical to the idea of water as incompressible, and
21 you're using a stiff hose, not a hose with a bulge. You
22 basically put a little bit of water in a -- in a hose
23 that's already filled and a little bit of water pops out at
24 the other end. You shove some electrons into a wire and
25 they pop -- different electrons pop out the other end,

1 okay?

2 Q. Thank you. One other basic sort of principle of
3 electricity and then I think we can move on. Could you
4 please explain the distinction between AC and DC current?

5 A. Okay. So when electricity was initially explored,
6 the first production of -- of artificial electro -- first
7 production of artificial electricity is to scuff across
8 and draw a spark to a doorknob, that's where you are doing
9 mechanical work separating the charges. That's the -- the
10 better case is when you do a battery, which is basically a
11 piece of metal stuck into a lemon or interlead discs of
12 copper and zinc with saltwater between -- between every
13 other disc and they produce an electric voltage. It's
14 called a volt -- a voltaic pile and you can use a voltaic
15 pile to make a frog twitch, and that was the original
16 Galvani experiment. So the voltaic pile was making small
17 voltages, but enough to make a frog twitch. Those are
18 steady currents. They are taking chemical energy and
19 converting it into electrical energy. So the electromotive
20 force comes from chemistry and the chemistry is basically
21 separating the positively charged ions and the negatively
22 charged ions and if you put it in a circuit it shoves
23 electrons out one end of the circuit and sucks electrons in
24 the other.

25 So a battery is using chemical energy to create

1 electrical energy that can then do either mechanical work
2 through a motor, you can have a battery-powered toy or you
3 can have a battery-powered heater. You can even make heat
4 or mechanical work using a battery to drive a steady
5 current. You can use the steady current to light a light
6 bulb, which is what Thomas Edison did.

7 The difficulty with batteries is that if you want a
8 very high voltage, you have to start stacking batteries on
9 top of batteries on top of batteries. And so the electric
10 eel and other electric animals have electrophores, which
11 are stacked batteries that gives them enough voltage to --
12 to give a lethal shock. This is not a practical way to get
13 high voltage.

14 The alternative way of making electricity is instead
15 of using chemistry to make the electricity -- and
16 chemistry's perfectly fine. In laymen's electricity, our
17 electric cars run on chemistry. You can take a strong
18 magnet and wave a copper wire -- this is a magnet. You
19 can wave a copper wire and it will cause the electrons to
20 move up and down the wire.

21 So the way it works with a generator is you take a
22 coil of wire and you spin the coil of wire in a long strong
23 magnetic field, the magnetic field goes this way, that way,
24 this way, that way, this way and the current this way, that
25 way, this way and that way, back and forth. That is an

1 alternating current that is flowing in both directions. So
2 the electrons move a little while to the right, they move a
3 little while to the left, they move a little while to the
4 right, they move a little while to the left.

5 Now what -- what makes alternating current so powerful
6 is that a European group invented a transformer, a very
7 efficient transformer, which lets you take high voltage --
8 actually low voltage at high current and convert it to high
9 voltage at low current. So if you ever take apart a TV,
10 you'll find coils in the back of the TV that are doing
11 these kinds of things. You have basically used -- one coil
12 makes a magnetic field, the other coil takes that magnetic
13 field and makes it back into electricity and by having
14 different numbers of windings on the coil you can make the
15 voltage go up and the current go down or the voltage go
16 down and the current go up.

17 So the beauty of transformers is that they let you
18 transmit electricity from, let's say, Savannah, Georgia, to
19 Columbia, South Carolina, at extremely high voltages, but
20 very low currents. Now the reason you want the low current
21 is that the power is dependent upon the current. So you
22 don't want to waste your power in the wires connecting the
23 generator to the user.

24 Edison's problem was -- is that he built a system with
25 low voltage DC and the only way he could move current at

1 low voltage DC was with very, very large wires. What
2 Westinghouse was doing using the -- the European method of
3 perfected transformers was, in fact, moving the electric
4 energy at very high voltage at low current.

5 Now the problem with the -- and this was called the
6 current wars. The AC DC current wars. At the time that
7 AC current was being used, they had very high voltage
8 distribution systems in, for example, New York City, to
9 drive arc lamps, extraordinary bright lamps outside, and
10 lot of people were being hurt. So there was an economic
11 battle between Westinghouse and his electric company and
12 Edison and his electric company and Edison did a couple of
13 things or had -- had people under his influence do things;
14 one of which was a very public demonstration of the
15 electrocution of an elephant to show how dangerous
16 alternating current was and the -- the reports, biased or
17 not, were very uncomplimentary of the electrocution of an
18 elephant, but what Edison also did is had basically a
19 shell company purchase a Westinghouse alternating current
20 generator and used it to equip the electric chair at Sing
21 Sing, so it was a calculated maneuver by Thomas Edison to
22 show that George Westinghouse's electric distribution
23 system was so dangerous that it was used to -- to execute
24 prisoners.

25 So that basically is an example of the distinction

1 between direct current and alternating current.

2 Q. And what do we use in buildings in the United States
3 for the most part?

4 A. We use alternating current in buildings though there
5 will be elevators that probably still run on direct
6 current. New York City used to have some direct currents
7 that were shut down a few years ago, but I would say a
8 vast fraction of electric power in the United States is
9 currently alternating current.

10 Q. And what does it mean to say that the most common
11 frequency in the United States is 60 hertz?

12 A. It turns out it's the choice that was made -- and
13 I don't know who made the choice, I assume it was
14 Westinghouse, on the speed of the turbines at Niagara
15 Falls, and somebody decided that these generators would run
16 at 60 revolutions a second -- or they would produce --
17 depending on how they wind the coil they would produce
18 electricity that would alternate 60 times a second and
19 if it's much lower than 60 cycles a second, you'd see
20 a blinking of the lights. Because of the flicker fusion
21 frequency of your visual system, you don't want to see the
22 lights blink. So I think -- I don't know exactly why they
23 chose 60. Europe chose 50. And you don't see substantial
24 differences when you travel to Europe between their 50
25 cycles per second and our 60.

1 Q. All right. So now I'd like to sort of --

2 A. There's one -- one last point.

3 Q. Please.

4 A. There's a -- a very interesting subtlety is that you
5 can put DC generators in a series in parallel. You have to
6 be careful putting AC generators in a series in parallel to
7 get them synchronized.

8 Q. Why is that?

9 A. Because you don't want the signs confusing each other.

10 Q. Okay. So let's turn back -- now that we have sort of
11 this framework for understanding circuits and electricity,
12 let's turn back to electrocution. Using the sort of
13 framework you just described, can you please explain again
14 the historical understanding of the mechanism of action for
15 the electric chair?

16 A. The position taken by early proponents for the
17 electric chair was in the context of the brutality of
18 earlier means of execution and at the time it was
19 introduced the view was that compared to what was being
20 used at the time, which probably was hanging, and I don't
21 know what other means of execution they had -- in Europe
22 you would have had beheading, not in the U.S. -- is that
23 the view was that judicial electrocution was instantaneous
24 and painless. That was the premise under which it was
25 established. The difficulty is that there is no scientific

1 basis for it being instantaneous and painless and that also
2 means that there's no scientific basis for the evolution of
3 the procedures for execution. So you can ask well, why
4 this voltage or why that voltage? I believe, and I -- this
5 would have to be a careful examination of the literature,
6 which I'm not prepared to report on today, but basically
7 the voltage is too low --

8 MR. PLYLER: Objection, Your Honor. He just said
9 he's not done a review of the literature and not
10 prepared to report on it today, so clearly what he's
11 about to say is speculation.

12 MS. FREEDMAN: My understanding is that he's just
13 drawing on -- he's saying he hasn't reviewed the very
14 specific literature in this field. He's drawing on his
15 fund of knowledge, his general areas of expertise to
16 draw a hypothesis that the Court can give whatever weight
17 you want to.

18 THE COURT: The objection's overruled.

19 MR. PLYLER: Thank you, Your Honor.

20 THE COURT: Continue, sir.

21 THE WITNESS: So the fundamental problem is in an
22 empirical way how do you decide what the correct voltage
23 is for a judicial electrocution and what is the correct
24 duration for the application of that voltage, and if you
25 look at the records from South Carolina you find that

1 over the years the voltages have been increased, the
2 voltage had been decreased, there were electrocutions
3 that were done at 7,000 volts, there were electrocutions
4 that were done at more than 3,000 volts and then the next
5 electrocution was a few hundred volts lower than that,
6 and one could hypothesize that the choice of voltage is
7 based on what didn't work the last time.

8 If the voltage is too low, the electrocution is not
9 successful. What does it mean to be not successful? You
10 simply write into the protocol if the first shock doesn't
11 work, give a second shock. So nationally there are a lot
12 of protocols that say if when the physician comes out to
13 check for a heartbeat, the heartbeat is continuing, simply
14 do a second shock. Another strategy is just to run the
15 shocks longer.

16 So I have been unable to identify any of the
17 rationale behind the South Carolina electrocution
18 procedures, so one has no choice but to hypothesize,
19 and bottom line is if it's not working, you have two
20 choices -- three choices; high voltage, longer time or
21 more shocks.

22 Now what you notice in reviewing the literature,
23 some of which is anecdotal reports, is that if you keep
24 the current on too long, you start burning the -- the
25 patient, the prisoner. So what happens is that the

1 initial shock may be -- may or may not be rendering the
2 brain insensate, but it is also burning the skin and
3 actually to the point of charring the skin, both on the
4 scalp and the legs. And autopsy reports, including
5 autopsy reports from South Carolina, can show severe
6 burns of the head and the leg associated with this
7 electric current.

8 So I've always believed that one of the reasons
9 the current is turned down -- the voltage is turned down,
10 is that the initial high voltage is not sufficient to
11 kill the prisoner based on experimental observation,
12 but if you continue the high voltage you will burn the
13 prisoner severely, so you turn down the voltage and then
14 continue applying the electricity. And in the case of
15 South Carolina it goes from 2,000 volts -- the current
16 protocol, 2,000 volts for four and a half seconds, 1,000
17 volts for eight seconds and either 100 or 200 volts for
18 120 seconds with no scientific basis for those choices
19 other than apparently they get revised fairly frequently
20 over the years.

21 BY MS. FREEDMAN:

22 Q. So what happens in your opinion when the electric
23 chair is activated and there's a person in it?

24 A. A whole pile of things happen and one of the questions
25 is they're all happening simultaneously and one could argue

1 which one occurs first, but let's not go into the which
2 came first argument for a moment.

3 So the electric current going from the top of the
4 head to either or both of the -- the lower limbs is -- has
5 two choices to get from the top of the head to the lower
6 limbs; one of which is to run down the scalp, the facial
7 musculature, the neck, the other is to go through the skull
8 into the brain and out the -- through the bottom of the
9 skull through the spinal cord into the body.

10 So a fundamental question is what fraction of the
11 current is going through the skull? I read -- I received
12 yesterday Mr. Wright's deposition, and have also read his
13 depositions from Nebraska and his other publications,
14 argues that the skull has the same conductivity as the
15 scalp and the brain, so I spent the past couple of weeks
16 since the deposition when I was --

17 MR. PLYLER: Your Honor, objection. This is exactly
18 the material that they e-mailed me at lunch that they
19 said wasn't gonna form any of the bases for his opinions
20 in this case.

21 THE COURT: I'm sorry. Tell me specifically what
22 that is. I know he was talking about a deposition.

23 MR. PLYLER: He just said that he just did research
24 over the last two weeks about the conductivity of the
25 skull. The four articles that were e-mailed to me at

1 lunch were all about conductivity of the skull. So this
2 is clearly them saying he's not gonna rely on it and then
3 him getting up on the stand and doing the exact opposite.

4 MS. FREEDMAN: I guess I would maybe like an
5 opportunity to ask him what the source of his opinion
6 that he's about to give is because I'm not sure if it's
7 those articles, if it's something else, just his basic
8 fund of knowledge and expertise.

9 MR. PLYLER: Your Honor, he literally just said --

10 THE COURT: Over the past couple of weeks.

11 MR. PLYLER: -- I spent doing research in the past
12 couple of weeks. The only thing that's happened in the
13 past couple of weeks is I deposed him and then we got
14 these articles here today.

15 THE COURT: And, in fact, he testified that since
16 the deposition, so he's not even talking about that.

17 MR. PLYLER: And he even -- the e-mail from them
18 says following his review of some of Wright's materials
19 in his deposition, Dr. Wikswo conducted some additional
20 research and reviewed the following attached articles.

21 THE COURT: What remedy are you --

22 MR. PLYLER: I want them to stop baiting us and
23 saying we're not gonna do this and then do the exact
24 opposite.

25 THE COURT: That --

1 MR. PLYLER: It happened yesterday when we talked
2 about confidentiality about the autopsies reports. We
3 produced the autopsy reports in response in your order
4 labeling them confidential and then the first thing we
5 hear out of them this morning is we don't think they
6 should be confidential. They said not an hour and a
7 half ago that he's not gonna rely on these articles.

8 THE COURT: I know. What would you like for me to
9 do about it now?

10 MR. PLYLER: Strike his testimony. Exclude any --
11 any testimony he wants to give about the conductivity
12 of the skull or anything related to this research he
13 did in the last few weeks. Prevent her from continuing
14 to go into areas that either she said she wasn't gonna
15 go into or that you ruled they shouldn't go into. That's
16 what I want.

17 MS. FREEDMAN: Your Honor, at Dr. Wright's
18 deposition, he said that Dr. Wikswo's opinions, and I
19 quote, are BS, and so that prompted Dr. Wikswo to inquire
20 into the basis for Dr. Wright's opinion on that position.
21 We didn't get Dr. Wright's -- a copy of his deposition
22 until very recently.

23 THE COURT: Well, now this is a different argument
24 than what you gave me before we started for the afternoon.

25 MR. PLYLER: Also they're pitting witnesses. We

1 haven't even heard the testimony of Dr. Wright.

2 THE COURT: I understand.

3 All right. Given that this information was just
4 provided to the defense hours ago, I'm gonna sustain
5 the objection and not allow Dr. Wikswo to testify about
6 the conductivity of the skull or anything gleaned from
7 any of the articles that were just provided to the
8 defense over lunch.

9 MS. FREEDMAN: And -- and I'm not -- I -- just to
10 be clear, Your Honor, at his deposition he did have
11 opinions about the conductivity of the skull. He opined
12 about those at his deposition. That was based on his
13 basic fund of knowledge about how the body works, and
14 this was really an on-going discussion during his
15 deposition, so I think to the extent that the other side
16 would like us to instruct Dr. Wikswo not to focus his
17 testimony or rely during his testimony on anything in
18 those new articles, that's fine, but I think to strike
19 his ability to discuss the resistance of the skull or
20 the conductivity of the skull, I think that goes sort
21 of beyond whatever prejudice they suffered from receiving
22 these at the late hour.

23 MR. PLYLER: May I add to that please, Your Honor?

24 THE COURT: Yes, sir.

25 MR. PLYLER: It also begs the question and, again

1 goes -- goes back to my reliability argument, if he's
2 such an expert in the resistance of the skull and the
3 conductivity of the skull, why did he have to go do
4 additional research in the last few weeks that I'm only
5 getting an hour and a half before he takes the stand?

6 The remedy should be he's not allowed to talk about
7 this subject. It's discovery abuse, it's surprise, it's
8 prejudice. It should be excluded.

9 THE COURT: Right. Whatever his opinions were,
10 and I'm trying to pull up the electronic version of his
11 deposition testimony -- I mean, it has to end there.

12 MS. FREEDMAN: Right.

13 THE COURT: It cannot go beyond that. So if he had
14 opinions that were expressed at the time that do not rely
15 upon newly discovered information, I will allow that, but
16 the -- the minefield that you're getting into, I've not
17 seen the articles that were provided, I didn't even know
18 that they were about skull conductivity until two seconds
19 ago, so, you know, I'm sort of operating in the blind a
20 little bit, but were there some opinions about skull
21 conductivity in the deposition?

22 MR. PLYLER: Well, Your Honor, I -- it's part of
23 his speculation, no scientific evidence and all that.
24 That's why I said it goes to my reliability argument.

25 Essentially what he testified to was he had

1 previously done a study to try to calculate that and
2 it was rejected from being published in any journal,
3 that he's never gone back to try to figure it out, that
4 there is no scientific evidence for him -- that would
5 allow him to calculate the conductivity and how much of
6 the current goes into brain. That's what he testified
7 to, but he wants to come in here and do it right now and
8 apparently thinks he's found new articles that are gonna
9 allow him to do that.

10 THE COURT: Well, I mean, clearly I've just ruled
11 he cannot use any new articles. I would expect any
12 testimony today to be consistent with the deposition
13 testimony that was given just a month ago. You know,
14 that's sort of it is what it is.

15 MR. PLYLER: I understand, Your Honor. Thank you
16 very much.

17 THE COURT: Okay.

18 MS. FREEDMAN: No problem.

19 BY MS. FREEDMAN:

20 Q. So, Doctor, bearing in mind that you cannot rely on
21 those four articles, could you please just explain what you
22 mean when you say that the skull conductivity is different
23 from the scalp conductivity?

24 A. There is a large and long history that is cited in
25 the documents I provided under my original discovery, both

1 for electroconvulsive therapy, electroencephalography,
2 magnetoencephalography, transcranial electrical stimulation
3 and transcranial magnetic stimulation, that the skull is a
4 resistive barrier to the delivery of current by electric
5 voltages applied to the scalp. That -- and those are
6 perfectly solid data with all sorts of references in the
7 material I provided in response to the subpoena.

8 Q. Okay. And maybe just you can give us a little example
9 of sort of what -- what -- just an analogy, something that
10 can help us or contextualize what you're talking about when
11 you say that the skull is resistant.

12 A. Okay. Let's go back to a -- a simple analogy of
13 what's happening. The garden hose and the pump in the
14 swimming pool are not a particularly good way to describe
15 judicial electrocution because you have what's called a
16 distributing circuit, the current is flowing more or less
17 everywhere.

18 So in the materials that I provided in response to
19 any subpoenas -- the subpoena, I presented an analogy that
20 electric current is equivalent to someone rolling bowling
21 balls down a hill. The height of the hill is equivalent to
22 the voltage. Now what you would think is the bowling balls
23 are gonna go faster and faster and faster as they go down
24 the hill, but the hill is filled with bushes and shrubs
25 and trees and the bowling ball hits into a shrub, stops

1 and then restarts and stops and restarts. So the bowling
2 balls are moving down the hill at a uniform speed. You're
3 dumping them out of a bucket and they're rolling down the
4 hill and the gravity is pulling them just the electromotive
5 force is pulling the sodium and the potassium chloride
6 ions.

7 Now what happens with the brain is imagine that on the
8 side of this hill -- it's a grassy hill with some bushes in
9 it. You have a small green thatch -- a green -- a green
10 patch. In the middle of the green patch, you have a
11 bowling ball. The goal is to hit the bowling ball, but
12 unfortunately the bowling ball is surrounded by a circle
13 of bushes. So the bowling balls are coming down the hill,
14 they hit the bushes and get deflected from the ball, and
15 that is effectively what's happening with the electric
16 current delivered to the top of the scalp. It's being
17 deflected by the fact that the -- the skull is not a
18 particularly good conductor of electric current.

19 Does that help?

20 Q. Yes. Thank you.

21 A. And so the -- and so, again, the problem is you have
22 to think of a graphic analogy for resistance and in this
23 case this is trying to roll bowling balls through small
24 bushes.

25 Q. And when the electricity is not capable of entering

1 into the skull, where does it go?

2 A. Well, it turns out in this analogy, you have a ring
3 of bushes and you have grass all around and so it rushes
4 around the -- the bushes, and in the case of judicial
5 electrocution it goes from the scalp -- the top of the head
6 into the scalp and if you -- if you clinch your jaw and --
7 put your fingers on your temple and clinch your jaw, you
8 can feel the muscles all the way at your eye tightening up.
9 You can raise your eyebrows and feel your muscles in your
10 forehead contract. Those muscles are very good electrical
11 conductors and they are helping to take the current from
12 the scalp all the way down into the musculature of the neck
13 and then it goes down through the thoracic muscles. Some
14 of it will, of course, go into the brain. The great
15 question is what fraction of the current goes into the
16 brain and it is by no means all of the current.

17 Q. Okay. So what are the ways in which the electric
18 chair in your opinion accomplishes death?

19 A. First of all, I have no doubt --

20 MR. PLYLER: Your Honor? Your Honor?

21 THE COURT: Yes, sir.

22 MR. PLYLER: Now we're asking him to opine on the
23 mechanisms of death. That is clearly a medical issue.

24 THE COURT: What are you getting at, Ms. Freedman?

25 MS. FREEDMAN: I can be -- with your permission,

1 I can just be way more leading and kind of guide him
2 through what I'm looking for.

3 THE COURT: I think that may be necessary.

4 MS. FREEDMAN: Okay. Thank you.

5 BY MS. FREEDMAN:

6 Q. How does the electric chair operate on the heart?

7 A. In theory, the electric chair causes the heart to
8 fibrillate.

9 Q. What does fibrillation mean before you go on?

10 A. Fibrillation -- in the normal heart, you have the
11 atria on the top of the heart, you have the ventricles
12 beneath. The atria are stimulated by the sinoatrial node,
13 which contract nicely. They push the blood into the
14 ventricles. After a short delay, the ventricles contract
15 and push the blood out and you have these beautiful
16 rhythmic contractions of waves of contractions moving
17 through the heart. That's your heart rate. With
18 ventricular fibrillation because of a disturbance, which
19 could be as simple as touching the heart with a nine-volt
20 battery, you can get a wave that travels around the heart
21 in a circle and that travel very quickly, the rhythm can be
22 very complicated, and if you look at a fibrillating heart,
23 it looks like a small bag of earthworms just quivering so
24 instead of this beautiful rhythmic contraction from the
25 bottom to the top pushing blood out of the aorta and the --

1 the vena cava, in fact, is sitting there quivering, it's
2 not pumping.

3 So when people started looking at how to build
4 defibrillators, they realize that they could put a shock
5 on the heart and basically stop it and then it would
6 restart. Ideally it would restart. So when people
7 started doing the experiments to figure out what is the
8 defibrillation threshold, they turn up the strength of
9 the defibrillator and it gets better and better at stopping
10 the heart until suddenly it stops working, and they
11 realized that there is what's called the upper limit of
12 vulnerability. If the shocks are too strong, the heart
13 will not fibrillate.

14 So if you're doing -- okay. Let's back up. When you
15 do the experiment of how you fibrillate the heart, the
16 threshold is fibrillation. As you turn up the current,
17 it's more and more likely that you will fibrillate the
18 heart and you can defibrillate it with -- with appropriate
19 current, but at some point when the current gets -- the
20 voltage gets so high you reached what's called in -- in the
21 trade, in the scientific, the upper limit of vulnerability,
22 you no longer cause the heart to fibrillate.

23 So in skeletal muscles, if I put a pair of electrodes
24 on my forearm and connect it to a little pulse generator
25 where I can turn the knob to adjust the speed, I can make

1 my arm contract and I turn the knob up and it goes faster
2 and faster, and if I make it a high enough frequency -- and
3 this is, you know, pulse, pulse, pulse, pulse, pulse, if I
4 make the pulses fast enough, the muscle will lock up. That
5 is tetany. And that means you are trying to make the
6 skeletal muscle fire more quickly than it can and it stays
7 locked up.

8 Now when I took my first cardiac electrophysiology
9 course at Stanford in the medical school, the first thing
10 you learn about cardiac muscle is that cardiac muscle does
11 not tetanize and that's because of the very particular way
12 that cardiac muscle operates and it's got what's called a
13 very long refractory period. You cannot get the cardiac
14 muscle to fire but just so fast. So cardiac muscle will
15 not tetanize period. There is no doubt in the scientific
16 literature that cardiac muscle does not tetanize.

17 What has also been shown by friends of mine that the
18 mathematical models for current distribution of cardiac
19 tissue show that if you take a piece of cardiac tissue and
20 stimulate it at 60 cycles, it might respond to every other
21 60-cycle cycle or every fourth 60-cycle cycle, but it gets
22 what we call entrained, so that -- that the electrical
23 shock can basically synchronize with the heart but the
24 heart doesn't beat for every cycle. Then, when that
25 happens, and this is what's happening above the upper limit

1 of vulnerability if you're using 60 cycles to cause -- to
2 cause fibrillation, you turn off the shock that's driving
3 the fibrillation and the heart starts beating again.

4 So the fundamental problem is if your initial shocks
5 are above the upper limit of vulnerability, you will not
6 cause the heart to enter into fibrillation, but you don't
7 know this unless you put an electrocardiogram electrode on
8 the person being electrocuted, and that hasn't been done.

9 Q. And when a person is in the electric chair, what
10 happens to their skeletal muscles?

11 A. Okay. So the electric current is going from the top
12 of the head to one or both -- in South Carolina it's to the
13 right lower leg -- lower limb. That electric current is
14 flowing through both nerves and skeletal muscle, some
15 alternating current, it's causing the skeletal muscles to
16 immediately contract. Any of the nerves that are on that
17 pathway are also being stimulated and they can cause
18 muscles to contract that don't have the current going
19 through them. So, for example, if you have electrical
20 current going through the right leg, the left leg may --
21 may jump as well.

22 Now so what we're seeing is that the electric current
23 is -- some fraction goes into the brain. That current,
24 depending on how it's flowing, will render some of the
25 brain nonfunctional. How much of the brain that is

1 rendered nonfunctional is -- there's no evidence on --
2 on what that fraction is. So, for example, in the case
3 of cardiac defibrillation, I did one of the definitive
4 studies on what fraction of the heart did you have to
5 defibrillate to stop fibrillation, but the corresponding
6 fraction of the brain that's affected by an electric shock,
7 that calculation has never been done.

8 So as this electric current is going down through
9 the chest, it is basically causing all of the intercostal
10 muscles between the ribs to contract and it's causing the
11 diaphragm to contract, which means the prisoner going into
12 electric shock cannot breathe period. It's not that the
13 person is being strangled per se, it's that the muscles of
14 the chest cannot work and that's because of the simple
15 bioelectricity and bioengineering of -- of response of
16 muscles to electric shock. So the intercostal muscles and
17 the diaphragmatic muscles both tetanize and for however
18 long those shocks are occurring there is no breathing at
19 which point carbon dioxide levels in the blood will be
20 increasing and oxygen levels will be dropping.

21 Another thing that's happening is that the metabolic
22 activity of the muscle is spiking because the muscle is
23 madly trying to do physical contractions, which is then
24 increasing the consumption of glucose and the secretion of
25 lactic acid and carbon dioxide.

1 I'm trying to think what else.

2 Q. Well, really quickly before you go on, can you just
3 explain very briefly why have the human studies not been
4 done?

5 A. I have done a sufficient number of human studies that
6 I have had to be trained in. The Nuremberg -- the training
7 associated with Nuremberg and other respect for humans,
8 those experiments are not allowed and a lot of the
9 historical experiments on electric shock would not be
10 allowed today as being too painful.

11 Q. Okay. So we talked about the heart either
12 fibrillating or not, we talked about loss of blood to the
13 brain if the muscles contract, and could you explain now
14 what happens to all of the power that's being dissipated
15 throughout the body.

16 A. It's going into heating and so just as we talked about
17 the earlier example of the electric stove that you put a
18 lot of current, a lot of power into your burner, the burner
19 gets red hot, well, it turns out you're putting very large
20 amounts of power into the prisoner and the prisoner is not
21 necessarily getting red hot, but the prisoner is being
22 heated up as the electrical resistance of the interface
23 between the electrodes and the skin to skin itself and all
24 of the connective tissue are dissipating power based on
25 their resistance, their acidity, and are getting hot.

1 And if you look at autopsy pictures, you can see
2 severe charring, you see blackened flesh under -- on the
3 skin, you can see through -- full depth penetration burns
4 of the skin, the classic being what's called the hat -- the
5 hat ring burn, which is from a head electrode in judicial
6 electrocution where you have a circular band of tissue of
7 the scalp that's literally destructed.

8 Q. Okay.

9 A. And that means you can also heat internal organs,
10 you're gonna be heating blood, and you can have a --
11 depending on what parts of the body are affected,
12 significant temperature rises of those parts of the body
13 to the point of charring.

14 Q. And in your opinion is it possible that a person who
15 is subject to those three processes could remain alive
16 during the course of the electrocution?

17 MR. PLYLER: Your Honor, getting back into mechanism
18 of death.

19 THE COURT: Yes. Sustained.

20 BY MS. FREEDMAN:

21 Q. Okay. Dr. Wikswo, I'm approaching you with what has
22 been marked as Plaintiff's Exhibit 5.

23 MS. FREEDMAN: And, Your Honor --

24 MR. PLYLER: Exhibit 5 is an autopsy report under
25 seal. He's already admitted he's not qualified as a

1 forensic pathologist, a medical examiner or doctor.

2 THE COURT: We don't even know what the question
3 is. You can't object when you don't know what it is yet,
4 right?

5 MR. PLYLER: I know that if he's gonna be asked to
6 interpret in any way that particular document, that he's
7 not qualified to do it.

8 THE COURT: Right. Let's see what the question is.

9 MS. FREEDMAN: I was gonna ask him if he saw
10 evidence of charring in any of South Carolina's
11 autopsies.

12 THE COURT: I think it's a valid question.

13 MR. PLYLER: Do you mean -- so he can interpret
14 what's in that autopsy?

15 THE COURT: Listen.

16 MR. PLYLER: I'm -- I'll withdraw my objection,
17 Your Honor.

18 THE COURT: What was the number? 5?

19 MS. FREEDMAN: Plaintiff's 5 and it's -- the Bates
20 stamp is 25 on the first page.

21 THE COURT: All right. That's a valid question.
22 The objection's overruled.

23 BY MS. FREEDMAN:

24 Q. Have you seen this document before, Dr. Wikswow?

25 A. Yes, I have.

1 Q. And what is this?

2 A. This is an autopsy report.

3 Q. Okay. And without identifying any of the personal
4 identifying information in this document, can you identify
5 for us where in -- if anywhere, in this autopsy report and
6 the associated images you saw charring?

7 A. There are the two classic examples of charring in
8 judicial electrocution. If you pass too much current
9 through tissue, you will actually burn the tissue. When
10 I'm working in the dog lab, if you electrocauterize tissue,
11 you can cut it. I was doing an experiment on a dog in the
12 dog lab and I say hey, look what happens when I turn the
13 stimulus knob up and the technician says oh, don't do that,
14 you'll cook the tissue, and I said yes, but look what
15 happens, and we discovered the mechanism of action of
16 defibrillation.

17 So as a biomedical engineer, a physiologist and a
18 biophysicist, I have seen the effects of electric current
19 on living systems, and I see charring of the hatband that's
20 equivalent to the hatband seen on many judicial executions
21 and severe burning of the right lower limb between -- well,
22 from above the knee to a band beneath the knee that is
23 associated with the electric currents and the heating.

24 Years ago I had interactions with a biomedical
25 engineer developing cardiac defibrillation electrodes and

1 for the -- for the full chest paddles where you take the
2 paddles and put them on the chest and the problems with
3 those paddles is they leave circular burns -- or they can
4 leave circular burns. This is a standard bioengineering
5 phenomenon that occurs associated with the very rapidly
6 changing electric field at the edge of an electrode and in
7 this case you can see in the images of the lower limb --
8 hold on just a second. It's Figure 033. You can see a
9 very clear marking of the edges of the electrode that is
10 delivering the current back and forth to the lower limb and
11 this is completely consistent with the understanding of how
12 electric current is delivered across the skin by a metal
13 electrode.

14 Q. Okay. And other than charring, these deep burns, are
15 there other kinds of thermal injuries that you have seen as
16 a result of judicial electrocution?

17 A. I have not been able to study these photographs to
18 the extent that I would like, but typically what you see is
19 at the regions where there's high electric current, for
20 example, below the hatband burn is where you have basically
21 a rendering of the subcutaneous fat.

22 Q. And what does that mean?

23 A. You basically liquefied the fat and you see -- you
24 can see a sloughing off of skin on -- on the side of the
25 face. It depends very much upon how the electric current

1 is getting from the scalp electrode to the -- to the rest
2 of the body.

3 Q. And do you see evidence of any of those things in any
4 of these images?

5 A. Well, the -- the scalp burns are -- are profound, so I
6 have to check the wording of -- of the autopsies that I've
7 read, some are described as full thickness burns of the
8 skin. The South Carolina autopsies that I read late last
9 night describe full thickness burns. On page F-039, there
10 appear to be holes in the neck, and one could imagine that
11 they're associated with judicial electrocution. I don't
12 know whether the person went into the event with holes in
13 the neck.

14 Q. Okay. In a judicial electrocution, what happens to
15 the electricity when it encounters the waist and the knee?

16 A. It becomes concentrated. It's the same thing as when
17 you have a river and you get -- you're rafting in a river,
18 you get to a rapids and suddenly the -- the water starts
19 flowing very quickly, you essentially have a constriction.
20 The local -- the total current going from head to foot is
21 the same, but it's being squeezed to a smaller region and
22 because the current is being squeezed into this constrained
23 region, the local power dissipation really increases and
24 that's why the -- the problem with the knee is that when
25 you -- if you just feel your knee, they're not -- there's

1 not much muscle around your knee. There's tendons, there's
2 lots of bone, there are blood vessels, but there are not
3 that many muscles compared to your thigh or your calf, so
4 the current density is not gonna go -- it will go through
5 the bone, but nowhere near as well as it's going to go
6 through the skin and the tendons. The net result is that
7 the current densities are so high that the heating is very
8 high and you get in this -- and this is an appropriate
9 example of extreme thermal burns in the knee.

10 Other autopsies that I read late last night included
11 that there's a -- a triangle behind the knee and that --
12 that has a characteristic burn as reported by the
13 pathologist and recorded on these autopsies saying there
14 was that burn in that triangle between the -- the tendons
15 on the back of the knee.

16 Q. Can you explain the term arcing, please?

17 A. Now typically if you have copper wire your electricity
18 is flowing without the generation of light and because
19 copper is such a good conductor it's not putting out a
20 whole lot of heat. Let's say you're vacuuming the floor
21 and you quickly unplug the vacuum cleaner, you will get
22 often a spark, you'll see a flash of light as the plug is
23 being withdrawn from the wall. That is an arc. And if --
24 lightning is an arc. When you scuff your feet across the
25 carpet and get close enough to the doorknob, without

1 touching the doorknob, the electric field can be strong
2 enough to ionize the air. So air, which is normally or --
3 dry air is a reasonably good insulator. If the electric
4 field is strong enough, the electrons get ripped off the
5 oxygen and nitrogen molecules -- if there's a nitrogen
6 molecule and if they're in great quantity, then suddenly
7 you have free electrons and you have charged nitrogen
8 ions. They can carry electricity, but they bump into
9 all the rest of the air molecules which means they're
10 dissipating energy. Just like the bowling ball that's
11 going down the hill and hitting bushes, that is an arc. So
12 you get an arc when the electric field potentially divided
13 by distance is high enough to ionize air.

14 So in a judicial execution I did not see clear
15 evidence in any of these five autopsies. Historically I
16 read a case where only one leg was energized and it turns
17 out there was arcing between the balls of the feet because
18 one foot was at the ground potential of the electrode, the
19 other foot happened to be at the potential of the hip, so
20 suddenly you had hundreds of volts between the balls of the
21 feet, they touched and drew an arc, and you had sparking
22 between the prisoner's feet.

23 Another time where you had arcing is where there's a
24 fold in the skin. If you have belly fat and you're -- from
25 here is belly fat and belly skin and they fold over, for

1 example, your belly reaches your thigh, the belly is at one
2 voltage, the thigh is at a different voltage, you can get
3 arcing.

4 You can get electrical arcing between the penis, the
5 scrotum and the thigh because the penis and the scrotum are
6 at the electric potential of the groin and the thigh is a
7 different electric potential because of the voltage drop
8 along the leg. Those are arcing.

9 If you have a mask on, a face mask, that is conducting
10 electricity, you can get arcing from the mask to the -- to
11 the face and there were reports in the autopsy reports that
12 I viewed last night apparently of -- of arcing between the
13 mask and the nose of -- of one of the prisoners.

14 So arcing is basically electric current flowing
15 initially through air and then through a plasma, which is
16 ionized air just like -- a lightning bolt is a plasma. The
17 voltages are vastly higher, but it's the very same thing.
18 An arc is a short lightning bolt.

19 Q. I'm now handing you what has been marked as
20 Plaintiff's Exhibit 4, and this is the one that starts
21 with Bates Number 11, if you'd turn to Bates Number 24.

22 A. The figure in the lower left-hand corner appears to me
23 to have a -- and without checking these, I don't remember
24 if the autopsy gave a dimension, but it -- it looked to me
25 like a couple centimeter hole burn into the tip of the nose

1 by the electric current flowing between the prisoner's face
2 and the facemask and that led to an arc that eroded the
3 nose.

4 This is the one that had -- there were burn effects
5 which extend through the full thickness of the dermis. In
6 some areas, there were autolysis of the fat which basically
7 is the destruction of the fat. This report also describes
8 burns on the scalp.

9 Q. Dr. Wikswo, in the course of preparing to give an
10 opinion today, did you also review autopsies from other
11 states?

12 A. Yes, I have. Probably forty -- at least forty
13 autopsies.

14 MS. FREEDMAN: May I approach?

15 THE COURT: Yes.

16 (Plaintiff's Exhibit Number 14 was marked for
17 identification under seal.)

18 BY MS. FREEDMAN:

19 Q. Dr. Wikswo, have you seen this document before?

20 A. Yes, I have.

21 Q. This series of images?

22 A. Yes, I have.

23 Q. And do you know what this is?

24 A. This is a set of autopsy photographs --

25 MR. PLYLER: Your Honor --

1 THE COURT: Hold on, Dr. Wikswo.

2 MR. PLYLER: -- I'm gonna need some sort of
3 foundation.

4 MS. FREEDMAN: He said he relied on his review of
5 autopsies from other states.

6 BY MS. FREEDMAN:

7 Q. Dr. Wikswo, is this -- are these images from an
8 autopsy report that you reviewed from another state?

9 A. Yes, they are. They were in my possession before. I
10 think we separately acquired these.

11 MR. PLYLER: I -- I still don't know what autopsy
12 it's from, what state it's from, who it's of, when this
13 happened, what were the circumstances of execution.
14 There is no foundation here for how whatever they want
15 to ask him about these particular images that's relevant
16 to the case we're litigating.

17 THE COURT: You've got to ask the questions. I know
18 what's in your head --

19 MS. FREEDMAN: Right. Okay.

20 THE COURT: -- but lay the foundation.

21 MS. FREEDMAN: Right.

22 So -- I guess I would just -- if I can just add to
23 that, our position is that judicial electrocution is
24 unconstitutional in all circumstances and so no matter
25 how these autopsies came to be, if it's from a judicial

1 electrocution our position is that it's relevant.

2 THE COURT: Lay the foundation.

3 MS. FREEDMAN: Okay.

4 BY MS. FREEDMAN:

5 Q. So, Dr. Wikswo, you said this document is from a prior
6 autopsy that you reviewed?

7 A. Yes.

8 Q. What state is this from?

9 A. I believe it's Tennessee.

10 Q. Okay. And was this part of a filing in Federal court?

11 A. I believe so. I have not testified -- I have filed
12 affidavits in Federal court, I have filed affidavits with
13 public defenders in Tennessee, and in the course of
14 discovery prior to filing those affidavits I received at
15 least forty autopsy reports, and this is one of them.

16 Q. And are there numbers on the bottom of the page of
17 these images?

18 A. Yes, there are. The number's MEC07-2980.

19 Q. Okay.

20 A. I would have to check my records to know exactly which
21 autopsy this corresponds to.

22 MS. FREEDMAN: Your Honor, is that a sufficient
23 foundation?

24 THE COURT: Any objection?

25 MR. PLYLER: I mean, it's not. He -- he hasn't --

1 this is hearsay if nothing else. She hasn't laid a
2 foundation for him to articulate the authenticity of
3 this document, when it was produced, where it came from,
4 all those things. He can't just say I found a picture
5 of a judicial electrocution. How are we supposed to
6 cross-examine him on it? I don't know when this occurred,
7 I don't know who was involved, I don't know who took the
8 photos. I don't know how long after whatever happened to
9 this individual the photos was taken. I don't know who
10 maintained possession of them.

11 THE COURT: The objection's sustained.

12 Actually this is probably a good time to take a
13 break. Let's take a ten-minute break.

14 Dr. Wikswo, you can step down. Do not discuss your
15 testimony with anyone. Understood?

16 THE WITNESS: (Nods head.)

17 THE COURT: Ten or fifteen minutes.

18 MR. PLYLER: Thank you, Your Honor.

19 (Recess taken at 4:39 PM.)

20 (Back on the record at 4:55 PM.)

21 BAILIFF: Remain seated. Come to order, please.

22 THE COURT: Thank you. You-all have a seat.

23 All right. Ms. Freedman, continue.

24 MS. FREEDMAN: Your Honor, at this time I have no
25 further questions for this witness.

1 THE COURT: Wonderful.

2 MS. FREEDMAN: Dr. Wikswo, please answer any
3 questions the defense has for you.

4 Thank you.

5 THE COURT: Mr. Plyler.

6 MR. PLYLER: Thank you, Your Honor. May it please
7 the Court?

8 CROSS-EXAMINATION

9 BY MR. PLYLER:

10 Q. Dr. Wikswo, you'd agree with me, would you not, that
11 you're not qualified to look at an autopsy report or photos
12 from an autopsy and then render an opinion whether or not
13 the burn is before the person died or after the person
14 died, correct?

15 A. I am not able to determine whether a burn occurred
16 before or after death.

17 Q. Right. You don't have those qualifications and you
18 can't do it, correct?

19 A. I have no experience in that determination.

20 Q. Right. So the burns that you were just discussing
21 that you saw in the two autopsies reports that were
22 provided to you to look at here in court, you don't know
23 whether those burns occurred before the person died or
24 after the person died, do you?

25 A. No, I do not.

1 Q. But previously you offered reports where you tried to
2 argue with medical examiners who had determined that
3 somebody suffered electrical burns after that person had
4 died, haven't you?

5 A. I do not recall having an argument with a medical
6 examiner.

7 Q. Well, I said you offered a report wherein you argued
8 with the medical examiners about that fact. Do you recall
9 doing that?

10 A. I do not recall writing a report that was designed to
11 argue with a medical examiner.

12 Q. Do you recall offering a report in Florida that you
13 produced to me during the -- or, excuse me, in response to
14 my subpoena?

15 A. Yes.

16 Q. Okay. And in that Florida report, you actually -- in
17 the document itself you call it an affidavit.

18 A. That's correct.

19 Q. So that would be sworn testimony, correct?

20 A. Correct.

21 Q. This is on page 23 of that report, paragraph 12. Do
22 you see paragraph 12? Do you see paragraph 12, sir?

23 A. I can barely read it from here because it's a little
24 faint, but I'm looking at it.

25 Q. Is that a little better?

1 A. Yes. Thank you.

2 Q. Okay. And these are -- this is your report?

3 A. May I please read this for a second? Okay.

4 Q. All right. So this is your report and you say in
5 your report, your affidavit, the pathologists who examined
6 Medina's body occurred -- concurred that the burns occurred
7 postmortem. Did I read that correctly?

8 A. Yes.

9 Q. Okay. And you're familiar with the Medina autopsy and
10 Pedro Medina's situation, correct?

11 A. Yes.

12 Q. The only reason I ask is when I deposed you four weeks
13 ago, you were not. You did not even recall being involved
14 in Medina's -- excuse me, the investigation in the Pedro
15 Medina situation. So are you familiar with it?

16 A. I have not reviewed the Medina autopsy since the
17 deposition.

18 Q. Which deposition?

19 A. The deposition that you -- that I gave to you a month
20 ago in Nashville.

21 Q. Is your recollection that you -- when -- did you
22 review it at the deposition?

23 A. I don't recall whether you handed me the Medina
24 autopsy report.

25 Q. Okay.

1 A. I stand by what I said in that statement very clearly,
2 but I don't know the specific details. I do not recall the
3 specific details that led to that decision.

4 Q. All right. When you say that statement, you're
5 talking about what's on the screen right now, paragraph 12
6 from your Florida report, correct?

7 A. Correct.

8 Q. All right. You go on to say after the sentence that
9 the pathologists who examined Medina's body concurred that
10 the burns occurred postmortem, and that would mean after
11 death, you go on to say the onset of the burns would begin
12 with the flow of the electric current since the power
13 dissipation is continuous throughout the electrocution.

14 Did I read that correctly?

15 A. Yes, you did.

16 Q. If death occurred in the first half cycle of the
17 electricity, i.e., one-one hundred and twentieth of a
18 second, or eight milliseconds, there would still be burning
19 during that period.

20 Did I read that correctly?

21 A. Yes, you did.

22 Q. Given the uncertainty in the time of death, during or
23 after the execution, there is no basis for the claim that
24 the burns occurred postmortem.

25 Did I read that correctly?

1 A. You correctly read what I stated in that report.

2 Q. All right. And that was when you were hired by the
3 Capital Collateral, if I'm not mistaken, in Florida to
4 review the Pedro Medina incident, correct?

5 A. Correct.

6 Q. And then you later testified either through affidavit
7 or in live testimony in court in two cases in Florida that
8 were challenging the electric chair after Mr. Medina's
9 execution. Isn't that right, sir?

10 A. Correct.

11 Q. One was Jones. The Jones case v. Florida?

12 A. Okay. I don't remember the name of the case -- the
13 two cases in Florida that I was party to.

14 Q. The other one was Provenzano.

15 A. I remember the Provenzano, but I don't remember the
16 Jones right this moment.

17 Q. And in both of those cases where your testimony was
18 used in the State of Florida to try to challenge the
19 electric chair as unconstitutional, the Court disagreed
20 with you and those individuals were executed; isn't that
21 right?

22 A. The Supreme Court accepted the appeal from the Florida
23 Court of Appeals, the Provenzano case. The State of
24 Florida then changed its execution protocol and the Supreme
25 Court then withdrew its acceptance of the case.

1 Q. Was Mr. Jones executed?

2 A. I believe he was.

3 Q. Was he executed in the electric chair?

4 A. I don't know.

5 Q. Was Mr. Provenzano executed?

6 A. I believe so.

7 Q. Was he executed in the electric chair?

8 A. I don't know for a fact. I expect not.

9 Q. Do you recall testifying at the Provenzano trial, the
10 trial that they had on that?

11 A. Yes, I recall that.

12 Q. Okay. And in your testimony -- do you recall
13 specifically your testimony from 1999?

14 A. No, and I did not review the transcripts of that
15 testimony.

16 Q. All right. Well, let me show you a little bit of it
17 here.

18 So this was your -- page 616 of the transcript from
19 that and your testimony here is -- in that trial, I was
20 retained as a consultant to review the procedures and
21 testimony at the time of the 1997 hearings following the
22 Media execution. Do you see that?

23 A. Yes.

24 Q. And it said would that have been the Leon Jones
25 litigation and your answer is that is the Leo Jones

1 litigation. I've also been retained by the corresponding
2 office in Tennessee in 1992 and again in 1994 to review
3 some very serious problems with the electric -- Tennessee
4 electric chair.

5 Did I read that correctly?

6 A. You read that correctly.

7 Q. And Tennessee still uses the electric chair; do they
8 not?

9 A. Tennessee has used both the electric chair and lethal
10 injection and I am not sure what they are currently using.

11 Q. The two autopsies that you looked at with
12 Ms. Freedman, do you know what year that happened?

13 A. I don't recall.

14 Q. Do you know where it happened? The execution that is.

15 A. I don't recall exactly. I know the names of the --
16 of the prisons where the death chambers have been, but I
17 wouldn't at this point want to state definitively that
18 execution occurred at a particular prison.

19 Q. Do you know the amount of voltage that was used in
20 those two particular executions?

21 A. I don't have the exact number. It was a couple of
22 thousand volts.

23 Q. Do -- do you know how long the voltage or the current
24 was applied in those executions?

25 A. I don't recall that number at this moment.

1 Q. You gave a fairly lengthy affidavit in this particular
2 case. Do you recall doing that? And I'm talking about the
3 case that we're here to talk about, this litigation.

4 A. Yes.

5 Q. And that affidavit contained all of your opinions or
6 was your best effort to contain all of the opinions that
7 you wanted to offer about executions in South Carolina,
8 correct?

9 A. That's correct.

10 Q. Nowhere in that affidavit did you make any mention of
11 animal euthanasia, husbandry, execution of horses or
12 cattle, did you?

13 A. I can't for sure state that I did not mention
14 euthanasia in that report because I haven't reviewed it
15 lately. I have been thinking about the euthanasia problem
16 for a long time in part because of my animal research.

17 Q. Okay. And in your response to the subpoena that I
18 sent during discovery, one of the things you provided was
19 a list of, I guess, research and documents that you looked
20 at, and that particular one that I'm talking about was from
21 March of 2009. Do you recall this particular effort you
22 made in March of 2009 to compile a listing of scientific
23 articles and other materials to which John Wikswow refers
24 when rendering his opinions regarding accidental and
25 judicial electrocution?

1 A. That's correct.

2 Q. Okay. And in there the only thing about euthanasia
3 that I can find is about the reports of the AVMA. Can you
4 tell me what the AVMA is?

5 A. American Veterinarian Medical Association.

6 Q. You're not a member of that association, are you?

7 A. No, I am not. It was a published peer-reviewed
8 document.

9 Q. And you're not a vet? You don't practice veterinary
10 medicine, do you?

11 A. No, I do not.

12 Q. You haven't performed any actual studies, you
13 personally, with regard to euthanasia of animals, have you?

14 A. I am subject to the animal regulations for Vanderbilt
15 University and have been carefully instructed about the
16 procedures for euthanasia of animals in a very general
17 manner prior to having animal experimentation protocols
18 approved.

19 Q. And I appreciate that information, but my question is
20 very specific. You've not personally conducted any studies
21 of animal euthanasia, have you?

22 A. I have used animal euthanasia, but I -- I have not
23 published studies on animal euthanasia.

24 Q. I understand you haven't published studies on animal
25 euthanasia, but you also don't have studies that you've

1 done specific to animal euthanasia that you haven't
2 published, do you?

3 A. I have trouble understanding exactly what you're --
4 what point you're trying to get across.

5 Q. Well, are you having trouble understanding the
6 question?

7 A. Yes.

8 Q. The question is has Dr. Wikswo personally performed
9 any studies specifically on the euthanasia of animals?

10 A. The reason I'm hesitating is the question of how
11 you define a study and there has been extensive
12 conversations with the Vanderbilt Animal Care Board on
13 the proper means by which -- and these are extensive
14 discussions -- for euthanasia of an animal for nonsurvival
15 -- after nonsurvival surgery for cardiac experiments that
16 require the use of an isolated rabbit heart and so I have
17 studied that problem to the extent of understanding how
18 to justify the specific dosages of barbiturate and type
19 of barbiturate so that the euthanasia procedure did not
20 interfere with the electrophysiology that we were doing on
21 the rabbit heart. I would consider that a non-published
22 study of the literature to identify a proper method for
23 euthanizing a rabbit without undue pain and suffering.

24 Q. Any other studies than you referring -- reviewing
25 somebody else's work on the topic?

1 A. Well, I mean, we -- we've also worked on having to
2 anesthetize a rabbit in a manner that was acceptable and
3 that included the preinjection of Ketamine in the ear
4 because we did not want the rabbit to squeal because
5 that was indicating the rabbit was undergoing pain and
6 suffering, so --

7 Q. Any other studies that you've conducted on this
8 specific issue?

9 A. No. You asked if I've done a study. That's an
10 example of a study I've done. I do not know of any others
11 right now.

12 Q. Have you reviewed the guidelines that are published
13 every year by the AVMA with regards to euthanasia?

14 A. I don't know that they're published every year. I
15 know there is a 2020 document on euthanasia and I think
16 it's 2016 on animal slaughter. I don't know if they are
17 produced annually, updated annually. These are the ones
18 that I have found.

19 Q. And that you're relying on?

20 A. And they are -- I basically relied on not only those,
21 but the earlier ones that are in my files. Same name, just
22 a different edition.

23 Q. And what do they call that document, the Guidelines
24 for Euthanasia of Animals?

25 A. That's what -- if you're looking at the list of

1 documents I provided, that is the name.

2 Q. Okay. So I've just placed on the screen the AVMA
3 Guidelines for the Euthanasia of Animals, 2020 Edition.

4 A. Yes.

5 Q. Okay. And that's the type of document that you were
6 talking about just a moment ago, this 2020 version of their
7 guidelines, right?

8 A. And my earlier reports were based on the earlier
9 version of those documents, which I've maintained in my
10 files as well. I can't remember the exact date of the
11 earlier version. It may be 2009. I don't remember. There
12 have been multiple editions. I can't remember if this is
13 the seventh or the ninth edition of those guidelines. They
14 are not -- to my knowledge not released annually.

15 Q. And this is on page 16 of the guidelines because
16 there's nothing in your affidavit about animal euthanasia
17 and your opinions on it, so when you talked about it just
18 a few minutes ago is the first time I'm hearing your
19 opinions on that.

20 A. I believe that I mentioned euthanasia during the
21 deposition.

22 Q. And what I heard you say is that after stunning,
23 then they normally would recommend following it up with
24 exsanguination. Is that not what you said just a while
25 ago?

1 A. Well, they actually had two recommendations. Either
2 exsanguination or cardiac fibrillations.

3 Q. Okay. And were you representing that stunning is done
4 through electrical means?

5 A. Well, actually they -- they are using the term
6 electrical -- they're using stunning by electrical means.
7 They're also using a captive bolt as -- well, they -- those
8 reports discuss a variety of means. And, again, there are
9 two reports. Not just the euthanasia of animals. There's
10 the slaughter one. So euthanasia of animals talks about
11 various ways to euthanize animals, but in that list of
12 ways to euthanize animals, they're discussing the use of
13 electric stunning.

14 Q. Okay. This is from page 16 of that guideline and the
15 section is mechanisms on euthanasia and it reads physical
16 destruction of brain activity can be produced through a
17 blow to the skull resulting in concussive stunning, through
18 direct destruction of the brain with a captive bolt, bullet
19 or pit -- pithing rod or through depolarization of brain
20 neurons following electrocution.

21 Now I thought -- I thought I understood your previous
22 testimony to be that these guidelines specifically said
23 it was unethical and then you backtracked a little bit
24 and said well, I don't want to say unethical to use
25 electrocution in the euthanasia of animals. Isn't that

1 what you testified to earlier?

2 A. If you look at the document --

3 Q. Can you just answer my question first and then please
4 explain? Is that not --

5 A. Specifically what is your question?

6 Q. Is that not what you testified to earlier when
7 Ms. Freedman was questioning you, sir?

8 A. I would like the court reporter to read back what I
9 said at that time.

10 THE COURT: It's a question. The answer is yes,
11 it is or no, it isn't or I don't remember or something
12 along those lines.

13 THE WITNESS: I do not remember my exact wording
14 in your question today. The reason there are caveats
15 built into that document that do not appear in that
16 sentence that you showed that you selected and the
17 approval of electrical stunning is conditional, not
18 universal, and one of the conditions is that it's not
19 to be done by an electrode between the head or nose and
20 a lower limb or hoof, and that was my hesitation because
21 I do not remember the exact word that was supporting the
22 conditional use of electrical stunning.

23 It basically said electrical stunning -- and, again,
24 I cannot quote exactly from the document, but in effect
25 it said electrical stunning cannot be done from the --

1 the head slash -- head or nose and a lower limb.

2 BY MR. PLYLER:

3 Q. Throughout your affidavit in this case, you used
4 several vague terms that I'd like to talk about with you,
5 and during your deposition you failed -- you had absolutely
6 no scientific proof to support any of them, so let's talk
7 about the terms "some period of time".

8 You would agree with me, would you not, that you used
9 the term "some period of time" multiple times in your
10 affidavit to try to establish your opinions in this case;
11 isn't that right?

12 A. That is correct.

13 Q. And, in fact, when I asked you to define that, some
14 period of time, what you said was that is a not yet
15 specified period of time. Do you recall saying that?

16 A. That's correct.

17 Q. And you don't know how long this theoretical not yet
18 specified some period of time is, do you?

19 A. I have searched the literature and I'm unable to find
20 a specification for some period of time.

21 Q. I feel like that says I don't know. I don't know what
22 that theoretical not yet specified, some period of time is;
23 is that right?

24 A. I don't believe that anyone today knows how long some
25 period of time is.

1 Q. Including you, correct?

2 A. I do not know what some period of time is. I would
3 argue that it's longer than instantaneous.

4 Q. Right. And when I asked you in your deposition, you
5 agreed with me that it could be less than ten seconds,
6 couldn't it?

7 A. I don't remember whether I explicitly had ten seconds
8 in my deposition. You have it in front of me, I do not.

9 Q. Actually you still have the transcript.

10 A. If you want to point me to the page, I'll -- I'll look
11 at it and see what --

12 Q. I'll be happy to do that for you, sir. Let's go to
13 page 120 of your transcript. So starting at the first line
14 up there, the question was essentially you don't know of
15 any scientific evidence that would allow you to quantify
16 the phrase you used here for some period of time into a
17 measurable increment, right? Your answer was, I know of no
18 existing scientific data that could provide that number
19 because the pre -- the requisite measurements are not made
20 at the time of a judicial electrocution and controlled
21 experiments are not possible. And my answer was -- I mean,
22 my question is are we talking in the order of microseconds?
23 You said I think some period of time could be many seconds
24 -- could be many. I said less than ten? I don't know was
25 your response. Less than five? I don't know was your

1 response. Less than two? I don't know was your response.

2 Isn't that right, sir?

3 A. That's correct. I stand by those statements.

4 Q. And when we looked at the Florida report just a moment
5 ago, the affidavit you gave in -- I believe it's dated
6 1998, you actually hypothesized it could be in the first
7 half -- or the first cycle of the electrical current,
8 correct?

9 A. No.

10 Q. Did you not say that --

11 A. You were --

12 MS. FREEDMAN: Your Honor, please let the witness
13 finish the question.

14 MR. PLYLER: The answer to the question, he said no,
15 and I started my next question.

16 THE COURT: Let him explain --

17 THE WITNESS: I withdraw my -- I withdraw my
18 response.

19 THE COURT: Hold on. Everybody hold on. Everybody
20 stop.

21 He's allow to explain his answer. That's what he
22 was doing.

23 Please explain your answer to the question and then
24 we will move on, Dr. Wikswo.

25 THE WITNESS: The statement -- can you put the

1 statement up that has the --

2 BY MR. PLYLER:

3 Q. Sure.

4 A. -- pathologist's statement. I said if death occurred
5 in the first half cycle of electricity. That is a
6 hypothetical.

7 Q. And I think my question was --

8 A. Just a minute. May I please finish my statement?
9 That was a hypothetical. If it occurred in the first half
10 cycle, there would still be burning during that half cycle;
11 hence, you can't say that the burning only occurred after
12 the half cycle. That was the context of that statement,
13 which is, again, if it occurred in the first half cycle,
14 which I think you can decide whether or not that's an
15 optimistic estimate, but it's the claim of some -- of
16 some people in the field that burning would be occurring
17 during that half cycle. So any claim that all burns
18 associated with judicial electrocution are postmortem is
19 unsubstantiated by experimental fact, experimental
20 observation. That is the context of that statement and I
21 don't know quite how to use that statement in your more
22 recent question.

23 Q. And that statement's up there where you hypothesized
24 if it happened in the first one-one hundredth and twentieth
25 of a second or eight milliseconds because we already know

1 it could be less than two seconds, you just don't know
2 that, but in that statement you're disagreeing with what
3 the pathologist found that examined Medina's body, right?
4 A. I see no scientific basis of any claims that a burn
5 occurs premortem or postmortem. So the pathologist was
6 claiming that the burns were postmortem and I have seen no
7 scientific evidence that suggests that you can distinguish
8 between a premortem burn and a postmortem burn without an
9 independent determination of time of mortality. That
10 requires effectively electroencephalography because you
11 have to decide when is the brain rendered insensate, when
12 is the brain legally dead and, hence, the premortem,
13 postmortem argument is, in my mind, not particularly
14 relevant to the discussion because you're defining a point
15 in time that has zero scientific support, which is that you
16 can establish a clear time during a judicial electrocution
17 during which death occurred.

18 So I have a problem with the initial first line. The
19 pathologists concurred that burns occurred post -- burns
20 occurred postmortem. Tell me how the pathologist can
21 decide that a burn is premortem or postmortem. That
22 statement basically says if you actually stipulate that
23 death was at the first cycle, you still had burns during
24 the first cycle. That's all that that statement says.

25 Q. Right. So you disagree with the pathologist?

1 A. No, what I disagree with is that there could -- well,
2 I disagree with the pathologist to the extent that burns
3 would have occurred premortem as well. So we're splitting
4 words here. Did all of the burns occur -- did these
5 pathologists claim that all the burns occurred during
6 postmortem? I don't know. I'm saying there are premortem
7 burns and postmortem burns and I know of no scientifically
8 proven means to distinguish between the two.

9 MR. PLYLER: Give me a moment. I'm gonna get this
10 marked.

11 This will be Defendant's 1.

12 (Defendant's Exhibit Number 1 was marked for
13 identification.)

14 MR. PLYLER: May I approach, Judge? I'd like to
15 hand this to the witness, Your Honor, if that's all
16 right?

17 THE COURT: Yes, sir.

18 MR. PLYLER: Here you go, sir.

19 THE WITNESS: Thank you.

20 BY MR. PLYLER:

21 Q. All right. I've handed you what's been marked
22 Defendant's Exhibit 1. I'll represent to you that not only
23 was this produced to us in discovery in this case and it's
24 something that you and Dr. Arden were provided to rely on,
25 but it also is, in fact, the medical examiner's report from

1 the execution of Pedro Medina, and that would have been
2 something you had to have reviewed to be able to say they
3 concurred -- that the pathologists who examined Medina's
4 body occurred -- concurred that the burns occurred
5 postmortem when you were reviewing all of this back in
6 1997; isn't that right?

7 A. I have not reviewed this document in the past -- what
8 is -- is the date of the affidavit, 1997? What's the date
9 on my affidavit?

10 Q. You produced it to us as February 15th of 1998.

11 A. Fine. I have not read this report since February of
12 1998, which is twenty-four years ago.

13 Q. You didn't read it to prepare for your opinions in
14 this case?

15 A. Not today, no.

16 Q. I didn't ask about today.

17 A. I have not read this -- I have not read this specific
18 report to my knowledge since 1998.

19 Q. But yet you produced it to me in 1500 pages of
20 documents when I sent you a subpoena asking for what you're
21 relying on to give your opinions in this case, but you now
22 you haven't reviewed that?

23 A. You -- you requested in your subpoena the breadth of
24 all the materials that I had utilized in acquiring my
25 knowledge about these cases and over the past thirty years

1 this is part of the knowledge that I acquired and I added
2 it to the list because you asked for, I thought, everything
3 that I had ever read or thought about in the subject. I
4 did not need this specific autopsy report to -- to change
5 or adjust any of my opinions. My opinions on judicial
6 electrocution have not actually changed over the years.

7 Q. Okay. But you did review this report back in 1997
8 when you were reviewing --

9 A. Definitely. I'll be glad to review it right now if
10 you'd give me a few moments to read it carefully.

11 Q. I just want an answer to my question, sir. You did
12 review it back in 1997 when you were hired to look into the
13 Pedro Medina situation, correct?

14 A. Yes, I did.

15 Q. Okay.

16 A. I referred to it in my report.

17 Q. And it was provided to you by whoever hired you to
18 look at it to formulate opinions, correct?

19 A. Correct.

20 Q. And in that situation, if you recall, sir, the
21 governor of Florida appointed -- or made sure that four
22 independent medical examiners were involved in the autopsy
23 of Mr. Medina. Two were appointed by the State and two by
24 the Capital Collateral Representative, the CCR; is that
25 right?

1 A. It appears that's the case.

2 Q. Do you not remember from when you actually dealt with
3 this situation in 1997?

4 A. I actually do not have specific details in my working
5 memory of 1997 testimony on capital punishment in Florida.

6 Q. And the CCR represents condemned individuals; isn't
7 that right?

8 A. I believe so.

9 Q. Okay. And the four medical examiners actually
10 participated in the autopsy of Mr. Medina and those are the
11 pathologists that you were referencing in paragraph 12 of
12 the Florida report that we just looked at; isn't that
13 right?

14 A. I can't tell from the fragment that you're showing me
15 whether that was the opinion of four the pathologists or
16 one of the pathologists.

17 Q. I haven't even gotten to that question yet. I'm not
18 sure if we can get there.

19 A. No, you asked --

20 Q. The question I asked was the four medical examiners
21 that are referenced in this report, the two appointed by
22 the State and the two appointed by the CCR, are the
23 pathologists that you were referencing in your report?

24 A. If you look at my statement that you were quoting, I
25 believe I used pathologist in the singular and so until we

1 go back and look at the document --

2 Q. Not a problem, sir.

3 A. -- I don't -- I'm perfectly glad to read the entire --
4 it's pathologists plural. I couldn't see that then. So
5 pathologists.

6 Q. Fine. It also says -- it also says concurred.

7 A. Okay.

8 Q. That would mean they agree, right?

9 A. I'm having a little trouble reading that through the
10 glass at this angle, but fine. It says pathologists who
11 concur -- no, it says pathologists who examined concurred.
12 Thank you. That really does help.

13 Q. Okay.

14 A. Okay. Yeah, so the document says the pathologists who
15 examined Medina's body concurred.

16 Q. Right.

17 A. At the time that I read this, I didn't realize there
18 were four pathologists. I would stipulate that if the
19 letter says there were four pathologists, there were four
20 pathologists and they apparently concurred.

21 Q. Right.

22 Give me a second here to get my technology working
23 right.

24 Okay. On page 8 of that letter, which is Defendant's
25 Exhibit 1, if you'd like to follow along, sir, and it

1 says at the conclusion of the autopsy examination,
2 Drs. Hamilton and myself, along with the two pathologists
3 selected by CCR, Drs. Sperry and Feegel held a summation
4 conference. In that discussion, Drs. Sperry and Feegel and
5 Dr. Hamilton and myself arrived at unanimous agreement that
6 Mr. Pedro Luis Medina died instantly upon the application
7 of the initial high voltage current. Further, it is also
8 the consensus opinion of the four pathologists that
9 Mr. Medina was not alive when the subsequent steam flash
10 burn occurred as eyewitness accounts indicated that this
11 took many seconds to minutes to form and Mr. Medina died
12 instantly upon the initial application of high voltage
13 current.

14 Did I read that correctly?

15 A. Yes, you have read what's on the screen.

16 Q. All right. So four independent medical examiners that
17 reviewed the exact same execution -- the results of the
18 exact same execution that you reviewed all concurred he
19 died instantly and that the burns that they saw were
20 postmortem burns, right?

21 A. That's what they are claiming.

22 Q. Right. And you disagree with that?

23 A. Yes, I do.

24 Q. Okay.

25 A. I would like to -- I would like to qualify that.

1 Would you please put that back up?

2 What I believe is unsubstantiated in the entire
3 business of judicial electrocution is the claim that
4 judicial electrocution is instantaneous. One could argue
5 that a pathologist without access to electrical recordings
6 of the brain has no means by which to conclude that the
7 death is instantaneous, so my position throughout all of
8 my testimony over the years on judicial execution is there
9 is no proof of the two basic tenants that, one, judicial
10 electrocution is instantaneous and, two, that's it's
11 painless. There's just -- there's no proof. It's not that
12 I'm arguing for it or against it. I'm simply saying there
13 is no scientific proof. So if those four pathologists who
14 were not skilled in electrophysiology, brain recordings and
15 did not have access to the data that nobody has access to,
16 concluded that the death was instantaneous, more power to
17 them. I just don't happen to support the fact that anyone
18 without the appropriate instrumentation can claim
19 instantaneous. Instantaneous is shorter than some time
20 interval and the suggestion is instantaneous is really,
21 really fast. There has been no evidence in my mind to
22 support instantaneous and there are examples where both
23 in industrial accidents and judicial execution where a
24 second shock is required. If the death was instantaneous,
25 no one would ever start taking breaths after the first

1 shock. There are cases in the literature that are actually
2 discussed in Mr. Wright's testimony where, in fact, yes,
3 the brain wasn't dead because the prisoner took a breath
4 after the first shock, so even Mr. Wright agrees that --

5 Q. It's Dr. Wright.

6 A. Dr. Wright. Dr. Wright agrees that the execution --
7 that the brain may not be destroyed instantaneously and
8 that hinges on the question of where are the electric
9 currents going and how much damage are they doing and the
10 fundamental -- that then gets back to the conductivity of
11 the skull and it says that you can't particularly easily
12 -- well, you can't at all today predict where the current
13 in a judicial execution is going to go and to say that oh,
14 that current is gonna render the entire brain insensate
15 immediately without pain is unsubstantiated.

16 So my theory is if people make measurements of both
17 pain and consciousness during a judicial electrocution and
18 show that it is within, let's say, the first half cycle of
19 60 -- 60 cycles and eight-milliseconds, more power to them,
20 but until that is done I'm going to claim that there is
21 no scientific evidence to show that judicial electrocution
22 is instantaneous and painless. It's complicated by the
23 fact there happens to be to the best of my knowledge no
24 scientific means to quantify pain from electrical
25 recordings of the brain and there are no scientific

1 universally accepted means to assess consciousness.

2 So if you look at the qualification for brain death,
3 it's actually a very complicated process to decree brain
4 death, and so these people are saying he died instantly,
5 more power to them, I do not support that claim. They're
6 pathologists, they're not electrophysiologists. They
7 are experts in their field, but their field does not
8 include brain electrophysiology. I happen to be an
9 electrophysiologist who understands bioelectricity. My
10 considered opinion is that that claim is unsubstantiated
11 by those four pathologists. I'm glad that they agree.
12 That's what their discipline teaches. I disagree with it.

13 Q. I didn't want to cut you off, so you just let me know
14 when you're done.

15 A. I'm done.

16 Q. Were you personally familiar with Dr. William
17 Hamilton?

18 A. I know a William Hamilton, but he was a gravitational
19 physicist.

20 Q. Well, allow me to be more specific. The Dr. William
21 Hamilton that was referenced as one of the pathologists --

22 A. No.

23 Q. -- in the 1997 report on Medina's execution that we
24 just reviewed. Are you familiar with him?

25 A. No. I know nothing about any of those pathologists.

1 Q. Do you know if he's published any peer-reviewed
2 articles?

3 A. I have not looked into his credentials.

4 Q. So you do not know, correct?

5 A. I do not know.

6 Q. Okay. So -- so you did claim to review peer-reviewed
7 articles to develop and support the opinions that you now
8 want to offer in this Court, right?

9 A. Yes, I have listed well more than a hundred
10 peer-reviewed articles that I reviewed and a number of
11 textbooks and other scientific treatises.

12 MR. PLYLER: Let me get this marked as Exhibit 2,
13 please.

14 (Defendant's Exhibit Number 2 was marked for
15 identification.)

16 MR. PLYLER: Your Honor, I would like to move into
17 evidence at this time Defendant's Exhibit 1, which is
18 the 1997 report of the four pathologists that we've been
19 discussing.

20 THE COURT: Any objection?

21 MS. FREEDMAN: No objection, Your Honor.

22 THE COURT: Defendant's 1 is admitted without
23 objection.

24 (Defendant's Exhibit Number 1, Medina Autopsy
25 Review, was admitted into evidence.)

1 BY MR. PLYLER:

2 Q. All right. Dr. Wikswo, I'm gonna hand you what's been
3 marked Defendant's Exhibit 2. Are you familiar with the
4 American Journal of Forensic Medicine and Pathology?

5 A. I have read a number of articles from it, I believe.
6 I do not at this point remember whether this is on the
7 list of articles that I provided you in response to your
8 subpoena.

9 Q. My question was simply were you familiar with that
10 scientific journal?

11 A. So, yes, I'm familiar with the journal.

12 Q. All right, sir. And this is an article published in
13 that journal dated September of 2005 authored by William
14 Hamilton, M.D. and Melissa Lee, M.D. Do you see that?

15 A. This is the article you just handed me, sir?

16 Q. Yes, sir.

17 A. Good.

18 Q. Do you see that it's from September of 2005 and it's
19 authored by William Hamilton, M.D. and Melissa Lee, M.D.?

20 A. I see that, yes.

21 Q. And it's entitled Review of Autopsy Findings in
22 Judicial Electrocution. Do you see that?

23 A. Yes.

24 MS. FREEDMAN: Your Honor, I think we have to
25 object to this. Dr. Wikswo said he doesn't know what

1 this article is, he can't remember if he's seen this
2 article before. I think it's all hearsay.

3 THE COURT: I don't know what the question is gonna
4 be.

5 MR. PLYLER: Well, quite frankly, Your Honor, if
6 anything in these articles is hearsay, then I guess he
7 shouldn't have been testifying to any of them either.
8 The way this works is experts are allowed to look at
9 information that might otherwise be hearsay and decide
10 whether it influences their opinions in any way or not.

11 THE COURT: Right.

12 MR. PLYLER: I'm allowed to cross-examine him on
13 it.

14 THE COURT: Time out. Everybody time out. Lets
15 go back to Trial Lab 101. He hasn't offered it into
16 evidence, so that's not ripe for an objection. He hasn't
17 asked a question yet, so you can't object to that.

18 Let's ask a question and see where we're going with
19 it and then I'll determine whether it's objectionable.

20 MR. PLYLER: Right now it's laying a foundation,
21 Your Honor.

22 THE COURT: Yes, sir. Go ahead.

23 MR. PLYLER: Okay.

24 BY MR. PLYLER:

25 Q. And you do review and rely on published articles that

1 have referenced or discussed judicial electrocutions
2 throughout your -- what did you say it was? Since 1992?
3 So thirty years that you've been looking into these issues
4 and trying to formulate your opinions, correct?

5 A. Yes.

6 Q. You've also apparently reviewed approximately forty
7 to forty-five autopsies and you've said that those have
8 influenced and provided bases for your opinions in this
9 cases as well?

10 A. Yes.

11 Q. And Dr. William Hamilton that we just looked at,
12 that is one of the authors or participants in Defendant's
13 Exhibit 1, offered this particular review of autopsy
14 findings in judicial electrocutions that was published
15 in the American Journal of Forensic Medicine and Pathology.
16 Do you see that?

17 A. Yes.

18 Q. If you'd flip to -- it has 262 at the bottom. It
19 would be the second page of the document. It says
20 materials and methods. Do you see that section?

21 A. Yes, I do.

22 Q. Do you see where it's talking about the protocol
23 established by the State of Florida? Do you see that?

24 A. Yes.

25 Q. And as you read through that paragraph, you'll see

1 where they were reviewing autopsies from electrocution --
2 or, excuse me, executions in Florida. Do you see that?

3 A. Repeat that last statement.

4 Q. If you read through here, do you see that what they
5 were reviewing when they say a review of autopsy findings
6 in judicial electrocutions that the autopsy they were --
7 autopsies they were reviewing were from the State of
8 Florida?

9 A. Okay.

10 Q. In fact, forty-three judicial electrocution autopsy
11 reports from the years 1983 to 1999 were reviewed. Do you
12 see that?

13 A. Yes.

14 Q. If you'd flip to the next to the last page of the
15 exhibit, page 266. Now earlier in your testimony,
16 Dr. Wikswa, one of the things that you mentioned was you
17 saw some sort of evidence of burning in the groin area I
18 thought you said in the two autopsy reports that --
19 Exhibits -- I think it's 1 and 5, that you saw -- you saw
20 those and I think you were saying that you believed that
21 was caused by arcing?

22 A. I did not see any evidence of arcing in any of the
23 autopsy reports -- any arcing in the groin in any of the
24 autopsy reports that I read last night.

25 Q. So you're not aware of any evidence of arcing in the

1 groin area in any execution in South Carolina, correct?

2 A. That is correct.

3 Q. So your testimony that you gave earlier has nothing
4 to do with your review of the South Carolina executions
5 because the ones you reviewed didn't have that situation,
6 right?

7 A. The executions that whose autopsy reports that I read
8 that showed arcing between either the penis, testicles and
9 the thigh were not from Florida.

10 Q. I didn't say Florida, I said South Carolina.

11 A. South Carolina. Correction, South Carolina.

12 Q. But some of them were from Florida, right?

13 A. I do not know at this point. I cannot recall at which
14 point which autopsy report showed the testicular and penile
15 burns.

16 Q. I said right groin.

17 A. What?

18 Q. I said the groin area.

19 A. Fine, but -- but the ones that I was referring to were
20 burns between penis and/or testicle and the thigh.

21 Q. Were any of those in Florida?

22 A. I do not know.

23 Q. You don't know? You don't know where they were from?

24 A. They are in the documents I provided to you. In the
25 review of the forty some odd autopsies I did, I do not

1 recall which state -- in fact, I'm not sure that list was
2 organized by state, so I'm not sure that I had easy access
3 to the states where those executions occurred. I think, in
4 fact, the report that I provided to you, which I generated
5 a number of years ago, does not list states where those
6 executions were conducted.

7 Q. So you can't tell me where this allegedly happened,
8 who it allegedly happened to and what the circumstances
9 were --

10 A. Well, I have the names of the --

11 Q. Sir, I've been instructed to let you finish, but
12 you've got to let me finish. You don't know -- you can't
13 tell me where this occurred, who it occurred to, when it
14 occurred or what were the mechanisms specific to that
15 execution that caused it, right?

16 A. That is not correct.

17 Q. Okay.

18 A. Because my list has names.

19 Q. Do you see on that -- page 266 under discussion about
20 halfway down that first paragraph, the right groin burn is
21 likely due to the metal buckle of the strap that extends
22 across the lower abdomen? Do you see that?

23 A. Yes.

24 Q. Do you see where it says it is the author's opinion
25 that these changes occurred postmortem since the initial

1 voltage should cause instantaneous death? Do you see that?

2 A. Yes, I do.

3 Q. And this was published in the American Journal of
4 Forensic Medicine and Pathology, right?

5 A. Correct.

6 MR. PLYLER: Your Honor, at this time I'd like to
7 move the Review of Judicial -- excuse me, the Review of
8 Autopsy Findings in Judicial Executions, Defendant's
9 Exhibit Number 2, into evidence.

10 THE COURT: Any objection?

11 MS. FREEDMAN: Yes, Your Honor. We object.

12 THE COURT: The basis of your objection?

13 MS. FREEDMAN: Foundation. Dr. Wikswow has never
14 -- I don't even know if he's seen this before. He
15 couldn't remember whether this was in his list of
16 articles or not. This is -- this is just an article
17 written by two doctors that Dr. Wikswow doesn't know
18 their names.

19 THE COURT: I don't recall. What is the source of
20 this or did he testify as to the source of this?

21 MR. PLYLER: The source is on the document itself.

22 THE COURT: No. Well, where did you get it from
23 though? From --

24 MR. PLYLER: From experts who did a review of the
25 literature.

1 THE COURT: Okay.

2 MR. PLYLER: And, Your Honor, I believe under
3 rules of evidence 803(18) it falls under learned treatise.
4 Dr. -- he testified at some length earlier about the peer
5 review process, how strenuous it was and the fact that
6 an article could be published in an accepted journal of
7 science or medicine is peer-reviewed and how important
8 that was. So I believe this qualifies as a learned
9 treatise.

10 THE COURT: Ms. Freedman?

11 MS. FREEDMAN: Is that not a hearsay exception,
12 Your Honor? I mean, I think the problem here is
13 foundation. Dr. Wikswo doesn't know what this
14 document is. He's permitted to cross-examine him on
15 this document, but it cannot become substantive evidence
16 without foundation.

17 THE COURT: That's correct. I mean, you can
18 cross-examine him about it, but he doesn't --

19 MR. PLYLER: You know what, Your Honor? To make
20 it a little smoother, I'll just -- I'm sure we can get
21 it in through one of our experts later, so I'll -- I'll
22 withdraw my effort to move it into evidence at this
23 time and we'll just stick with it being premarked as
24 Defendant's Exhibit 2.

25 May I collect the document from you, sir?

1 THE WITNESS: Sure.

2 THE COURT: Actually, if you will give it to the
3 court reporter just so that it doesn't end up at home
4 with you.

5 MR. PLYLER: I thought since it hasn't been moved
6 in, I'd --

7 THE COURT REPORTER: But it's been marked.

8 THE COURT: But it's been marked.

9 MR. PLYLER: Okay. Got it. No problem. I'm happy
10 to.

11 BY MR. PLYLER:

12 Q. Dr. Wikswo, despite using the term "consciousness" and
13 "death" multiple times today and multiple times in your
14 affidavit, multiple times in previous testimony when I
15 deposed you on this, wouldn't you agree with me that you
16 had an incredibly difficult time defining the word "death"?

17 A. I seem to have some difficulty in answering your
18 questions.

19 Q. And some of those questions we're asking you to define
20 the word "death", correct?

21 A. Yes.

22 Q. In fact, during your deposition you -- you attempted
23 in multiple pages of your deposition to amend your
24 deposition -- your definition of death; isn't that right?

25 A. I invested some time in trying to produce a definition

1 of death that would satisfy your question.

2 Q. Including changing that definition at least twice,
3 correct?

4 A. I focussed the definition. I wouldn't say I changed
5 it.

6 Q. Would you say amend, the word "amend" means to change?

7 A. That's fine.

8 Q. All right. So would you agree with me that you
9 amended your definition of death on at least two occasions
10 in your deposition? Are you -- are you reviewing your
11 deposition?

12 A. I wanted to review my deposition.

13 Q. I just asked, sir. I'll be happy to point you to it.

14 A. Would you please point me to the part in my
15 deposition?

16 Q. Sure. Let's go to page 67. On page 67, starting at
17 line 7 -- excuse me, I've got the wrong citation. Give me
18 just a moment. I got ahead of my outline.

19 Let's go to page 72, my apologies, and look at lines
20 19 through 24.

21 A. Okay.

22 Q. All right. So you say, following up here, and I'm
23 saying and I'm asking you to define it so that I know what
24 you mean when you say death in your report and you say
25 given the fact that we have been discussing molecular

1 physiology and you brought up ATP and ADP and effectively
2 all of biochemistry, I would amend the definition you
3 requested. Cessation of systemic physiological function
4 beyond recovery.

5 That became your new definition of death. Do you see
6 that?

7 A. Yes.

8 Q. And if we go to page 67, line 7 through 13 -- and
9 let's just go up to actually line 3 so we can get the
10 question in. We're talking about your definition of death
11 as you used in your report. So for Dr. Wikswo, in order
12 for somebody to be dead, what has to occur? Your answer is
13 given your line of questioning I would amend my definition
14 to cessation of physiological function beyond the point of
15 recovery.

16 Do you see that?

17 A. Yes, I do.

18 Q. So that's two occasions where you amended your
19 definition of the word "death" in your deposition?

20 A. Could I ask you to show page 66 first?

21 Q. My question was did you amend your definition of death
22 on two occasions in your deposition testimony and is that
23 not two occasions that we've just showed you where you did,
24 in fact, amend your definition of death? Yes or no?

25 THE WITNESS: Your Honor, can I qualify my response

1 because I'm being asked to give a yes or no answer?

2 THE COURT: You need to -- well, because it's a yes
3 or no question. I've read it and you've read it. The
4 question is did you amend your definition twice? Did you
5 or did you not?

6 THE WITNESS: Yes, I did amend my definition twice.

7 THE COURT: Okay. Next question.

8 BY MR. PLYLER:

9 Q. Because to you, Dr. Wikswo, death is not, quote, black
10 and white; isn't that right?

11 A. The context of this discussion was that you raised
12 the question of cellular trans -- you asked is cellular
13 transport a physiological function and basically we were
14 talking about -- well, actually I had a definition as the
15 cessation of physiological function. I was describing in
16 my mind macroscopic physiological function, you took it to
17 molecular physiological function. First, no signs of
18 gastrointestinal activity, which would follow long after --
19 in my mind long after brain death.

20 MR. PLYLER: Your Honor, I'm sorry. I don't even
21 remember the question.

22 A. And -- and you -- you then said so is cellular
23 transport a physiological function and I said yes. You
24 then bring up ADP and ATP, the energy molecules. So if,
25 whichever one it is, is moving back and forth through a

1 cell membrane, that person is still alive, to which I
2 responded the biochemistry will continue long after what
3 would be considered clinically dead. So --

4 THE COURT: Okay. Stop there. Stop there.

5 THE WITNESS: Thank you.

6 THE COURT: Because the question was you don't
7 believe that it's black and white, do you? What is the
8 answer to that question?

9 THE WITNESS: I do not believe that death is
10 black and white.

11 BY MR. PLYLER:

12 Q. Right. You'd agree with me that to you it's not black
13 and white until you get far enough into the process of
14 death that you can refer to it as a state, this person is
15 dead.

16 You'd agree with that, wouldn't you?

17 A. Is this something that I said or is this -- are you
18 putting words in my mouth or quoting me?

19 Q. Can you answer the question or not?

20 A. Well, the question was basically putting words in my
21 mouth and I don't necessarily agree with the way it was
22 phrased.

23 Q. Okay. So you do not agree with that statement. And
24 I'm gonna read it again.

25 A. I do not know whether I agree with it because I don't

1 know the context.

2 Q. I'm gonna read the statement again and I'm gonna ask
3 you if you agree with it or not. Please play -- pay close
4 attention to the words that I used. For you Dr. Wikswo,
5 you would agree with me that death is not black and white
6 until you get far enough into the process of death that you
7 can refer to it as a state, this person is dead.

8 You'd agree with that, wouldn't you?

9 A. At some process in the point of dying, yes, there will
10 be a state that is irreversibly dead.

11 Q. So do you agree with that statement or not?

12 A. It's a nuanced statement, but I'll -- for the sake of
13 argument, I'll agree with it.

14 Q. Well, I hope so because it's your statement.

15 A. That's fine.

16 Q. And we can look at page 71 of your deposition, lines
17 16 through 19, where you say, so, again, it's not black and
18 white and it's not black and while until you get far enough
19 into the process of death that you can refer to it as a
20 state, this person is dead, right?

21 A. Fine.

22 Q. Is that -- did I read it correctly or not, sir?

23 A. Yes, you did read it correctly.

24 Q. And that was your deposition testimony under oath not
25 four weeks ago, correct?

1 A. I have no problem with the statement.

2 Q. Then why didn't you just agree with it when I asked
3 you about it the first time?

4 A. Because I felt that you were leading me.

5 Q. It's cross-examination, sir. I will be leading you.

6 A. Okay. I didn't understand that.

7 Q. You had similar difficulties defining the term
8 "consciousness"; isn't that right?

9 A. No, I don't view it as a similar difficulty. They
10 are -- these are fine points of both physiology and law
11 and I am not qualified to state the legal definitions of
12 either death or consciousness. I am able to comment on
13 the physiological basis of death and consciousness, but
14 I am not qualified to specify a legal definition, which
15 is -- was one of the topics in our discussion during the
16 deposition.

17 Q. You're not qualified to specify what would be a
18 legally accepted definition of those terms? Is that what
19 you're saying?

20 A. I know what they are, but I'm not -- I'm not an expert
21 on the legal definition of death.

22 Q. But you came into this court and offered opinions
23 specific to death and when it might occur, didn't you?

24 A. That's right, but I did not offer an opinion on what
25 would be statutory death.

1 Q. I'm not asking you about statutory death, sir.

2 A. What?

3 Q. I asked you during your deposition similar to what we
4 went through with the term "death", you had difficulty
5 defining the term "consciousness"; isn't that right?

6 A. It took us a while to agree on -- for you to accept
7 my definition of death -- both death and consciousness.

8 Q. I -- I couldn't understand that. Was that an
9 affirmative response to my question or a negative response
10 to my question?

11 A. It was a statement of fact.

12 THE COURT: I understood what he meant. Let's move
13 on.

14 MR. PLYLER: Okay.

15 BY MR. PLYLER:

16 Q. When I asked you about consciousness, you said the
17 issue is you have to agree upon either a definition of
18 consciousness or the levels of consciousness and the
19 complexities that -- well, that's fine. So the point is,
20 that it's not like consciousness is an all or nothing. Do
21 you recall making that statement?

22 A. I remember that statement.

23 Q. And you can't -- you cannot determine how long it
24 might take for somebody to lose consciousness during an
25 electrocution; isn't that right?

1 A. My position has been no one can, so I can't.

2 Q. So you can't, right?

3 THE COURT: He just answered that. Next question.

4 BY MR. PLYLER:

5 Q. And you're just of the opinion that loss of
6 consciousness might not be instantaneous; is that right?

7 A. My opinion is that the time for loss of consciousness
8 for judicial electrocution is unproven. There is no
9 scientific evidence supporting an estimate of time for loss
10 of consciousness and there's going to be a great deal of
11 variation between prisoners tied into things such as
12 hydration of the prisoner or the -- the skull conductivity
13 and the location of the electrodes.

14 Q. Okay. On page 158 of your deposition, lines 19
15 through 20, you say what we do know is that it may not be
16 instantaneous. Do you see that?

17 A. Yes.

18 Q. We talked about your use of the phrase "some period of
19 time". Let's talk about -- let's start going towards this
20 idea that you're trying to give opinions on about the
21 resistivity of the -- the skull. Do you recall in your
22 affidavit that you used the term "vast"? Your terminology
23 was the "vast majority of the current"? Do you recall
24 using that terminology?

25 A. I'm aware -- again, I'd like to make sure I understand

1 the context of your question rather than stating thoughts
2 on the word "vast", so why don't we go to the specific
3 point in my deposition where I used the word "vast"?

4 Q. I actually said in your affidavit, so.

5 A. Page 143, 137, 140, 150, 151, 2009, which -- which of
6 those are you referring?

7 Q. All right. I need you to listen to my question.

8 A. Okay.

9 Q. I said in your affidavit --

10 A. Oh, affidavit.

11 Q. -- in this case, you used the term "vast". You said
12 the vast majority of the current. Do you remember that
13 statement --

14 A. Yes.

15 Q. -- in your affidavit?

16 A. I don't have -- I don't have at my fingertips the
17 exact wording of my affidavit, but, yes.

18 Q. All right, sir. I'm gonna put up on the screen your
19 April 27, 2021, affidavit that you gave in this case
20 wherein you intended on putting your opinions that you
21 wanted to offer. Do you remember giving that affidavit?

22 A. Yes.

23 Q. And in paragraph -- this is 12B two little I's. It's
24 on page 6 of your affidavit. You say when you're talking
25 about the prisoner's skull presents significantly greater

1 resistance for the current than does the prisoner's skin,
2 you say as a result the vast majority of the electrical
3 current travels around the perimeter of the prisoner's head
4 and down the prisoner's torso and leg until it leaves his
5 or her body through an electrode applied to the calf of one
6 leg or an electrode on each leg.

7 Did I read that correctly?

8 A. Yes, you did read that correctly.

9 Q. All right. And you said that -- the term "vast" was
10 your term; isn't that right?

11 A. Yes.

12 Q. Now you first signed a contract to become engaged in
13 this particular litigation with Mr. Blume's clinic out of
14 Cornell and by extension Justice 360 February 19th of 2021;
15 isn't that right?

16 A. It could be. I'm not sure of the exact date.

17 Q. And after you were -- after you signed the contract
18 and became retained as the expert, Mr. Blume provided you
19 two documents for your review. Do you remember?

20 A. Yes, he did.

21 Q. And he did that by e-mail on February 19th of 2021
22 and the two documents were a spreadsheet that him and his
23 clinic had put together of executions in South Carolina
24 and the other was a document that he referred to as a
25 description we drafted laying out how we think it works and

1 the problems?

2 A. Yes.

3 Q. And that document was entitled the SC Electrocution
4 Process? Isn't that what the name of it was?

5 A. I believe that's correct.

6 Q. And you responded to Mr. Blume after reviewing that
7 document that he prepared about how he thinks there were
8 some problems and in the response you provided comments and
9 edits to that document, didn't you?

10 A. Yes, I did.

11 Q. And one of the problems you had with the document was
12 this phrase. I'm presenting it. Mr. Blume's document
13 says the vast majority of the electrical current travels
14 around the perimeter of the prisoner's head and down the
15 prisoner's torso and leg until it leaves through the leg
16 electrode. Do you see that?

17 A. I sure do.

18 Q. And you made a comment here on the right-hand and that
19 comment has what do we have to prove, quote, vast. That's
20 what it says, isn't it?

21 A. Yes. I'm asking what do we have to prove vast.

22 Q. Right. So you're the expert, Mr. Blume is an anti
23 death penalty advocate, he's prepared a document about how
24 he thinks it works, he uses the term "vast" and your
25 response to him is well, what do we have to prove that,

1 right?

2 A. I viewed that as a rhetorical question.

3 Q. What's the answer?

4 A. It turns out that the answer is related to the
5 conductivity difference between the scalp and the skull
6 and that conductivity difference is on the order of a
7 factor of 40, but the actual measurements as to what
8 fraction of the current goes through the brain -- goes
9 through the skull into the brain and what fraction of the
10 current goes along the scalp is unknown and, hence, I
11 cannot prove the fraction that it's moving.

12 I actually think that you can decide -- we're back
13 to the same kind of problem of instantaneous versus some
14 period of time is how big a number is vast. I would argue
15 that in the context of judicial electrocution, vast could
16 easily be a factor of 20 and I would say that maybe --
17 maybe 10 percent of the current goes into the brain, maybe
18 15 percent, maybe 5 percent. I don't know. I'm asking
19 what do we have to prove the use of the word "vast".

20 Q. Right. But you're the expert. Shouldn't you be the
21 one asking -- or providing the information and the lawyer
22 should be the one asking the questions, not the other way
23 around?

24 A. I think it's a perfectly fine rhetorical question to
25 see if we understand what the literature shows and the

1 answer is the literature does not support the claim that
2 all the current goes through the brain.

3 Q. And it also doesn't allow you to say with any
4 scientific support that the, quote, the vast majority
5 travels around the outside of the skull?

6 A. I would ask whether you think the factor of 20 is
7 vast. I think a factor of 20 is a pretty -- a pretty big
8 factor, but the actual factor is unknown and that's the
9 basis of this entire argument is that for judicial
10 electrocution to be instantaneous and painless it needs
11 to render the brain insensate without doing other
12 simultaneous damage and there is no proof that that can
13 be done, particularly with the recognition that -- and
14 rather than use the word "vast", a very large fraction of
15 the current delivered by the scalp electrode is not going
16 into the brain for the configuration of electrodes that
17 are used in judicial electrocution. In contrast when the
18 objective of electroconvulsive therapy is to induce a --

19 MR. PLYLER: Your Honor, I think he's getting into
20 some sort of medical opinion now about electroconvulsive
21 therapy.

22 A. No, I'm getting into -- I'm getting into the
23 biomedical literature on the induction of a grand mal
24 seizure using electrodes that includes calculations of
25 the response of a bidomain model of the brain that was

1 developed with boundary conditions in part by one my
2 graduate students.

3 Q. You've actually tried to calculate and model this idea
4 of how resistant the skull is?

5 A. Yes.

6 Q. Yeah. And you -- you and a Dr. Sepulveda? Is that
7 how you say his name?

8 A. Yes.

9 Q. You actually put together a manuscript and tried to
10 have it published where you tried to model that; isn't that
11 right?

12 A. That is correct.

13 Q. And it was rejected for publication, wasn't it?

14 A. Yes, it was.

15 Q. Okay. And isn't it true that you just simply don't
16 have a true definition or calculation for how much of this
17 electric current might go around the outside of the skull
18 even though you would like to have that?

19 A. The problem with --

20 Q. Is that right?

21 THE COURT: Yes or no.

22 THE WITNESS: Repeat the question, please.

23 BY MR. PLYLER:

24 Q. Here. I'll just show --

25 A. If you have it --

1 Q. On page 151 of your deposition, lines 1 or 2, I would
2 like, but do not have, a quantification for vast. That was
3 your testimony just four weeks ago.

4 A. I agree with that.

5 Q. Okay. But yet despite having quantification, despite
6 not having quantification, despite not have any scientific
7 support for it and despite the fact that it was actually
8 provided to you by Mr. Blume, you chose to include it in
9 your affidavit; isn't that right?

10 A. I view it as an appropriate qualitative term.

11 Q. So that's a yes?

12 A. I view the use of vast as an appropriate qualitative
13 term.

14 Q. Do you have any scientific evidence to support the use
15 of the term "vast"?

16 A. The fact that there are massive thermal burns reported
17 in multiple autopsies for the scalp and the skull and
18 substantially less thermal damage to the underlying brain
19 suggests that an awful lot of current is going not through
20 the skull and the brain supporting use of the term "vast".

21 Q. All right.

22 A. The differential heating of the scalp versus the brain
23 is completely supportive of the qualitative term "vast".

24 Q. Now my question was you don't have any scientific
25 evidence -- it's the same question I asked you in your

1 deposition on page 151. Question: Then why use the term
2 "vast" if you can't support it with any scientific
3 evidence? Answer: I can support it with evidence. It's
4 not scientific evidence.

5 Do you see that?

6 A. We were having discussions about observer-based
7 evidence and autopsy reports and scientific evidence would
8 be quantitative measures of burn size. Those data have
9 never been acquired. So these are qualitative arguments.
10 I view vast as a qualitative term.

11 Q. That you cannot support with any scientific evidence?

12 A. It is supportive by evidence, but the question is in
13 your definition of scientific evidence that we had during
14 the deposition. You have to decide whether an autopsy
15 report or -- whether an autopsy report is quantitative
16 scientific evidence versus qualitative scientific evidence.
17 One could argue that in the course of our discussion
18 during my deposition it is not quantitative scientific
19 evidence. I would qualify that statement. I would amend
20 the statement.

21 Q. Do you want to amend your sworn testimony from four
22 weeks ago? Is that right?

23 A. I have no comment.

24 MR. PLYLER: Your Honor, could you please have him
25 answer the question.

1 THE COURT: Sir, would you like to amend your
2 testimony?

3 THE WITNESS: Sure, I'll amend my testimony.

4 BY MR. PLYLER:

5 Q. Now when you had your manuscript that you wrote with
6 Dr. Sepulveda rejected, it was rejected by the foremost
7 journal in the field, correct?

8 A. Yes.

9 THE WITNESS: Your Honor?

10 THE COURT: Yes, sir.

11 THE WITNESS: Am I allowed to qualify any of these
12 answers because the simple yes does not encompass the
13 nature of that peer review.

14 THE COURT: Well, and I've let you qualify a number
15 of times, but -- but, frankly, no, that's what -- that's
16 what a redirect examination is for for Justice 360
17 attorneys to ask you the questions that would allow you
18 to qualify your answer if that's -- if they believe
19 that's necessary.

20 THE WITNESS: Okay. That's -- that's fine then.
21 I just didn't want to leave a -- a half story hanging.

22 THE COURT: Yes, sir. I understand.

23 THE WITNESS: Thank you very much, Your Honor.

24 BY MR. PLYLER:

25 Q. But isn't it true that in the Jones litigation in

1 Florida the opposing experts actually used that paper and
2 came up with some calculations for how much of the current
3 would go into the brain and the Court in Florida accepted
4 those calculations? Isn't that right?

5 A. I do not have a copy of the court transcripts
6 describing that analysis.

7 Q. Well, I do have a copy of the opinion that they
8 issued.

9 MR. PLYLER: And the cite for that, Your Honor,
10 is 701 -- I think S.O. is Southern, but I don't practice
11 down here, so I don't want to get it wrong --
12 So.2nd 76, Jones v. State.

13 BY MR. PLYLER:

14 Q. And in Jones v. State, that was a convicted condemned
15 inmate challenging the constitutionality of the electric
16 chair in Florida; isn't that right?

17 A. I believe so.

18 Q. Well, I mean, you were an expert in that case. Do
19 you not even recall at this point what it was you were an
20 expert -- or you were being asked to provide opinions
21 about?

22 A. How many years go was that case? I forget.

23 Q. Well, you were in the case, weren't you?

24 A. What was the date on that case, please?

25 Q. I can give you the date of the opinion. I'm happy to

1 do that. The opinion was issued October 20th of 1997. Do
2 you see that?

3 A. Fine. Twenty-five years ago. So what's the question?

4 Q. Well, let's just -- right there. The synopsis on the
5 first page of the opinion. The Supreme Court held inmate
6 attorney/client privilege was not violated by physician
7 testimony at hearing and electrocution in State's electric
8 chair is not cruel or unusual punishment. Do you see that?

9 A. Yes, I see that.

10 Q. And on page --

11 MR. PLYLER: I'm using the physical page numbers,
12 Your Honor. I'm happy to do a pinpoint cite if Your
13 Honor needs it, but on the second page of the printed
14 version of the opinion there's a discussion by the Court
15 about testimony that was received by Dr. Michael Morse.

16 BY MR. PLYLER:

17 Q. Do you see that? Do you see that?

18 A. Yes, I see that.

19 Q. And Dr. Morse testified he utilized a document
20 prepared by Dr. John Wikswo and carried it forward to
21 conclude that in his opinion somewhere between one-third
22 and two-thirds of the current would flow to the brain
23 during an execution in the electric chair. Do you see
24 that?

25 A. I see that.

1 Q. But you're not using these calculations that you were
2 part of creating in the Sepulveda article to try to offer
3 any opinions in this case; isn't that right?

4 A. That is correct.

5 Q. Let's talk about the term "botched". Do you know
6 what the term "botched" means when we talk about judicial
7 executions?

8 A. It generally applies to executions that did not go
9 according to plan.

10 Q. And in your affidavit, sir, paragraph 5, you try to
11 offer the opinion that I'm now confident that there is a,
12 quote, substantial risk that in a significant number of
13 cases death by electrocution is neither painless nor
14 instantaneous for the reasons described below.

15 Do you see that?

16 A. Yes, I do see that.

17 Q. Do you recall me trying to get you to explain to me
18 what you mean by substantial risk?

19 A. I -- I recall that discussion.

20 Q. Yeah. And you stated that you meant the probability
21 of a botched execution. Do you recall?

22 A. Correct.

23 Q. And in your subpoena response -- and you actually
24 typed out your subpoena response to me. Do you remember
25 doing that?

1 A. Yes.

2 Q. All right. And this is the typed out version of your
3 subpoena response and you say in addition to a number of
4 articles in that list, I have reviewed the following
5 documents specifically in preparation for this case.

6 Do you see that?

7 A. Yes.

8 Q. And the first one listed there is by a man named
9 Radelet, R-A-D-E-L-E-T, that was published on the death
10 penalty info website.

11 A. Yes.

12 Q. And it was called Botched Executions, right?

13 A. Correct.

14 Q. And I also asked you if you had reviewed any of
15 the work done by Austin Sarat on the issue of botched
16 executions. Do you recall being asked those questions?

17 A. I recall being asked the questions.

18 Q. And you didn't know who Sarat was, right?

19 A. I didn't recall the name at the time.

20 Q. You weren't familiar with any of his work, right?

21 A. Not that I know of at the time.

22 Q. Okay. But you did, in fact, review this Radelet
23 article, right, because you say in here I've reviewed the
24 following documents specifically in preparation for this
25 case, right?

1 A. Yes.

2 Q. All right. I happened to bring the first page of that
3 Radelet article up here on the screen. Botched Executions:
4 Examples of Post Furman Botched Executions. Michael
5 Radelet. Do you see that?

6 THE COURT: It's not --

7 THE WITNESS: No, I'm not seeing it. It's not on
8 the screen.

9 MR. PLYLER: Oh, I'm sorry.

10 BY MR. PLYLER:

11 Q. Examples of Post Furman Botched Executions, Professor
12 Michael Radelet. Do you see that?

13 A. Yes.

14 Q. Okay. And just for posterity, do you see there at the
15 top left it says death penalty information?

16 A. Yes.

17 Q. Okay. So when you pull that article, the very first
18 thing you see is a quote from Austin Sarat. Do you see
19 that?

20 A. I see that.

21 Q. And then the first data they show in that article is
22 actually a chart from the work of Mr. Sarat. Do you see
23 that?

24 A. I see that.

25 Q. And according to Mr. Sarat's work, which is cited

1 specifically in the article you say you reviewed for this
2 case, the rate of botched executions with regard to
3 electrocution is 1.92 percent.

4 A. Okay.

5 Q. Is that what it says?

6 A. That's what it says.

7 Q. And he reviewed 4,374 electrocutions. Do you see
8 that?

9 A. I see that.

10 Q. So when you used the term "substantial risk" and
11 you've already said that that is defined by the chance of
12 a botched execution, the published work in that area says
13 that's a 1.92 percent risk; isn't that right?

14 A. That's correct.

15 Q. 1.92 percent, is that a big number?

16 A. When I had prostate cancer, I asked the surgeon after
17 my first year what was my prospect and he said John, your
18 prospect is excellent, he looked at my chart, and I said
19 well, I want a number and he said it's really very, very
20 good, and I said --

21 MR. PLYLER: Your Honor, this is clearly hearsay.

22 THE WITNESS: I asked --

23 THE COURT: No. No, sir.

24 THE WITNESS: -- what was the number on my cancer
25 coming back and he said --

1 THE COURT: Okay. You have to stop talking.

2 It's not necessarily offered for the truth of the
3 matter. He's giving some context as to how he, you know,
4 evaluates the numbers. I'll allow it.

5 Go ahead.

6 THE WITNESS: And the surgeon said the odds of
7 your cancer coming back are one in ten, at which point
8 I indicated that my previous -- to a friend, but my
9 previous risk estimate was the odds of getting killed
10 commuting, which was one in 10,000, and my friend said
11 well, John, it looks to me like you can forget about
12 worrying about commuting.

13 On the second year when I went back, I asked the
14 surgeon what was the probability and he said one percent.
15 I still was not happy with one percent. I considered at
16 the second year of my cancer recovery that a one percent
17 risk of the cancer coming back was significant.

18 Then by the year three, he said the odds are one
19 in a thousand and I stopped worrying about my cancer
20 coming back.

21 So this question is, it's the same thing as
22 instantaneous, some interval, vast, substantial. The
23 context for substantial is matter of context. In my
24 case, my cancer return was a life and death matter. I
25 did not want to die of metastasized prostate cancer. I

1 think that prisoners probably do not want to die in a
2 botched execution and you can decide what is the
3 substantial risk. That's maybe a call for ethicists.

4 My personal call is --

5 BY MR. PLYLER:

6 Q. Are you an ethicist?

7 A. No, I'm not an ethicist.

8 Q. Okay.

9 A. I try to practice -- I try to practice ethical science
10 and an ethical life, but I'm not an ethicist.

11 Q. All right.

12 A. I was suggesting that you might go to an ethicist to
13 get that question answered.

14 Q. You also have no scientific evidence to support your
15 repeated use of the term "may on occasion"; isn't that
16 right?

17 A. It's the same category of -- of qualitative
18 measurements.

19 Q. So the answer is yes, I have no scientific evidence to
20 support my use of the term "may on occasion", right?

21 A. No. In fact, would you please use the term "may on
22 occasion" in the context that I used it?

23 Q. See, the way this works is I ask questions and you
24 answer them. So I'm gonna ask again. Do you recall
25 testifying in your deposition that you had no scientific

1 evidence to support your term "may on occasion"?

2 A. What I'm asking for is the context in which I used the
3 term "may on occasion".

4 Q. How you used it in your affidavit.

5 THE COURT: But, Dr. Wikswow -- stop. Either you
6 remember saying it or you don't remember saying.

7 THE WITNESS: I don't remember the use of that term,
8 so I would like to have my memory refreshed.

9 I used that term, but when I'm asked -- when I say
10 no scientific evidence or may on occasion, I may have
11 used that term under multiple situations.

12 THE COURT: I understand. His question is simply
13 do you remember testifying to that in your deposition?

14 THE WITNESS: No, I do not.

15 THE COURT: There it is.

16 THE WITNESS: Thank you.

17 THE COURT: Move on.

18 MR. PLYLER: Thank you, Your Honor.

19 BY MR. PLYLER:

20 Q. All right. Here's your deposition again.

21 A. If could you please make that wider.

22 Q. I will when I get to the right spot, sir.

23 Page 161 of the deposition, line 6, and it's gonna
24 take a moment, Your Honor, but we're gonna go through
25 page 163 so I can give the good doctor his context.

1 Okay. All right. Going to 12B Roman Numeral IX
2 little Roman numeral four, it says the reduced portion
3 of electrical current that reaches a prisoner's brain may
4 on occasion depolarize the prisoner's brain disrupting
5 the brain's ability to transmit electrical current and
6 inactivating, depolarizing or hyperpolarizing the neurons,
7 and I ask you did I read that correctly and you said
8 correct. I said you do recognize that some portion of the
9 electrical charge is going to reach the brain and you
10 answered yes, right? And then it says when you say may
11 and on occasion, have you done anything to try to quantify
12 that, and your answer was no, I have not. I said are you
13 aware of any scientific -- published scientific data or
14 papers out there that would allow someone to quantify this
15 and this may on occasion that you have here in 12B IX, and
16 you said I know of no studies of neural polarization or
17 depolarization during a ju -- judicial execution, and
18 that's on page 162. I said so you have no way to quantify
19 the may or the on occasion in that sentence, correct? And
20 you say the anecdotal evidence coming from survivors or
21 transient survivors and witnesses suggest that the return
22 to function of the neurons is possible. It says will -- it
23 says will, therefore, the last sentence will be -- will
24 thereafter be incapable of repolarizing during alternating
25 current stimulation. My question, right. Read the whole

1 sentence. However, there's no scientific evidence that the
2 prisoner's depolarized or hyperpolarized brain neurons --
3 you say correct -- will thereafter be incapable of
4 repolarizing and you say right. This is basic -- so this
5 is -- basically says that there is no statement that proves
6 them incapable of repolarizing.

7 A. I said right.

8 Q. My question before was different and you said what
9 was your question before? I said it was your use of the
10 word may on occasion and then in the context of that
11 sentence, so. Because there are two different concepts
12 in my opinion, when you look at that paragraph, the first
13 one is the reduced portion of electrical current that
14 reaches the prisoner's brain may on occasion depolarize a
15 prisoner's brain disrupting the brain's ability to transmit
16 electrical current and inactivating, depolarizing or
17 hyperpolarizing the neurons. I said that was the first
18 statement you made and you said no problem with that and I
19 said -- that's literally what it says in the question --
20 and I said did you do anything to try to quantify the may
21 or the on occasion to try to figure out how often the --
22 and your answer was my response to that was there are
23 anecdotal accounts suggesting it happens. Right?

24 A. Right.

25 Q. Okay. So despite giving you multiple opportunities

1 to answer if there is any scientific evidence to support
2 the use of the term may on occasion as you used in your
3 affidavit, your response was there's anecdotal evidence to
4 suggest it, correct?

5 A. Correct.

6 Q. Additionally, you used the term "during at least a
7 portion" in your affidavit in paragraph 12.

8 A. Paragraph 12? I don't -- line and page, please.

9 Q. Paragraph 12 --

10 A. Oh, the affidavit.

11 Q. -- of your affidavit.

12 A. Fine. I don't -- I just don't have the affidavit in
13 front of me.

14 Q. And you agreed that when you used the term "during at
15 least a portion" it's the same as when you're using the
16 term "some period of time", right?

17 A. Yes.

18 Q. Okay. Which gets back to that not yet quantified, I
19 don't know what it is and there's no scientific evidence to
20 support it conversation that we already went through today,
21 right?

22 A. Correct.

23 Q. Now, interestingly enough, Doctor, you've not provided
24 any opinion in your -- that you hold regarding just how
25 much -- how often electrocutions in South Carolina might

1 result in what you believe is a painful or torturous death.
2 You've not provided any of those opinions here today, have
3 you?

4 A. I have not provided any of those opinions today.

5 Q. You did try to provide that opinion in your affidavit,
6 didn't you?

7 A. I believe I provided a list of -- of the 200 and
8 some South Carolina executions that was provided to me by
9 Justice 360.

10 Q. So is the answer to my question yes or is the answer
11 to my question no?

12 A. What's the question again?

13 Q. I'll try my best, Dr Wikswo.

14 A. I'm sorry I'm slow on these questions.

15 Q. Sitting here today in court, you've not attempted to
16 offer any opinions regarding how many -- a percentage, a
17 number, how many of the electrocutions in South Carolina
18 that in your opinion results -- resulted in some sort of
19 painful or torturous death, right?

20 A. I believe that all judicial electrocutions, whether
21 botched or not -- correction. I believe that there is no
22 proof that a judicial electrocution, whether botched or
23 not, is instantaneous and painless.

24 Q. You're against the death penalty, aren't you?

25 A. My professional opinions are based on the biophysics,

1 physiology, biomedical engineering and do not reflect my
2 personal beliefs.

3 Q. In your affidavit, you actually tried to calculate a
4 percentage of how many electrocutions in South Carolina you
5 believed resulted in painful or torturous deaths. Do you
6 recall trying to do that in your affidavit?

7 A. That is using the data provided to me by Justice 360.

8 Q. Again, is that yes?

9 A. Yes.

10 Q. All right. But you've not tried to offer that same
11 opinion here in open court; isn't that right?

12 A. I do not have those data at the tip of my working
13 memory at this moment, so I am not able to provide you
14 with exact numbers based on the analysis that I did some
15 time ago. Were I given access to the data, I would be
16 able to tell you.

17 Q. I feel like you're not answering the questions that
18 are asked. That's why I have to keep asking the questions.

19 A. I'm sorry.

20 Q. In your affidavit, your sworn affidavit that was filed
21 in this case, you tried to offer a calculation of how many
22 executions in South Carolina you believed were -- resulted
23 in painful and torturous death, didn't you?

24 A. Yes.

25 Q. And you have not tried to offer that same opinion here

1 in open court today; isn't that right?

2 A. That's correct. I have not tried to offer that
3 opinion.

4 Q. Is that because you no longer hold that opinion?

5 A. Not at all. I haven't been asked it and I didn't
6 come prepared to answer it. I wasn't asked. I wasn't
7 prepared -- I did not come with the anticipation of having
8 to produce those results.

9 Q. All right. Well, since you filed it in this case,
10 we're gonna address it. In paragraph 13 of your affidavit,
11 you make the statement that in your opinion 30 percent of
12 all electrocutions in South Carolina for which there's any
13 reliable evidence resulted in painful or torturous death;
14 isn't that right?

15 A. That's what my affidavit says. That's what I stand
16 by. At the time I wrote the affidavit, I had those data at
17 my hand.

18 Q. But when I asked you in great detail during your
19 deposition to tell me what did you use to decide what was
20 or was not reliable information, what you told me was you
21 didn't set that criteria, Justice 360 set that criteria.
22 Isn't that what you testified to?

23 A. That is correct.

24 Q. So you couldn't tell me why you chose some information
25 as, quote, reliable and other information as not reliable

1 because you didn't create the criteria to decide what was
2 or wasn't reliable?

3 A. That's correct.

4 Q. But you still tried to come up with a percentage based
5 off of information provided to you by an anti death penalty
6 advocacy group who set the criteria for what was or was not
7 reliable and then offered sworn testimony that 30 percent
8 of all executions in South Carolina resulted in some sort
9 of painful or torturous death, right?

10 A. Yes.

11 Q. And you didn't do anything to try to verify how
12 accurate their information was, did you?

13 A. I did nothing after the deposition regarding verifying
14 the information.

15 Q. You did not do anything before signing that affidavit
16 and that information being in your affidavit to try to
17 verify how accurate or reliable the information provided to
18 you by Justice 360 was. Isn't that right?

19 A. I reviewed the information and it's consistent with
20 my reading of other autopsy reports and press accounts of
21 electrocutions nationwide.

22 Q. You read the spreadsheet they gave you with their --

23 A. I also have read a large --

24 THE COURT: Dr. Wikswo, hold on.

25 THE WITNESS: I'm sorry.

1 THE COURT: Let him finish his question.

2 THE WITNESS: Okay. Thank you, Your Honor.

3 THE COURT: Mr. Plyler.

4 MR. PLYLER: Thank you, Your Honor.

5 BY MR. PLYLER:

6 Q. You relied on the spreadsheet that contained their
7 summaries of what they say the anecdotal evidence says
8 about executions in South Carolina, right?

9 A. That's correct.

10 Q. And you don't even know of the ones in that summary
11 which ones they later determined were reliable and which
12 ones they determined were not reliable because you didn't
13 set that criteria, right?

14 A. Correct.

15 Q. In fact, what you said in your deposition was that
16 information was just provided to me.

17 A. Correct.

18 Q. You didn't do anything to try to source the materials,
19 make calculations on it, figure out if it's reliable or
20 accurate, you just took it at face value and put it in your
21 affidavit, right?

22 A. Yes.

23 Q. And it is your testimony under oath here today, sir --

24 A. Of course.

25 Q. -- that you relied on the -- that you actually

1 reviewed the newspaper articles that would allegedly
2 provide the anecdotal evidence that then went into these
3 summaries in that spreadsheet. Did you actually review
4 those news articles?

5 A. I have reviewed many news -- in fact, I have read some
6 time ago all of the news articles that were provided to me
7 by Justice 360. At the time they prepared the list, I
8 reviewed all of those articles.

9 Q. And you would have put all of that into your subpoena
10 response to me, wouldn't you?

11 A. I probably failed to include the screen shot of the
12 folder of all those newspaper articles.

13 Q. You think so?

14 A. I can't remember whether my response included that.
15 Yes. Okay. So I did, yes, put it in a screen shot of all
16 the newspaper articles that I reviewed.

17 Q. That you reviewed. And that's under that same place
18 on the -- Exhibit 4 to your deposition where you typed in
19 what your subpoena responses were, right?

20 A. Correct.

21 Q. And it says I have read the following news accounts
22 regarding executions in South Carolina. Do you see these?

23 A. Yes.

24 Q. Okay. And it's about half a page there, right?

25 A. Yes.

1 Q. 1986, 1915, 1893, 1912, 1916, 1913, 1985. You -- you
2 look at these numbers and tell me --

3 A. 1996, 19 --

4 Q. Let me finish, sir.

5 A. Sorry.

6 Q. You look at these numbers and you tell me if you see a
7 1944, okay? So far do you see a 1994? I mean, excuse me,
8 1944.

9 A. No, I do not.

10 Q. Okay. I'm going to the next page because it continues
11 at the top of the next page. Do you -- do you see a 1944?

12 A. No, I do not.

13 Q. Okay. And you went through multiple drafts of this
14 affidavit before signed -- you swore to and signed it. Do
15 you remember doing that, going through multiple drafts and
16 providing it back and forth with Justice 360 and Mr. Blume?

17 A. Now that -- the document you just showed me was not my
18 affidavit. That was the response to the subpoena.

19 Q. I know.

20 A. Okay.

21 Q. It's -- it's the response to the subpoena where you
22 listed the newspaper articles you actually reviewed --

23 A. Right.

24 Q. -- in preparing the affidavit and opinions that you
25 have in this case, right?

1 A. Correct.

2 Q. And the affidavit that we're talking about, you went
3 through multiple drafts of that affidavit back and forth
4 with Justice 360 and Mr. Blume, right?

5 A. I do not know the number of iterations on that
6 affidavit and how many of them were shared with Mr. Blume
7 and his staff. I have them on my computer all date
8 stamped, but I do not know the number of -- of revisions.

9 I probably did not send you the files which was
10 basically delete when done, which was every draft of every
11 manuscript.

12 Q. Well, you did send me some of the drafts.

13 A. Good.

14 Q. On March 29th of 2021, you sent an e-mail. See here
15 on the screen, that's you at the top from, and you sent it
16 to John Blume, Ms. Freedman, Ms. Franz, copied yourself,
17 and you copied Mr. Van Winkle. Do you see that?

18 A. Yes.

19 Q. Subject, regarding affidavit. Do you see that?

20 A. Yes, I see that.

21 Q. Okay. And in here it says, one, two -- third
22 paragraph. I can't review all the newspaper accounts at
23 this time. Do you see that?

24 A. Yes.

25 Q. Okay.

1 A. I had read them previously.

2 Q. Do you see where you say I can't review them at this
3 time? Do you see that?

4 A. I see that.

5 Q. Okay. You also say in that next paragraph, I attached
6 my marked-up copy, talking about the execution process and
7 your affidavit, right?

8 A. Yes.

9 Q. Okay. Let's go to -- this is the draft affidavit you
10 provided and you'd already changed the notarized thing here
11 to March. Do you see that, the last page of it?

12 A. Yes.

13 Q. And we've just seen an e-mail where you hadn't had a
14 chance to review all the newspaper articles yet, but when
15 we go in here and look at the draft affidavit, it says in
16 paragraph 10, on page 3, in addition to the information I
17 reviewed about judicial electrocutions generally, attorneys
18 from Justice 360 asked me to review the following
19 information specific to South Carolina's electrocution
20 process and you listed a couple of items here. We go to
21 the next page and in H it says newspaper and other accounts
22 of South Carolina judicial electrocutions and other events
23 from 1893 through 1996. Do you see that?

24 A. Yes.

25 Q. Okay. So the draft of your affidavit already included

1 these items that you haven't even reviewed yet as a basis
2 for opinions you were prepared to offer in --

3 A. That is incorrect.

4 Q. I don't know how you'd say it's incorrect. You didn't
5 let me finish my question. But included in this draft
6 affidavit is paragraph 13, the same one where you're saying
7 you're relying on their summaries of these anecdotal
8 evidence about electrocutions to try to make statement that
9 30 percent of electrocutions in South Carolina resulted in
10 painful and torturous deaths, right?

11 A. Yes.

12 Q. And one of the ones listed in that account -- in
13 that spreadsheet, was the execution of the unfortunate
14 Mr. George Stinney. Do you remember reviewing anything
15 about the execution of George Stinney?

16 A. I do not recall at this moment.

17 Q. George Stinney was executed in 1944. Did you know
18 that?

19 A. I did not recall that today.

20 Q. And we just looked at your subpoena response where you
21 listed all of the newspaper articles you said you reviewed
22 for this case, right?

23 A. I listed the newspaper articles --

24 Q. Would you answer the question, please, sir?

25 A. I listed the newspaper articles that were in the

1 folder labeled newspaper articles.

2 Q. Do this again. Your typed response, Exhibit 4 to your
3 deposition, you typed this. You literally typed I have
4 read the following news accounts regarding executions in
5 South Carolina and then you listed those newspaper articles
6 and we just reviewed them a few minutes ago on this screen,
7 remember?

8 A. Yes.

9 Q. And I had you go through them and none of them were
10 dated 1944, right?

11 A. I'm aware of that.

12 Q. So you couldn't have possibly reviewed any source
13 materials on the execution of George Stinney --

14 A. I said --

15 Q. -- because you never reviewed any newspaper articles
16 from 1944, right?

17 A. I do not recall reading any newspaper articles from
18 1944.

19 Q. In that spreadsheet they provided to you, they listed
20 in addition to a summary a column of whether in their
21 opinion or not the execution was botched. There's like
22 a Y or an N in that column. Do you recall that?

23 A. I remember that, yes.

24 Q. Because you did review the spreadsheet, right?

25 A. Yes, I did.

1 Q. And next to Mr. Stinney's execution, they put a Y for
2 yes in the botched column. Do you remember that?

3 A. If there is a Y in -- next to Mr. Stinney's name in
4 the botched column, yes, I saw it. I cannot recall having
5 seen a Y next to Mr. Stinney's name in the botched column
6 at the time I reviewed the botched column.

7 Q. Let me pull it up. This is that spreadsheet. The
8 column there, see, right in the middle of the screen it
9 says George Stinney. Do you see that?

10 A. Yes.

11 Q. It says date of execution, June 16, 1944. Do you see
12 that?

13 A. I sure do.

14 Q. It says yes in that next to the last column. Do you
15 see that?

16 A. Yes.

17 Q. But you don't have any independent knowledge
18 whatsoever to explain why it was listed as botched because
19 you didn't review any of the source materials for that
20 execution. All you did was accept whatever Justice 360's
21 interpretation of botched was, right?

22 A. No.

23 Q. So what source materials did you have with respect to
24 the execution of George Stinney?

25 A. I remember reading about that incident. I do not

1 apparently have a record of it in my files.

2 Q. So did you violate the subpoena I sent you?

3 A. I don't believe I did because I have no record that
4 I have read it, but when you show it to me I say yes, I
5 remember that case. So the question is, is how can I
6 remember the case? I do not have the documentation to
7 certify that I reviewed documents regarding that case, but
8 I'm aware of the case.

9 Q. Are you aware of any newspaper article anywhere that
10 suggested there was anything botched about Mr. Stinney's
11 execution?

12 A. I am not aware of any newspaper articles about
13 Mr. Stinney, though I realize that I have read about that
14 incident before. I also would like to point out that your
15 request for the subpoena regards this case and not the
16 discussions I had with Justice 360 prior to this case.

17 So on the e-mail discovery the decision was made
18 that the e-mail discovery would start on the date when I
19 basically commenced work on this case, not my earlier
20 conversations with Justice 360. So I have not rev -- I
21 have not reviewed the e-mails that I had with John Blume
22 and the staff at Justice 360 prior to starting on the
23 current case.

24 Q. You'd agree with me that the only way you are able
25 to try to figure out how to come up with this 30 percent

1 number was to count the anecdotal accounts?

2 A. That's correct.

3 Q. And you didn't do anything to try to figure out how
4 reliable those anecdotal accounts were, right?

5 A. No, I did not.

6 Q. You didn't even do anything to try to figure out how
7 reliable the summaries of the purported anecdotal accounts
8 were?

9 A. No, I did not.

10 Q. And we know basically the only thing you reviewed were
11 the summaries, right?

12 A. No. There are cases on that spreadsheet that were
13 covered by newspaper articles that I read when I received
14 them before I started -- I believe before I started working
15 on this particular case, so you were not privy to the
16 e-mails that delivered those documents to me.

17 Q. But you're claiming now that you relied on some
18 document you haven't produced in response to the subpoena
19 to try to say you do have a basis?

20 A. No, I'm not claiming that.

21 Q. Okay. So you have no basis for that --

22 A. No, I -- I gave you the names -- the dates of all
23 the newspaper articles that I had read regarding South
24 Carolina judicial electrocutions not knowing which
25 additional electrocutions on my autopsy list came from

1 South Carolina because the list I maintained did not
2 include the state of execution.

3 Q. But there is -- you cannot prof -- provide a reliable
4 scientific method to justify the statement you made in your
5 affidavit of 30 percent, right?

6 A. I am counting on the analysis done by the staff at
7 Justice 360 to come up with that number.

8 Q. And you do not know the specifics of their method so,
9 therefore, you do not have a reliable scientific method
10 that underpins the opinion you tried to give in your
11 affidavit of 30 percent, right?

12 A. Since I did not do the counting that led to that
13 number, I do not have the method by which those numbers
14 were obtained.

15 MR. PLYLER: Your Honor, at this time we'd move to
16 strike from the record of this case paragraph 13 of his
17 affidavit as unreliable. My problem is he's already
18 filed it in the case as sworn testimony, it's in the
19 record, and I want to make sure that given the fact he
20 clearly has no reliable basis for this expert to render
21 opinion -- opinions on, it must be stricken and not
22 considered.

23 THE COURT: Ms. Freedman? Mr. Kendrick?

24 MR. PLYLER: It's Ms. Freedman's witness, right?

25 No, this is a motion. That's fair. That's fair.

1 It's a motion.

2 THE COURT: Right.

3 MR. KENDRICK: So that I am clear, Judge, I mean,
4 he's moving to strike -- I think, Your Honor, the
5 appropriate way to handle this would be to simply let
6 them argue the weight of it and -- I mean, some of that
7 is because it is extremely late and we've spent a lot of
8 time getting to a point that I'm not sure -- I don't
9 know, Judge. I don't know. I mean, he's been -- he's
10 been crossing him, he's made a motion to limit it, he's
11 made a motion to strike it. He's made these motions
12 to you. I think the appropriate way to handle this in
13 a bench trial is for you to evaluate the weight of the
14 testimony at the end of the case. I think when you
15 strike testimony -- because you're obviously at some
16 point gonna have to issue an opinion and say this is
17 what I took into account.

18 THE COURT: Well, right, but the question wasn't
19 striking the testimony, it was paragraph 13 of the
20 affidavit.

21 MR. KENDRICK: And I just want to make sure that's
22 the -- it starts out with since 1912 South Carolina has
23 carried out judicial electrocutions and going from there.

24 I -- I'm reading the right one?

25 MR. PLYLER: And its subparts, Your Honor. They do

1 13 with subparts.

2 THE COURT: Yes, sir.

3 MR. KENDRICK: Yes. That's what I'm reading.

4 Give me one second, Your Honor. There might be an
5 easy solution.

6 MR. PLYLER: Hold on. Wait. I'm just trying to
7 make sure he didn't say something about it in 14 as well
8 so that we're -- we've covered all that matter.

9 It doesn't appear that that opinion that we were
10 just talking about is covered in 14, so I'll stick with
11 just all of 13, please, Your Honor.

12 (Discussion between counsel.)

13 MR. KENDRICK: So, Your Honor, I think my -- again,
14 smarter cocounsel told me we haven't -- we didn't put his
15 report into evidence and if -- if I understand correctly
16 we did not offer the opinion he's talking about in our
17 case in chief. So on direct I don't think that opinion
18 was part of his testimony, so Mr. Plyler is the one that
19 has brought up all this paragraph 13, so I don't think
20 the appropriate remedy would be to strike testimony that
21 he brought out on cross, it would be to -- I mean, we
22 didn't offer -- we didn't talk about this, and I -- I
23 mean, we can go into the ins and outs of it, but I don't
24 think there's any need for it.

25 We -- we agree, and I guess that's why I was looking

1 a little confused earlier. We didn't have him testify
2 to this information on direct. I think Mr. Plyler has
3 brought it up maybe as impeachment, but I don't know how
4 you would strike an opinion we did not offer to, Your
5 Honor. It doesn't seem like a remedy. It's a -- it's a
6 remedy to a problem that didn't appear, so.

7 MR. PLYLER: It's filed sworn testimony in the case.
8 That's the problem.

9 THE COURT: Right, and so I'm -- the Court declines
10 to strike that paragraph of the affidavit. The affidavit
11 was actually filed -- and correct me if I'm not looking
12 in the right place. Maybe you should tell me where it
13 was first filed.

14 MR. PLYLER: As an attachment to the complaint. All
15 versions of the complaint, Your Honor.

16 THE COURT: Okay.

17 MR. PLYLER: There's three versions of it for the
18 record.

19 THE COURT: Yes, sir.

20 And so -- I mean, that is -- that is -- I'm sorry,
21 did you want to weigh in on that?

22 MR. LAMBERT: Just to clarify where it is and what,
23 it came in with the original complaint. They sought a
24 preliminary injunction on that and used that as evidence.
25 It was filed with the third amended complaint, which is

1 the operative pleading. There was no request for
2 injunctive relief on that, so if it's not being offered
3 with that complaint as evidence for this trial, I don't
4 know why it was attached to the complaint to begin with.
5 The third amended complaint, that is. That's the reason
6 the issue was raised.

7 MR. KENDRICK: No, I think what I'm saying is
8 paragraph 13 was not brought out on direct examination
9 and -- and so I think maybe -- I don't know. I mean,
10 I'm not sure. If you want to -- I guess what we could
11 say is -- I don't know how we could strike part of the
12 complaint. I mean, I think -- it was attached to the
13 complaint under a fact pleading as part of our support
14 of our allegation. So when it comes to striking this
15 opinion we have not offered in our case in chief, Your
16 Honor, and there's --

17 MR. PLYLER: If I'm hearing correctly, they're not
18 relying on the opinion in their case. As long as that's
19 in the record that the finder of fact should not be
20 considering the opinion, then it alleviates my concern,
21 but in a bench trial when the complaints has this
22 affidavit attached to it and he's filed his opinion
23 under sworn testimony. They didn't do it as an expert
24 report, they did it as an affidavit. That's sworn
25 testimony and I don't want any question at the next

1 level of whether or not that opinion was relied on in
2 any way in -- in this case and I don't know how I can
3 clean that record up without showing there's no reliable
4 foundation for it and asking that it be stricken. I'm
5 unaware of how I can do that.

6 THE COURT: Well, I don't see -- I mean, frankly,
7 in my mind it operates as any other bit of testimony. I
8 mean, you can have a witness who, you know, signs an
9 affidavit and says the light was green in the wreck and
10 then they come in here and say the light was red, you
11 know, that's -- both pieces of testimony are sworn
12 testimony, but it certainly bears on the credibility
13 of the witness and the reliability of the things
14 testified to by the witness.

15 I don't know that the appropriate remedy is to
16 strike any portion of the affidavit. I mean, going
17 back to Mr. Lambert's point, if -- if it was really
18 filed in conjunction with the injunction or the request
19 for injunctive relief, I don't even know that it's a
20 necessary part of the third amended complaint. So
21 maybe from that perspective it should be stricken in
22 its entirety. But that was never done. There was never
23 a request made to do that and we're in the middle of
24 things now, so -- so it's not appropriate to strike it
25 in its entirety at this moment, but I'm also not gonna

1 parse out a paragraph of it. He's offered contradicting
2 testimony to the Court and that is what it is.

3 MR. PLYLER: Thank you, Your Honor.

4 If I may have just a moment to confer with cocounsel
5 and make sure I didn't miss something important, I believe
6 I may be wrapping up.

7 And thank you for your patience.

8 THE COURT: Yes, sir.

9 (Discussion between counsel.)

10 MR. PLYLER: Your Honor, that's all I have for
11 Professor Wikswo.

12 Thank you.

13 THE COURT: Mr. Limehouse or Mr. Lambert, I assume
14 having conferred with Mr. Plyler, you have no questions?

15 MR. LIMEHOUSE: No further questions, Your Honor.

16 MS. FREEDMAN: I just have one very, very quick
17 question for him.

18 REDIRECT EXAMINATION

19 BY MS. FREEDMAN:

20 Q. Dr. Wikswo, why did the article that you prepared, the
21 draft article with Dr. Sepulveda, why was that article
22 rejected?

23 A. I have been unable to find the reviews. I've looked
24 for them. I've been unable to find the figures that went
25 with the calculation, which was done almost thirty years

1 ago. There were two distinct different reviews, one of
2 which asked -- actually one of which questioned the ethics
3 of a biomedical engineer design -- basically trained to
4 help improve healthcare would dare to do a calculation
5 of such a brutal process. They basically said it was
6 unethical for me to do that calculation. I happen to
7 disagree, but the position of the reviewer was the
8 calculation itself was unethical. The other review
9 basically said that my model was too simplistic and I
10 needed experimental data to validate the model and I was
11 unwilling to do cad -- cadaver experiments to replicate
12 the calculations. The model was axisymmetric, which means
13 you can say consider a cylindrical prisoner that has a
14 head, a chest, hips and legs and knees with electrical
15 conductivities along the length, some central for the bones
16 and peripheral for the fat, and -- and a shell for the
17 skull in order to get a qualitative representation of the
18 current distribution. The other reviewer -- I think that I
19 know of there were at least two reviews, there could have
20 been more, but the -- the two reviews. One said it's an
21 unethical calculation. Why are these people even thinking
22 about this problem and the other was my model was too
23 simplistic, I didn't have -- I didn't have arms, I didn't
24 have distinct legs and I had no data to validate it from an
25 -- effectively you could imagine doing this by putting a

1 cadaver in the electric chair, though that has its own
2 problems. And Dr. Sepulveda returned to Columbia, South
3 America. He was -- had written his own very sophisticated
4 finite element code to do these calculations, I had no
5 money to pay him to continue those calculations, he
6 returned to Columbia, and I did not have the technical
7 skills to do -- no one in my group had the technical skills
8 to do those calculations, so I came to the conclusion I had
9 no choice but to abandon the publication, so the manuscript
10 was not resubmitted because -- and I knew I could have
11 answered both sets of comments. The ethical one was easy.
12 There's good reason for doing that and today is one of the
13 reasons why one might want to do that calculation, but the
14 other side of it is that the other reviewer wanted very
15 specific details added that made the calculation vastly --
16 vastly harder, and I couldn't do it.

17 MS. FREEDMAN: Thank you. That's all for me.

18 THE COURT: Anything further, Mr. Plyler?

19 MR. PLYLER: I don't see any on redirect that needed
20 cross.

21 Thank you, Your Honor.

22 THE COURT: All right. Thank you, sir. You may
23 step down. Leave all of those exhibits up there.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: All right. Thank you, sir.

1 (Witness excused.)

2 THE COURT: And that's our day.

3 Yes.

4 MR. PLYLER: Judge, just one housekeeping matter.
5 I'd like to make the deposition of Dr. Wikswo an exhibit,
6 a Court's Exhibit. I think it would be Court's Exhibit
7 Number 2.

8 THE COURT: Yes. We'll mark the deposition
9 transcript as Court's 2.

10 MR. PLYLER: Thank you, Your Honor.

11 (Court's Exhibit Number 2 was marked for
12 identification.)

13 THE COURT: Anything else we need to handle before
14 we leave today?

15 MR. PLYLER: Your Honor, the only other thing, I
16 think, I think we can handle it first thing in the
17 morning, is just -- and I mentioned this yesterday, we
18 may have remote testimony tomorrow and I'm just making
19 sure we have access because I've got to provide that to
20 people. I'm assuming they can just go to the judicial
21 website, the calendar view and click on the day, go to
22 your virtual courtroom, that same path we do for hearings.

23 THE COURT: Let me double-check that very quickly
24 just because that is changing. I don't know if it has
25 changed already.

1 Was there something else from plaintiff's counsel
2 while I'm looking at this?

3 MS. FREEDMAN: We're all set. Thank you.

4 MR. KENDRICK: Thank you, Judge.

5 MR. MILLS: Your Honor, 9:30 again in the morning
6 or --

7 THE COURT: 9:30 tomorrow morning.

8 I believe that the instructions for the virtual
9 courtroom are done.

10 MR. PLYLER: Thank you very much, Your Honor. I'm
11 sure we can get information out to them if something --
12 if we learn something different tomorrow.

13 Thank you, Judge.

14 THE COURT: Okay. Thank you.

15 (Whereupon, the proceedings were concluded for
16 August 2, 2022, at 7:05 PM.)

17 (The following proceedings were held August 3, 2022,
18 beginning at 9:40 AM.)

19 BAILIFF: All rise. Court come to order.

20 Please be seated today.

21 THE COURT: All right. Good morning, everybody.
22 Today we have WIS.

23 Anyone else?

24 REPORTER: WACH Fox. WACH Fox.

25 THE COURT: Yes. Right. Okay.

1 REPORTER: Post and Courier.

2 THE COURT: Yes. Got it.

3 Okay. We're good.

4 Good morning, counsel.

5 MR. KENDRICK: Good morning.

6 THE COURT: All right. Is there anything we need
7 to discuss this morning before hearing testimony from the
8 plaintiffs?

9 MS. VANN: No, Your Honor.

10 THE COURT: From the defense?

11 MR. PLYLER: No. I don't think before testimony.
12 I think more we need to talk about just staging the day
13 out, you know.

14 THE COURT: Okay.

15 MR. PLYLER: If you want to do that now so we don't
16 interrupt, that --

17 THE COURT: We can.

18 MR. PLYLER: My understanding is their last witness
19 is Dr. Arden. He's here in the courtroom. I believe
20 he is gonna take maybe between direct and cross maybe
21 two hours, somewhere in that neighborhood. That's a
22 guess. I think that starts pushing up pretty close to
23 lunchtime. I might ask that we take an early lunch
24 before -- depending on how that pans out before we start
25 putting up our case only because I hate to put a witness

1 up and then want to take a lunch break, you know.

2 And I think there are two potential exhibits they
3 want to talk about that we may have some legal issues
4 with in terms of not necessarily foundation and -- and
5 authenticity because I think he probably can lay that
6 foundation even though I'd like to hear it, but in terms
7 of should they be sealed similar to other evidence that's
8 already in the case or not, that -- that type of stuff.

9 So I don't know if you'd rather take those up --
10 that up now before he -- so we don't interrupt his
11 testimony. I'm -- I'm happy to do it however Your Honor
12 would like.

13 THE COURT: Sure. Let's do that now, I think.

14 MR. PLYLER: And, honestly, because it's similar
15 arguments to what we've already talked about, I think
16 it pretty much goes to the same arguments we had and
17 I imagine their response is pretty much the same and
18 it's just -- I don't think this is like a 45-minute
19 conversation.

20 THE COURT: All right. So let's start with me
21 seeing the exhibits.

22 MR. KENDRICK: And, Your Honor, if you don't mind,
23 so Ms. Vann is actually handling this witness, but I was
24 in charge of making sure the exhibits were vetted to get
25 in legally, so I don't want -- I don't want to get stuck

1 if you're gonna commit me to do direct, but I'm gonna
2 handle this.

3 MR. PLYLER: I will not make that argument.

4 MR. KENDRICK: Thank you.

5 And to give context, Judge, these are photos from
6 out of state autopsies. One would be a Utah firing
7 squad death and one would be a Tennessee electric chair
8 death, and we anticipate Dr. Arden being able to tell
9 you why he has them and how he would rely on them.

10 MR. PLYLER: Yeah, you -- you showed me.

11 THE COURT: So let me see them and if they're gonna
12 be offered --

13 MR. KENDRICK: What maybe we could do is let's go
14 ahead mark them. I mean, it's kind of weird with a
15 bench trial to mark something for identification and --

16 THE COURT: Well, and I was gonna say so that it's
17 part of the record, whether they're admitted or not,
18 let's go ahead and have them marked --

19 MR. KENDRICK: Sure. Sure.

20 THE COURT: -- so that we know what we're talking
21 about.

22 MR. KENDRICK: Okay. They're both from autopsies,
23 but we don't intend to introduce the autopsies. We
24 obviously -- and I think it's well known who these people
25 are, but we can certainly discuss them, you know, with a

1 bigger level of -- some level of anonymity, if that would
2 be helpful.

3 THE COURT: Mr. Kendrick, I'll give you these back.

4 So, the first of them appears to be what we started
5 to get into with Dr. Wikswa yesterday.

6 MR. KENDRICK: Correct.

7 THE COURT: That set of photos. I've also taken
8 a -- it appears you have maybe four or so sets of
9 photographs of the other folder.

10 MR. KENDRICK: Correct.

11 THE COURT: I've taken a set for myself.

12 MR. KENDRICK: Okay.

13 THE COURT: I assume -- they appear to all be the
14 same -- you know, photocopies of the same thing.

15 And let me hear from Mr. Plyler.

16 MR. PLYLER: Yes, Your Honor. It's -- like I said,
17 we've already laid the bases for this argument. I'm not
18 gonna rehash all of it. Attorney General opinions. The
19 -- the statute, 17-5-535, doesn't say autopsies in South
20 Carolina, it doesn't says depictions of autopsies in
21 South Carolina, it just says under South Carolina law
22 they shouldn't be public information. Confidential and
23 private.

24 So our position is the fact that these are from
25 out of state doesn't matter. The public policy of the

1 state should be upheld. Obviously if Dr. Arden has
2 opinions that he plans on offering based on these, he
3 can do that similar to what happened yesterday with
4 Dr. Wikswo where he can discuss something, but that
5 doesn't mean it comes into evidences, especially with
6 what, I guess, is premarked as 14, which would be
7 purportedly something from an electric chair. I'm just
8 trying -- I'm just trying to use general terms. I
9 believe they marked that one first.

10 Am I wrong?

11 MR. KENDRICK: I have not marked them yet, but that
12 would be the way I would intend to --

13 THE COURT REPORTER: That one was marked yesterday
14 as 14.

15 MR. KENDRICK: Okay. So Plaintiff's Exhibit 14
16 was marked yesterday, but not admitted, so we'll just --

17 THE COURT: Okay.

18 MR. KENDRICK: -- keep it that number.

19 MR. PLYLER: Correct.

20 So 14, to the extent he, you know, wants to offer
21 opinions about it, that's fine, I think he can do it
22 without coming into evidence, and our position is -- on
23 that is I don't -- I think I know based on some things
24 I looked at when that occurred, like when that incident
25 allegedly occurred, and it was under very different

1 protocols than what's used in South Carolina. And I know
2 that goes to the weight of the evidence, but from an
3 admissibility -- especially into like a public record
4 given the public policy of South Carolina, I would think
5 that he can opine on it, but it doesn't necessarily
6 become a part of the public record.

7 So my suggestion is either it not be admitted
8 into evidence for those reasons or if it is admitted
9 similar to what we did with Plaintiff's 1 through 5,
10 it be admitted under seal and that way -- I've made my
11 argument and I will await the Court's instructions.

12 THE COURT: So I propose to, you know, assuming
13 the proper foundation is laid, admit both sets under
14 seal the same as the other autopsy photos were treated.

15 Does that suit plaintiff?

16 MR. KENDRICK: For simplicity's sake, Your Honor,
17 I think -- I mean, I don't know that they need to be
18 under seal for some reasons I can articulate; however,
19 I hesitate to talk you out of anything.

20 You know what, give me one second.

21 THE COURT: Sure.

22 (Discussion between counsel.)

23 MR. KENDRICK: Your Honor, we're fine with that.
24 I'm sorry.

25 THE COURT: Okay. And have you had the second set

1 marked?

2 MR. KENDRICK: No, I have not. I'm gonna do that
3 right now.

4 MR. PLYLER: That will be 15, Josh?

5 MR. KENDRICK: That will be 15.

6 MR. PLYLER: Thank you.

7 MR. KENDRICK: And we're -- we're just marking the
8 set of four as 15, if that's okay with Your Honor?

9 THE COURT: Yes.

10 (Plaintiff's Exhibit Number 15 was marked for
11 identification under seal.)

12 THE COURT: Right. And I understand that there may
13 be some other objections as to foundation or something
14 along those lines, but as to that --

15 MR. PLYLER: I don't expect that. I think he can,
16 unlike the last witness, but I -- I need to hear it to
17 make sure that I'm not incorrect about that assumption.

18 THE COURT: Right. But as to the other objections
19 because they are autopsy photos, you know, the objections
20 that arise from that specifically the Court would admit
21 them under seal just to head that off before we even get
22 into the witness's testimony.

23 Anything else before we hear from the next witness?

24 No? Okay. That's good.

25 Call your next witness.